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Haley S. Peterson

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**MCCUTCHEON v. FEC: SACRIFICING CAMPAIGN FINANCE
REGULATION IN THE NAME OF FREE SPEECH**

HALEY S. PETERSON*

The 2008 elections marked the first time that campaign spending by presidential candidates exceeded \$1 billion, more than double the amount spent in 2004.¹ Private contributions, in particular to the Obama campaign, were credited as one of the major reasons for this enormous spending increase.² Four years later, during the 2012 election, candidates spent \$3.2 billion, doubling spending again according to Federal Election Commission (“FEC”) estimates.³ Individuals alone contributed over \$540 million to the Obama campaign and over \$300 million to the Romney campaign.⁴

The Federal Elections Campaign Act (“FECA”) sought to limit these types of campaign contributions by individuals, among other campaign finance regulations. In *McCutcheon v. Federal Election Commission*,⁵ the Supreme Court considered whether aggregate limits on campaign contributions violated individuals’ First Amendment rights of free speech.⁶ The Court determined that by setting a ceiling on campaign contributions, the aggregate limits essentially forced individuals to ration their political participation in violation of the First Amendment.⁷ The Court reasoned that the government only could justify limits on free speech in the interest of preventing quid pro quo corruption—that is, money given to public officials in

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J.D. Candidate, 2016, University of Maryland Francis King Carey School of Law. The author would like to thank her editors Megan Raker, Susan Schipper, Laura Koman, Liz Clark Rinehart, and Lucia Cook for their time and invaluable insight throughout the writing process. She also would like to thank Professor Jana Singer for her guidance on this Note and her expertise in its subject matter. Finally, the author would like to dedicate this Note to her husband, parents, sister, and brothers for their unwavering love, support, and humor.

1. Jonathan D. Salant, *Spending Doubled as Obama Led First Billion-Dollar Race in 2008*, BLOOMBERG (Dec. 26, 2008), <http://www.bloomberg.com/apps/news?sid=aerix76GvmRM&pid=newsarchive>; see also Jeanne Cummings, *2008 Campaign Costliest in U.S. History*, POLITICO (Nov. 5, 2008), <http://www.politico.com/news/stories/1108/15283.html>.

2. Cummings, *supra* note 1.

3. Tarini Parti, *\$7 Billion Spent on 2012 Campaign, FEC Says*, POLITICO (Jan. 13, 2013), <http://www.politico.com/story/2013/01/7-billion-spent-on-2012-campaign-fec-says-87051.html>.

4. *2012 Presidential Campaign Finance*, FEDERAL ELECTION COMMISSION, <http://www.fec.gov/disclosure/pnational.do>.

5. *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (plurality opinion).

6. U.S. CONST. amend. I.

7. *McCutcheon*, 134 S. Ct. at 1448.

direct exchange for political favors.⁸ The Court struck down the aggregate limits, concluding that they were not sufficiently related to the government's interest in preventing this type of corruption.⁹

The Court should have upheld these limits. First, the Court incorrectly analyzed the government's interest, breaking with precedent by narrowing the definition of corruption.¹⁰ Second, there is a significant risk that individuals will work around other FECA regulations without the aggregate limits in place.¹¹ Finally, the Court's decision leaves open the question of FECA's effectiveness without aggregate limits, threatening to dismantle campaign finance regulation altogether.

I. THE CASE

In September 2012, plaintiffs Shaun McCutcheon and the Republican National Committee ("RNC") challenged FECA in the United States District Court for the District of Columbia.¹² Specifically, the parties challenged the constitutionality of the statute's aggregate limits on campaign contributions under the First Amendment.¹³ FECA contains two limitations on political campaign contributions: base limits, which restrict how much a contributor can give "to specified *categories* of recipients," and aggregate limits, which set a ceiling on the overall amount an individual can donate over a given two-year election period.¹⁴ Base limits apply to contributions made by a variety of entities, including "individuals, partnerships, committees, associations, corporations, unions, and other organizations," whereas aggregate limits apply only to individuals.¹⁵ Aggregate limits prevent individuals from contributing "more than an aggregate of \$46,200 to candidates and their authorized committees or more than \$70,800 to anyone else" during a two-year period.¹⁶

8. *Id.* at 1448–62.

9. *Id.* at 1456–58.

10. *See infra* Part IV.A.

11. *See infra* Part IV.B.

12. *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 135 (D.D.C. 2012), *rev'd*, 134 S. Ct. 1434 (2014).

13. *Id.* at 137.

14. *Id.* at 135 (emphasis added) (citing Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 307, 116 Stat. 81, 102–03 (2002)).

15. *Id.* at 135, 136.

16. *Id.* at 136 (citing 2 U.S.C. § 441a(a)(3) (2012), *declared unconstitutional by FEC v. McCutcheon*, 134 S. Ct. 1434 (2014) (current version at 52 U.S.C.A. § 30116(a) (West 2014))). The two-year period begins on January 1 of an odd-numbered year and ends December 31 of the following even-numbered year. *See id.* § 30116(a)(3). These limits are adjusted every odd-numbered year for inflation, thus the limit numbers that the Supreme Court evaluated in *McCutcheon* are higher than the values discussed by the district court. *See id.* § 30116(c).

Mr. McCutcheon, a voter and resident of Alabama, had made various contributions during the 2011–2012 election cycle,¹⁷ including contributions to the RNC, the National Republican Senatorial Committee, and the Alabama Republican Party.¹⁸ However, he wanted to give additional funds to the committees, as well as to numerous candidates, but could not because of FECA’s aggregate limits.¹⁹ The RNC in turn argued that it should be able to accept contributions that donors such as Mr. McCutcheon wanted to give.²⁰ The plaintiffs filed a Motion for a Preliminary Injunction to enjoin the FEC from enforcing the aggregate limits under the statute.²¹

The district court denied the preliminary injunction and granted the FEC’s motion to dismiss, finding the aggregate limits constitutional.²² First, the court distinguished between campaign contributions, the amount an individual can *give* to a candidate, and campaign expenditures, the amount an individual or group can personally spend on a political campaign (including, for example, on advertisements to promote a certain candidate or cause).²³ The court explained that contribution limits are evaluated under a lower level of scrutiny than expenditure limits “because they primarily implicate the First Amendment rights of *association*, not expression, and contributors remain able to vindicate their associational interests in other ways.”²⁴ The court reasoned that aggregate limits function as contribution limits, not expenditure limits, because they restrict a donor’s capacity to give funds, rather than a campaign or political party’s ability to spend donated money.²⁵

The court then analyzed the aggregate limits under a lower level of scrutiny.²⁶ In constitutional law, a lower level of scrutiny entails application of the closely drawn test: the regulation that impacts a constitutional right must be “closely drawn to match a sufficiently important [government] interest.”²⁷ The district court noted that the government’s interest in

17. Under FECA, an election cycle is defined as “the period beginning on the day after the date of the most recent election for the specific office or seat that a candidate is seeking and ending on the date of the next election for that office or seat,” and “a primary election and a general election [are] considered to be separate elections.” *Id.* § 30101(25).

18. *McCutcheon*, 893 F. Supp. 2d at 136.

19. *Id.*

20. *Id.*

21. *Id.* at 137, 142. In response, the FEC filed a motion to dismiss. *Id.* at 142.

22. *Id.* at 142.

23. *Id.* at 137–38.

24. *Id.* at 138 (citing *Buckley v. Valeo*, 424 U.S. 1, 22 (1976)) (emphasis added).

25. *Id.*

26. *Id.* at 137–38.

27. *Id.* at 137 (quoting *McConnell v. FEC*, 540 U.S. 93, 136 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010)) (internal quotation marks omitted). Expenditure limits are evaluated under the higher threshold of “strict scrutiny.” *Id.*

preventing corruption is the only legitimate rationale for limiting First Amendment rights and should be narrowly construed.²⁸

The court described corruption as *quid pro quo*, which it defined as “dollars for political favors,” or more simply, bribery.²⁹ The court also noted, however, that the extent of the government’s interest in preventing corruption was ambiguous.³⁰ For example, the court understood *Citizens United v. FEC*³¹ as allowing for an interpretation of corruption as something less than “pure bribery.”³² The court ultimately concluded that since the plaintiffs had not contested the base limits, these limits were presumably constitutional for the purpose of preventing corruption.³³ The court held that aggregate limits could thus be upheld as a means of protecting and preventing “circumvention” of the base limits.³⁴ The plaintiffs appealed directly to the Supreme Court.³⁵

II. LEGAL BACKGROUND

The Supreme Court’s interpretation of FECA before *McCutcheon* was based on two primary premises: first, that the Court should apply different levels of scrutiny to expenditure limits and contribution limits; and second, that the Court should define the government’s interest in preventing corrup-

28. *Id.* at 138–39.

29. *Id.* at 139 (quoting *FEC v. Nat’l Conservative Political Action Comm. (NCPAC)*, 470 U.S. 480, 497 (1985)) (internal quotation marks omitted) (finding “[i]nfluence over or access to elected officials does not amount to corruption” and “contributing a large amount of money does not ipso facto implicate the government’s anticorruption interest” (citing *Citizens United v. FEC*, 558 U.S. 310, 360 (2010))).

30. *Id.*

31. 558 U.S. 310 (2010).

32. *McCutcheon*, 893 F. Supp. 2d at 139 (citing *Citizens United*, 558 U.S. at 361).

33. *Id.* at 139–40.

34. *Id.* The district court explained:

Eliminating the aggregate limits means an individual might, for example, give half-a-million dollars in a single check to a joint fundraising committee comprising a party’s presidential candidate, the party’s national party committee, and most of the party’s state party committees. After the fundraiser, the committees are required to divvy the contributions to ensure that no committees receives more than its permitted share . . . but because party committees may transfer unlimited amounts of money to other party committees of the same party, the half-a-million-dollar contribution might nevertheless find its way to a single committee’s coffers.

Id. at 140 (citations omitted); see also *Buckley v. Valeo*, 424 U.S. 1, 38 (1976) (finding that aggregate limits are “no more than a corollary” of base limits and protect constitutionally permissible base limits from being circumvented).

35. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014) (Roberts, C.J., concurring) (plurality opinion). The Supreme Court “noted probable jurisdiction.” *Id.* A party can appeal directly to the Supreme Court from an order granting or denying “an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges.” 28 U.S.C. § 1253 (2012).

tion broadly.³⁶ The Court's 1976 decision in *Buckley v. Valeo*³⁷ provided the foundation for the understanding that expenditure limits and contribution limits implicate different First Amendment concerns.³⁸ *Buckley* also suggested that the government's interest in preventing corruption could extend beyond the deterrence of blatant bribery, and also could include efforts to thwart improper influence and the appearance of corruption.³⁹ After Congress amended FECA in 2002, the Court continued to apply different levels of scrutiny based on limit type.⁴⁰ The Court also embraced the broad definition of corruption, perhaps even expanding the scope of the government's interest from *Buckley*.⁴¹ *Citizens United v. FEC* marked a shift in the Court's interpretation of campaign finance regulation when the Court determined that the government could only justify a limitation on free speech in order to prevent quid pro quo corruption.⁴²

A. *The Court Distinguished Between Contributions and Expenditures and Defined Corruption Broadly In Buckley and Subsequent Cases*

Supreme Court interpretation of FECA originated with the *Buckley* decision in 1976. *Buckley* considered numerous constitutional challenges to FECA of 1971 and the Internal Revenue Code of 1954.⁴³ The 1971 Act, in relevant part, limited individual campaign contributions to \$1,000 per candidate with a cap of \$25,000 on the total amount an individual could give during each election.⁴⁴ FECA also limited spending by "individuals and groups 'relative to a clearly identified candidate'" to \$1,000 per year, and imposed certain limits on expenditures by federal candidates and political party conventions.⁴⁵

In *Buckley*, the Court determined that contribution limits and expenditure limits implicate different First Amendment concerns and thus warrant distinct levels of scrutiny.⁴⁶ The *Buckley* Court also implied that the government's interest in regulating campaign finance could be justified not only by efforts to prevent quid pro quo corruption, but also the appearance of corruption and improper influence.⁴⁷ The Court continued to apply the contribution-expenditure dichotomy and this broad definition of corruption,

36. See *infra* Parts II.A–B.

37. 424 U.S. 1 (1976).

38. *Id.* at 20–21.

39. *Id.* at 27.

40. See *infra* Part II.B.

41. See *infra* Part II.B.

42. 558 U.S. 310, 359–60 (2010); see also *infra* Part II.C.

43. *Buckley*, 424 U.S. at 6–7.

44. *Id.* at 7.

45. *Id.* (quoting 18 U.S.C. § 608(e) (1970 ed., Supp. IV)).

46. *Id.* at 19–20.

47. *Id.* at 27.

perhaps even expanding it, when faced with other challenges to FECA and its subsequent versions after *Buckley*.⁴⁸

1. *In Buckley, the Court Established the Contribution-Expenditure Limit Dichotomy and Hinted at a Broad Definition of Corruption*

The Court in *Buckley* considered numerous First Amendment challenges to FECA provisions, including both expenditure and contribution limits, brought by presidential and senatorial candidates and political party groups.⁴⁹ The Court struck down campaign spending restrictions but upheld limits on campaign contributions, differentiating between the First Amendment impacts on expenditures and contributions.⁵⁰

The *Buckley* Court found that FECA's expenditure limits, including limits of \$1,000 by groups and individuals annually, posed a greater threat to First Amendment rights because these spending restrictions directly impacted political expression.⁵¹ The Court explained that a limit on spending would restrict the candidate's ability to reach the public through news and advertisements by default.⁵² The Court noted that "virtually every means of communicating ideas in today's mass society requires the expenditure of money," emphasizing that the public's reliance on "television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech."⁵³

Because the expenditure limits imposed major First Amendment burdens, the Court applied the "exacting scrutiny" test.⁵⁴ Under this test, the government can only limit free speech to further a "vital"⁵⁵ interest and the restriction must bear a "substantial relation"⁵⁶ to this interest. The Court supported the government's ostensible interest in stopping actual and apparent corruption, but nevertheless determined that the government had not

48. *See infra* Part II.A.2.

49. *Buckley*, 424 U.S. at 6–8.

50. *Id.* at 23, 143.

51. *Id.* at 19.

52. *Id.*

53. *Id.*

54. *Id.* at 44. This test is also referred to as the "strict scrutiny" test. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1445 (2014) (Roberts, C.J., concurring) (plurality opinion) ("[R]egardless whether we apply strict scrutiny or *Buckley*'s 'closely drawn' test, we must assess the fit between the stated governmental objective and the means selected to achieve that objective."); *McConnell v. FEC*, 540 U.S. 93, 141 (2003) (finding that contribution limits were subject to a lower level of scrutiny than strict scrutiny).

55. *Buckley*, 424 U.S. at 94 (quoting *Am. Party of Tex. v. White*, 415 U.S. 767, 780–781 (1974) (internal quotation marks omitted)).

56. *Id.* at 64 (quoting *Gibson v. Fla. Legislative Comm.*, 372 U.S. 539, 546 (1963)) (internal quotation marks omitted).

demonstrated how expenditure restrictions would serve this interest.⁵⁷ The Court concluded that limits on campaign spending constituted a major burden on free speech because such limits would automatically impact how much, how broadly, or how in-depth a candidate, political party, or individual could communicate through expensive mass media.⁵⁸

Conversely, with respect to the contribution limits of \$1,000 per candidate (with an overall cap of \$25,000), the Court determined that these limits involved only a minor limitation on a donor's speech.⁵⁹ Even if an individual was limited in contributing to a candidate *financially*, the Court reasoned that the individual could still engage freely in political discourse.⁶⁰ The individual also could contribute in other ways, such as volunteering for a candidate's campaign.⁶¹

Thus, the Court evaluated the First Amendment impacts of contribution limits under the closely drawn test,⁶² the lower level of scrutiny, and determined these limits were justified on the basis of preventing actual and apparent corruption.⁶³ The Court identified the corruption justification in part as an interest in preventing quid pro quo corruption, but also hinted that the government could have a legitimate interest in stopping other types of corruption.⁶⁴ The Court noted that the *appearance* of corruption or "improper influence" is similarly problematic to quid pro quo.⁶⁵

Finally, the Court countered appellants' arguments that FECA's contribution limits were unnecessary because bribery laws were enough to combat corruption.⁶⁶ The Court found that these laws merely addressed

57. *Id.* at 45. Instead, the Court reasoned that the government's true interest behind expenditure limits was leveling the playing field among candidates running for office and curbing campaign spending and costs—both unacceptable government rationales for limiting First Amendment rights. *Id.* at 48–49, 54, 57.

58. *Id.* at 19. The Court also emphasized the "particular importance that candidates have the unfettered opportunity to make their views known," in order for voters to make informed decisions in elections. *Id.* at 52–53.

59. *Id.* at 20–21.

60. *Id.* at 21.

61. *Id.* at 22, 28. The Court also characterized contribution limits as less concerning than expenditure limits since they primarily implicate associational freedoms. *Id.* at 24–25. The Court noted that contributions allow individuals to align themselves with a particular candidate and also empower "like-minded persons to pool their resources in furtherance of common political goals." *Id.* at 22.

62. Under the closely drawn test, the government must establish a legitimate interest in limiting speech, and restrictions on speech must be "closely drawn" to this interest to "avoid unnecessary abridgment of associational freedoms." *Id.* at 25.

63. *Id.* at 25–29.

64. *Id.* at 27.

65. *Id.* ("Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative [g]overnment is not to be eroded to a disastrous extent.'" (quoting *U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, AFL-CIO, 413 U.S. 548, 565 (1973))).

66. *Id.* at 27–28.

“the most blatant and specific attempts of those with money to influence governmental action.”⁶⁷ This reasoning also seemed to indicate that the government’s interest in limiting corruption could extend to a more nuanced definition of corruption.⁶⁸

The Court concluded that FECA’s expenditure limits violated the First Amendment because of their direct restraints on political expression.⁶⁹ By contrast, the Court found that contribution limits were constitutional because they only minimally impinged on free speech and were enacted for the legitimate purpose of preventing corruption.⁷⁰

2. *After Buckley, the Court Continued to Apply the Expenditure-Contribution Limit Dichotomy and Arguably Broadened the Definition of Corruption*

When faced with subsequent challenges to FECA and state campaign spending laws, the Court consistently continued to evaluate contribution limits and expenditure limits under different levels of scrutiny, and applied—and even broadened—*Buckley*’s definition of corruption.⁷¹

The Court held expenditure and contribution limits to distinct levels of scrutiny under the First Amendment in the wake of *Buckley*.⁷² In *FEC v. Massachusetts Citizens for Life*,⁷³ the Court reiterated the concept that “restrictions on contributions require less compelling justification than restrictions on independent spending.”⁷⁴ Similarly, in *Colorado Republican Federal Campaign Committee v. FEC* (“*Colorado I*”),⁷⁵ the Court recognized that typically contribution limits are constitutional, while expenditure limits are not.⁷⁶ Justifications for this dichotomy echoed *Buckley*’s reasoning: “Restraints on expenditures generally curb more expressive and associational activity than limits on contributions do,” and thus expenditure limits

67. *Id.* at 28.

68. *Id.*

69. *Id.* at 58–59.

70. *Id.* at 58.

71. *See, e.g.*, *FEC v. Beaumont*, 539 U.S. 146, 155–56 (2003); *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 437, 440–41, 456 (2001); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 386–89 (2000); *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado I)*, 518 U.S. 604, 610 (1996); *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 259–60 (1986); *NCPAC*, 470 U.S. 480, 493–94, 497–98 (1985); *Cal. Med. Ass’n. v. FEC*, 453 U.S. 182, 194–95, 197–99 (1981).

72. *See, e.g.*, *NCPAC*, 470 U.S. at 493–94.

73. 479 U.S. 238 (1986).

74. *Id.* at 259–60.

75. 518 U.S. 604 (1996).

76. *Id.* at 610. The “contribution limits” that the Court found to be constitutional were “limits that apply both when an individual or political committee contributes money directly to a candidate and also when they indirectly contribute by making expenditures that they coordinate with the candidate.” *Id.* (citations omitted).

are subject to a higher level of scrutiny.⁷⁷ Later, the *Nixon v. Shrink Missouri Government Political Action Committee* (“PAC”)⁷⁸ Court continued to draw this distinction and applied the closely drawn test for limits on contributions.⁷⁹

The Court also continued to define the government’s interest in campaign finance limits as an interest in preventing corruption, including, but not limited to, quid pro quo.⁸⁰ Where *Buckley* had hinted at the possibility of corruption beyond quid pro quo, including “improper influence,”⁸¹ the Court began to *explicitly* recognize a broad definition of corruption that included undue influence.⁸² For example, though the Court in *FEC v. National Conservative Political Action Committee*⁸³ (“NCPAC”) found that the “hallmark of corruption is the financial quid pro quo: dollars for political favors,” the Court also defined corruption as situations where officials are “influenced” to act in ways that will bring them the most money, often at the cost of their official responsibilities.⁸⁴ The Court began to emphasize concerns that public officials could become “too compliant with the wishes of large contributors” and the potential for donations to cloud politicians’ judgments and hamper responsiveness to constituents.⁸⁵

B. The Court Reinterpreted FECA’s Free Speech Implications After Amendments to the Act in 2002

The Court considered the constitutionality of campaign finance limitations in a new era when FECA was amended in 2002.⁸⁶ Congress passed the amendments to address concerns that individuals had found ways to

77. *Colorado II*, 533 U.S. at 440.

78. 528 U.S. 377 (2000).

79. *Id.* at 386–88.

80. *See, e.g.*, *FEC v. Beaumont*, 539 U.S. 146, 155–56 (2003); *Colorado II*, 533 U.S. at 456; *Shrink Mo. Gov’t PAC*, 528 U.S. at 388–89; *FEC v. NCPAC*, 470 U.S. 480, 497–98 (1985).

81. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976).

82. *See supra* note 80.

83. 470 U.S. 480 (1985).

84. *Id.* at 497.

85. *See, e.g.*, *Colorado II*, 533 U.S. at 440–41 (defining corruption not only as quid pro quo arrangements “but also as undue influence on an officeholder’s judgment, and the appearance of such influence” (citations omitted)); *Shrink Mo. Gov’t PAC*, 528 U.S. at 389 (finding that corruption may include not only quid pro quo but also “the broader threat from politicians too compliant with the wishes of large contributors”); *see also Beaumont*, 539 U.S. at 155–56 (noting that campaign contribution limits are justified “carrying as they do a plain threat to political integrity and a plain warrant to counter the appearance and reality of corruption and the misuse of corporate advantages”). The *Colorado II* Court also recognized that circumvention could constitute corruption if “unlimited coordinated spending by a party” allowed that party to work around constitutionally legitimate contribution limits. *Colorado II*, 533 U.S. at 456; *see also Beaumont*, 539 U.S. at 155. This is analogous to the circumvention justification that the district court noted in *McCutcheon*. *See McCutcheon v. FEC*, 893 F. Supp. 2d. 133, 139–40 (D.D.C. 2012).

86. *See infra* Parts II.B.1–2.

work around the original contribution limits upheld in *Buckley*.⁸⁷ The Court evaluated the First Amendment impact of these statutory changes in *McConnell v. FEC*,⁸⁸ maintaining the expenditure-contribution dichotomy and the broad definition of corruption under the new FECA framework.⁸⁹

1. Congress Passed the Bipartisan Campaign Reform Act to Amend FECA

Congress amended FECA in 2002 with the Bipartisan Campaign Reform Act (“BCRA”).⁹⁰ BCRA was primarily aimed at limiting the use of soft money—funds contributed to political parties and limited to nonfederal purposes, including “influencing state or local elections.”⁹¹

Congress passed the amendments following the publication of a 1998 Senate Report entitled *Investigation of Illegal or Improper Activities in Connection with the 1996 Federal Election Campaigns*.⁹² At the time, individuals and corporations could use essentially unlimited amounts of soft money on state elections, party support, and general initiatives such as “get out the vote.”⁹³ The Report revealed that individuals and corporations were able to work around FECA contribution limits by “funnel[ing] soft money through state parties, congressional campaign committees, and leadership [PACs], where its use for federal election activity becomes difficult to trace.”⁹⁴ Individuals also were giving, and candidates and national parties were encouraging, hefty donations in exchange for special treatment and access to public officials.⁹⁵ The Report indicated that the amount of soft money raised by parties had increased dramatically, from \$89 million in 1992 to \$262 million by 1996.⁹⁶

The Report concluded that this vast amount of soft money had undermined efforts to stop corruption.⁹⁷ The Report recommended action to

87. See *infra* Part II.B.1.

88. 540 U.S. 93 (2003).

89. *Id.* at 136–37.

90. Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002). BCRA is also known as the McCain-Feingold Act.

91. *McConnell*, 540 U.S. at 122–23. For additional background reading on BCRA and soft money issues, see Scott E. Thomas, *The ‘Soft Money’ and ‘Issue Ad’ Mess: How We Got Here, How Congress Responded, and What the FEC Is Doing*, FEDERAL ELECTION COMMISSION (2003), www.fec.gov/members/former_members/thomas/thomasarticle06.pdf (discussing the issues leading to BCRA, the Act itself, and FEC efforts to implement and enforce BCRA).

92. S. Rep. No. 105-167, pts. I–VI (1998).

93. S. Rep. No. 105-167, pt. V, at 7516 (1998).

94. *Id.* at 7517–18.

95. *Id.* at 7517, 7519.

96. *Id.* at 7517.

97. *Id.* at 7519.

close this “loophole” and crack down on soft money spending.⁹⁸ Congress then passed BCRA in 2002.⁹⁹

2. *The Court Maintained the Contribution-Expenditure Dichotomy and Broad Definition of Corruption in McConnell*

In *McConnell v. FEC*, the Court considered the constitutionality of the BCRA amendments in a multi-part opinion.¹⁰⁰ Justices Stevens and O’Connor, joined by a majority of the Court, wrote the first part of the opinion, which evaluated limitations on the use of soft money.¹⁰¹ The justices reiterated that the proper test for evaluating contribution limits under the First Amendment was the “less rigorous” closely drawn test.¹⁰² The majority then determined that BCRA’s restrictions on soft money were constitutional methods of preventing circumvention of the contribution limits.¹⁰³ Justices Stevens and O’Connor emphasized the importance of deferring to Congress and its knowledge on the most effective measures for preventing “circumvention of regulations [such as contribution limits] designed to protect the integrity of the political process.”¹⁰⁴

The *McConnell* Court also applied a broad definition of corruption in its analysis of the amendments.¹⁰⁵ The justices found it “firmly established that Congress’ legitimate interest extends beyond preventing simple cash-for-votes corruption” and that this interest also includes thwarting improper influence on public officials and its appearance.¹⁰⁶ The majority noted that this more subtle form of corruption, causing public officials to act based on the priorities of their largest donors, could be as problematic as quid pro quo corruption, especially because of the difficulties in proving when it occurs.¹⁰⁷ Justices Stevens and O’Connor explicitly rejected Justice Kennedy’s “crabbed view” that corruption should be limited to quid pro quo, noting that this definition “ignores precedent, common sense, and the realities of political fundraising.”¹⁰⁸ Finding that the ability of donors to gain access to elected officials through soft money donations fit within a properly broad

98. *Id.* at 7519, 7526.

99. *See* Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002).

100. *McConnell v. FEC*, 540 U.S. 93, 114 (2003).

101. *Id.* at 114, 122.

102. *Id.* at 137, 141.

103. *Id.* at 146, 165–66.

104. *Id.* at 137; *see also* *FEC v. Beaumont*, 539 U.S. 146, 155 (2003) (“[D]eference to legislative choice is warranted particularly when Congress regulates campaign contributions, carrying as they do a plain threat to political integrity and a plain warrant to counter the appearance and reality of corruption and the misuse of corporate advantages.”).

105. *McConnell*, 540 U.S. at 136, 142–56.

106. *Id.* at 136, 150 (citing *Colorado II*, 533 U.S. 431, 441 (2001)).

107. *Id.* at 153.

108. *Id.* at 152.

definition of corruption, the majority upheld BCRA's soft money contribution limits.¹⁰⁹

Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy all dissented from the Stevens-O'Connor opinion, arguing that the soft money limits were an unacceptable attack on free speech.¹¹⁰ In particular, the dissenters believed that the majority's definition of corruption went too far.¹¹¹ Justice Scalia argued that an organization's increased access via financial backing to a public official it supports is simply par for the course in politics.¹¹² He noted that donor organizations flock to officials that already support their causes (seemingly dismissing arguments that the scenario may be the other way around).¹¹³ Justice Thomas argued that bribery laws are sufficient to thwart both quid pro quo and other less obvious forms of corruption, while Justice Kennedy explicitly rejected the government's power to stop any corruption other than quid pro quo.¹¹⁴ Finally, Justices Thomas and Kennedy both argued that the proper standard of review for any type of campaign finance regulation is always strict scrutiny, rather than the closely drawn test.¹¹⁵

C. *The Court Narrowed Its Definition of Corruption in Citizens United*

In *Citizens United v. FEC*, five members of the Court seemed to break with precedent in a narrowed definition of corruption.¹¹⁶ The case came before the Supreme Court when a non-profit corporation challenged BCRA provisions limiting spending on advertisement broadcasting within a certain timeframe before an election.¹¹⁷

The *Citizens United* Court limited the scope of the government's interest in preventing corruption as a justification for First Amendment restrictions.¹¹⁸ The majority understood *Buckley* as only allowing campaign

109. *Id.* at 152, 224.

110. *See id.* at 259 (Scalia, J., dissenting), 266–67 (Thomas, J., dissenting), 291–98 (Kennedy, J., concurring in part, dissenting in part).

111. *See id.* at 259 (Scalia, J., dissenting), 291–98 (Kennedy, J., concurring in part, dissenting in part).

112. *Id.* at 259 (Scalia, J., dissenting).

113. *Id.*

114. *Id.* at 267 (Thomas, J., dissenting), 291–98 (Kennedy, J., concurring in part, dissenting in part).

115. *Id.* at 266 (Thomas, J., dissenting), 308–14 (Kennedy, J., concurring in part, dissenting in part).

116. 558 U.S. 310, 359 (2010). Justice Kennedy authored the *Citizens United* majority opinion and was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. The Justices were aligned essentially identically to their positions in *McConnell*, with the additions of Justices Alito and Roberts to the majority in *Citizens United*, and Justice Sotomayor replacing Justice Souter in the minority, though this time the *McConnell* dissenters had the majority.

117. *Id.* at 319–21.

118. *Id.* at 359–60.

finance limits in the interest of deterring quid pro quo corruption.¹¹⁹ The Court reasoned that just because individuals “may have influence or access to elected officials does not mean that these officials are corrupt.”¹²⁰ The majority warned that including undue influence in the definition of corruption essentially gives the government unchecked power to restrict First Amendment rights.¹²¹ In stark contrast to the reasoning of the *McConnell* majority, the Court concluded that “[i]ngratiation and access . . . are not corruption.”¹²²

The Court ultimately upheld the soft money restrictions of *McConnell* and struck down BCRA limits that impacted when and how corporations could broadcast advertisements related to federal elections.¹²³ The majority famously held that the government cannot restrict political speech on the basis of the “speaker’s corporate identity.”¹²⁴

III. THE COURT’S REASONING

In *McCutcheon v. FEC*, the Supreme Court reversed the United States District Court for the District of Columbia and held that aggregate contribution limits were unconstitutional under the First Amendment.¹²⁵ Led by Chief Justice Roberts, the plurality concluded that “aggregate limits do little, if anything, to address [corruption], while seriously restricting participation in the democratic process.”¹²⁶ The Court came to this conclusion by determining that the holding in *Buckley* did not apply and finding that the aggregate limits were not sufficiently tied to the government’s interest—an interest the Court narrowly defined as *only* preventing quid pro quo corruption.¹²⁷

First, the Court determined that the *Buckley* holding—that aggregate limits were a constitutional means for preventing circumvention of base limits—did not apply.¹²⁸ The plurality noted that multiple “statutory safe-

119. *Id.* at 359 (Kennedy, J., concurring in part, dissenting in part) (citing *McConnell*, 540 U.S. at 296–98).

120. *Id.*

121. *Id.* The Court noted that the “appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.” *Id.* at 360. The Court reasoned that spending by corporations or other actors in order to “persuade voters” actually underscores that “the people have the ultimate influence over elected officials” and undermines arguments that political funding could threaten the democratic system. *Id.*

122. *Id.* at 360.

123. *Id.* at 361, 365–66.

124. *Id.* at 347, 365.

125. 134 S. Ct. 1434, 1442, 1462 (2014) (Roberts, C.J., concurring) (plurality opinion).

126. *Id.* at 1442.

127. *Id.* at 1445–46, 1449–52.

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

guards against circumvention” had become part of the statutory scheme since the *Buckley* decision, such as additional base contribution limits and stricter earmarking provisions.¹²⁹ The plurality concluded that *Buckley* did not control, stating, “[w]e are confronted with a different statute and different legal arguments, at a different point in the development of campaign finance regulation.”¹³⁰

Next, the Court weighed the First Amendment interests implicated by aggregate limits.¹³¹ The plurality explained that the First Amendment “safeguards an individual’s right to participate in the public debate through political expression and political association.”¹³² The Court reasoned that by imposing a definitive ceiling on the amount an individual can contribute to candidates and committees, aggregate limits essentially force an individual to ration her political participation, thereby limiting the expression and promotion of her policy concerns.¹³³

The Court then emphasized that the government can only regulate campaign finance for the purpose of addressing quid pro quo corruption or the appearance of this type of corruption.¹³⁴ Quid pro quo corruption occurs when a donor aims to directly influence a candidate by making donations with specific political strings attached.¹³⁵ For example, a donor might offer money in exchange for the recipient’s sponsorship of a bill. The plurality noted several activities that do *not* constitute quid pro quo corruption, including “the possibility that an individual who spends large sums may garner ‘influence over or access to’ elected officials or political parties.”¹³⁶ While acknowledging the difficulty in differentiating between quid pro quo

129. *Id.* at 1446–47; see 11 C.F.R. § 110.6(b)(1) (2014) (“[E]armarked means 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.”).

130. *McCutcheon*, 134 S. Ct. at 1447 (Roberts, C.J., concurring) (plurality opinion).

131. *Id.* at 1447–50.

132. *Id.* at 1448.

133. *Id.* at 1448–49. The Court rejected arguments that an individual’s participation is minimally threatened by aggregate limits because an individual could simply give smaller contributions to a greater number of candidates, or contribute in ways outside of the financial realm, such as volunteering for a campaign. *Id.* at 1449. The Court noted that forcing an individual to give less “because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process.” *Id.* Furthermore, the plurality argued that “personal volunteering is not a realistic alternative for those who wish to support a wide variety of candidates or causes.” *Id.*

134. *Id.* at 1450–51 (“No matter how desirable it may seem, it is not an acceptable governmental objective to ‘level the playing field,’ or to ‘level electoral opportunities,’ or to ‘equaliz[e] the financial resources of candidates.’” (quoting *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 134 S. Ct. 1434, 2825–26 (2011); *Davis v. FEC*, 554 U.S. 724, 741–42 (2008); *Buckley v. Valeo*, 424 U.S. 1, 56 (1976))).

135. See, e.g., *id.* at 1441, 1451–52 (defining quid pro quo as “a direct exchange of an official act for money”).

136. *Id.* at 1451 (quoting *Citizens United v. FEC*, 558 U.S. 310, 359 (2010)).

corruption and “general influence,” the Court stressed the importance of “err[ing] on the side of protecting political speech rather than suppressing it.”¹³⁷ In other words, the plurality seemed to find instances of questionable sway over elected officials a small price to pay for the robust protection of First Amendment rights.¹³⁸

The Court also reiterated that even if the government limits free speech for the (legitimate) aim of preventing quid pro quo corruption, it still has the “burden of proving the constitutionality of its actions.”¹³⁹ This burden can be satisfied when the government can show that the limits on free speech are appropriately designed (either narrowly tailored or closely drawn, depending on the level of scrutiny) to prevent quid pro quo corruption.¹⁴⁰ The plurality did not elaborate on the appropriate level of scrutiny to apply to aggregate limits because it found that even if the lower level of scrutiny applied, the aggregate limits were not “closely drawn” to preventing quid pro quo corruption.¹⁴¹

The government contended that by restricting the total amount of money that an individual can donate during an election cycle, aggregate limits prevent circumvention of base limits, that is, the limit on how much an individual can give to each candidate.¹⁴² For example, the government argued that without aggregate limits, an individual could give the maximum amount allowed by base limits to a particular candidate, and then attempt to give more by contributing additional funds to PACs apt to support that same candidate.¹⁴³ The plurality disagreed and instead found that the possibility of this base limit circumvention was “far too speculative” under the current statutory framework and dismissed various examples of circumvention as highly unlikely.¹⁴⁴ The Court reasoned that given the implausibility of the various circumvention scenarios, the potential alternatives to aggregate limits that would not infringe on First Amendment rights, and the blanket ban on every contribution over the aggregate limit threshold, the aggregate limits violated the First Amendment.¹⁴⁵

137. *Id.*

138. *Id.*

139. *Id.* at 1452 (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 816 (2000)) (internal quotation marks omitted).

140. *Id.* at 1456–57.

141. *Id.* at 1446 (“Because we find a substantial mismatch between the Government’s stated objective and the means selected to achieve it, the aggregate limits fail even under the ‘closely drawn’ test. We therefore need not parse the differences between the two standards[, strict scrutiny and closely drawn,] in this case.”).

142. *Id.* at 1452–53.

143. *Id.* at 1453.

144. *Id.* at 1452–56.

145. *Id.* at 1458–59.

Concurring, Justice Thomas agreed with the plurality that aggregate limits were a violation of First Amendment rights.¹⁴⁶ He argued, however, that *Buckley* should be overruled in its entirety.¹⁴⁷ Justice Thomas rejected *Buckley*'s distinction between campaign expenditures and campaign contributions (with campaign contributions subject to a lower level of scrutiny under the closely drawn test), and contended that both should be subject to the same heightened level of (strict) scrutiny in evaluating possible First Amendment infringements.¹⁴⁸ Justice Thomas argued that contrary to the reasoning in *Buckley*, campaign contributions directly impact free speech by "amplifying the voice of the candidate and help[ing] to ensure the dissemination of the messages that the contributor wishes to convey."¹⁴⁹ Justice Thomas agreed with the plurality that aggregate limits "would surely fail" under First Amendment strict scrutiny.¹⁵⁰

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented.¹⁵¹ The dissent took issue with three primary premises advanced by the plurality: 1) that the government only has an interest in preventing quid pro quo corruption; 2) that aggregate limits are unnecessary for preventing the circumvention of base limits; and 3) that aggregate limits are not closely drawn to the government's interest in protecting base limits.¹⁵²

First, Justice Breyer argued that the plurality's definition of corruption was too narrow, breaking with the foundational purposes for the First Amendment and the definition of corruption from precedent.¹⁵³ The dissent highlighted the historical importance of the First Amendment as a tool to foster a "chain of communication between the people, and those, to whom they have committed the exercise of the powers of government."¹⁵⁴ Noting the clear risk that unchecked contributions could threaten the responsiveness of elected officials to their constituents, the dissent contended that cor-

146. *Id.* at 1464 (Thomas, J., concurring) (agreeing with the plurality that "limiting the amount of money a person may give to a candidate *does* impose a direct restraint on his political communication").

147. *Id.* at 1462.

148. *Id.* at 1462–64. Justice Thomas contended, "[c]ontributions and expenditures are simply 'two sides of the same First Amendment coin.'" *Id.* at 1464 (quoting *Buckley v. Valeo*, 424 U.S. 1, 241, 244 (1976) (Burger, C.J., concurring in part and dissenting in part)).

149. *Id.* at 1463 (Thomas, J., dissenting) (quoting *Nixon v. Shrink Mo. Gov't*, 528 U.S. 377, 415 (2000)) (internal quotation marks omitted).

150. *Id.*

151. *Id.* at 1465.

152. *Id.* at 1465–66.

153. *Id.* at 1466–70 (Breyer, J., dissenting).

154. *Id.* at 1467 (quoting JAMES WILSON & THOMAS MCKEAN, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES OF AMERICA 30–31 (1792)) (internal quotation marks omitted).

ruption should be afforded a broader, more nuanced definition than blatant bribery.¹⁵⁵

The dissent offered the following definition of corruption: any contributions that may have an “undue influence on an officeholder’s judgment,” that lead to “privileged access” to these officials, and the appearance of these types of corruption.¹⁵⁶ Justice Breyer supported this definition with an extensive documentation of prior decisions in which the Court had defined corruption to include improper influence over elected officials by wealthy donors, even if this influence did not rise to the level of quid pro quo deals.¹⁵⁷

Justice Breyer also rejected the plurality’s arguments that aggregate limits are unnecessary for protecting base limits.¹⁵⁸ Primarily, he argued that these limits are essential to prevent circumvention and offered three situations where donors are able to work around base limits in the absence of aggregate limits.¹⁵⁹ In addition, the dissent countered the plurality’s claim that changing laws had made aggregate limits unnecessary.¹⁶⁰ For example, even though Congress had imposed additional restraints on contributions to PACs, the dissent argued that “[f]ederal law places no upper limit on the number of PACs supporting a party or a group of party candidates that can be established.”¹⁶¹ Thus political party supporters could simply create additional PACs and new recipients for contributions.¹⁶²

Finally, Justice Breyer argued that aggregate limits *are* narrowly tailored to the government’s interest in preventing circumvention of base limits.¹⁶³ Justice Breyer contended that though the plurality offered alternatives to aggregate limits to achieve this purpose, it did not “show, or try to show, that these hypothetical alternatives could effectively replace aggregate contribution limits.”¹⁶⁴ Furthermore, the dissent noted that the “hypo-

155. *Id.* at 1468–69 (citing *Buckley v. Valeo*, 424 U.S. 1, 27–28 (1976)).

156. *Id.* at 1469–70 (quoting *FEC v. Beaumont*, 539 U.S. 146, 155–56 (2003)) (internal quotation marks omitted) (citing *McConnell v. FEC*, 540 U.S. 93, 146–52 (2003); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390 (2000)).

157. *Id.* at 1468–70; *see, e.g.*, *FEC v. Beaumont*, 539 U.S. 146, 155–56 (2003) (defining corruption as “not only . . . quid pro quo agreements, but also as undue influence on an officeholder’s judgment”); *McConnell v. FEC*, 540 U.S. 93, 153 (2003) (“Just as troubling to a functioning democracy as classic quid pro quo corruption is the danger 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.”).

158. *McCutcheon*, 134 S. Ct. at 1471–79 (Breyer, J., dissenting).

159. *Id.* at 1472–75. *See infra* Part IV.B.1 for an in-depth discussion of one of these scenarios in which donors are able to work around base limits in the absence of aggregate limits.

160. *McCutcheon*, 134 S. Ct. at 1475 (Breyer, J., dissenting).

161. *Id.*

162. *Id.* The dissent contended, “creating a [new] PAC is primarily a matter of paperwork, a knowledgeable staff person, and a little time.” *Id.*

163. *Id.* at 1479.

164. *Id.*

thetical presence” of these alternatives when *Buckley* was decided did not impact the Court’s holding in that case that aggregate limits were constitutional.¹⁶⁵

IV. ANALYSIS

The Supreme Court should have upheld FECA’s aggregate limits in *McCutcheon*. First, the Court defined the government’s interest in preventing corruption too narrowly, breaking with precedent in this definition and failing to defer to Congress’s understanding of corruption.¹⁶⁶ Second, without aggregate limits, individuals can and have been able to work around other valid FECA regulations, including base limits.¹⁶⁷ Ultimately the Court’s decision threatens to dismantle campaign finance regulations entirely.¹⁶⁸ Without aggregate limits, base limits are meaningless and individuals will be able to contribute as much money as they want, as long as the number of local party committees and PACs continues to grow.¹⁶⁹

A. *The McCutcheon Court Incorrectly Narrowed the Definition of Corruption.*

In *McCutcheon*, the plurality struck down aggregate limits based in part on its holding that the government’s interest in deterring corruption is strictly limited to the prevention of quid pro quo corruption and its appearance.¹⁷⁰ This definition of corruption was too narrow and broke with precedent.¹⁷¹ The Court should have deferred to Congress’s definition of corruption, which would include forms of corruption beyond quid pro quo.¹⁷²

1. *The Plurality’s Definition of Corruption Was Too Narrow and Inconsistent with Precedent*

The plurality’s exceedingly narrow definition went against precedent.¹⁷³ In prior cases, the Court consistently defined corruption as extending beyond quid pro quo and including the interest in preventing improper influence.¹⁷⁴ Only one case, *Citizens United*, limited the definition of corruption to quid pro quo, the definition used by the *McCutcheon* plurality.¹⁷⁵

165. *Id.*

166. *See infra* Part IV.A.

167. *See infra* Part IV.B.

168. *See infra* Part IV.B.2.

169. *See infra* Part IV.B.2.

170. *McCutcheon*, 134 S. Ct. at 1450–51, 1462 (Roberts, C.J., concurring) (plurality opinion).

171. *See infra* Part IV.A.1.

172. *See infra* Part IV.A.2.

173. *See infra* note 177; *see also* *McCutcheon*, 134 S. Ct. at 1468–70 (Breyer, J., dissenting).

174. *See infra* note 177; *see also* *McCutcheon*, 134 S. Ct. at 1468–70 (Breyer, J., dissenting).

175. *See* *Citizens United v. FEC*, 558 U.S. 310, 359–60 (2010).

That definition was dictum in *Citizens United* and limits corruption to actions that would already be punishable under criminal bribery laws.¹⁷⁶

The Court's precedent establishes that corruption extends beyond quid pro quo.¹⁷⁷ For example, the *Buckley* Court alluded to the fact that the government may have a legitimate interest in preventing "improper influence."¹⁷⁸ The Court also recognized that bribery laws outside of FECA were only equipped to address the "most blatant and specific attempts of those with money to influence governmental action," seemingly emphasizing FECA's role in addressing less obvious forms of corruption.¹⁷⁹ In the wake of *Buckley*, the Court explained the government's interest in addressing broad forms of corruption even more explicitly, including recognizing the government's valid efforts to thwart "undue influence on an officeholder's judgment" and acts of "politicians . . . too compliant with the wishes of large contributors."¹⁸⁰ The *McConnell* Court emphasized that undue influence, making officials more beholden to wealthy contributors than their constituents, was "[j]ust as troubling" as quid pro quo corruption.¹⁸¹

Citizens United is the only case that lends support to the plurality's narrow reading of corruption.¹⁸² However, the *Citizens United* majority's

176. *McCutcheon*, 134 S. Ct. at 1471 (Breyer, J., dissenting); see also Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 391 (2009).

177. See, e.g., *FEC v. Beaumont*, 539 U.S. 146, 155–56 (2003) (defining corruption as both quid pro quo and undue influence); *McConnell v. FEC*, 540 U.S. 93, 153 (2003) ("Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger 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."); *Colorado II*, 533 U.S. 431, 441 (2001) (noting that corruption is "understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence"); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389–90 (2000) (defining corruption as including not only quid pro quo, but also "'improper influence[.]' . . . 'opportunities for abuse,' . . . and officials too compliant with the wishes of large contributors" (quoting *Buckley v. Valeo*, 424 U.S. 1, 27 (1976))); *FEC v. NCPAC*, 470 U.S. 480, 497–98 (1985) (finding that though the "hallmark of corruption is the financial *quid pro quo*," it is also situations where officials are "influenced" to act in ways that will bring them the most money, often at the cost of their official responsibilities); *Buckley*, 424 U.S. at 27 (finding that "improper influence" could be of equal concern to Congress as *quid pro quo* corruption); see also *McCutcheon*, 134 S. Ct. at 1466–70 (Breyer, J., dissenting); Teachout, *supra* note 176, at 391 ("For twenty-two years, the Court clearly explained (in majority opinions) that quid pro quo was but one type of corruption.").

178. *Buckley*, 424 U.S. at 27.

179. *Id.*

180. *Colorado II*, 533 U.S. at 440–41; *Shrink Mo. Gov't PAC*, 528 U.S. at 389.

181. *McConnell*, 540 U.S. at 153.

182. *McCutcheon*, 134 S. Ct. at 1470–71 (Breyer, J., dissenting) (citing *Citizens United v. FEC*, 558 U.S. 310, 359 (2010)). Zephyr Teachout argues that the *FEC v. Wisconsin Right to Life* decision marked the turning point where the Court determined that quid pro quo was "the heart of corruption." Teachout, *supra* note 176, at 391 (citing *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478 (2007)). However, the *Wisconsin Right to Life* Court did not explicitly rule out other understandings of corruption as the *Citizens United* majority did. Compare *Wis. Right to Life*, 551 U.S. 449, 478–79 (2007) (finding that an interest in preventing quid pro quo corruption was not a legitimate justification for regulating issue advertisements), with *Citizens United*, 558 U.S. 310 at

discussion of corruption can be treated as dictum because it was unnecessary for the holding that struck down free speech limits on corporations.¹⁸³ *Citizens United* also did not explicitly overrule the broad definition of corruption that the *McConnell* Court used to uphold soft money limits.¹⁸⁴ Additionally, the *McCutcheon* plurality left the soft money limits from *McConnell* intact, while dismantling the very definition of corruption (extending beyond quid pro quo) on which *McConnell*'s soft money holding depended.¹⁸⁵ This fact reiterates that the *McCutcheon* plurality mistakenly narrowed the scope of the government's anti-corruption interest.

Furthermore, the plurality's quid pro quo definition would limit corruption to activities that are already actionable under criminal bribery laws.¹⁸⁶ Professor Zephyr Teachout notes that this definition is attractive in its simplicity: essentially the Court need only look to criminal bribery laws to determine whether or not there has been corruption.¹⁸⁷ However, this limited definition not only cuts against precedent, but also undermines the importance of preventing other, broader types of corruption, of which the Framers' were acutely aware in their drafting of the Constitution.¹⁸⁸ Debates about the size of the Senate and the House of Representatives, how members of Congress would be elected, the checks and balances system, the impeachment of the President, and many other major aspects of the Constitution were based on the Framers' concerns that corruption could threaten the "integrity" of the democratic system.¹⁸⁹

2. *Congress, Not the Court, Should Define Corruption*

The *McCutcheon* plurality broke with precedent in its definition of corruption, but perhaps the Court should not have offered a definition at

359 ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.").

183. *McCutcheon*, 134 S. Ct. at 1471 (Breyer, J., dissenting) (citing *Citizens United*, 558 U.S. at 365).

184. *Id.* (citing *Citizens United*, 558 U.S. at 359, 360–61 ("This case . . . is about independent expenditures, not soft money.")).

185. *Id.* ("Our holding about the constitutionality of the aggregate limits clearly does not overrule *McConnell*'s holding about 'soft money.'" (quoting *id.* at 1451 n.6)).

186. See Teachout, *supra* note 176, at 388–91. Justice Breyer also seems to hint at this idea in the *McCutcheon* dissent. See, e.g., *McCutcheon*, 134 S. Ct. at 1466 (Breyer, J., dissenting) ("[The plurality] defines *quid pro quo* corruption to mean no more than 'a direct exchange of an official act for money'—an act akin to bribery.").

187. Teachout, *supra* note 176, at 391.

188. See *id.* at 347–73. Teachout argues that a "loss of integrity" theory of corruption is the one that would have influenced the Framers the most. *Id.* at 395. This is the perception of "corruption as a loss of political integrity, and systems that predictably create moral failings for members of Congress." *Id.*

189. *Id.* at 347–73.

all.¹⁹⁰ Arguably, the Court should have deferred to Congress's definition of corruption because Congress "defin[es] the legislator's role in our democracy."¹⁹¹ The Court's own precedent recognizes the need for this deference.¹⁹² If the Court had deferred to Congress, it is clear that Congress itself understood the interest in preventing corruption to include types of corruption beyond quid pro quo.¹⁹³

Professor Deborah Hellman argues that in campaign finance jurisprudence, "the Court has . . . missed the significance of the fact that defining legislative corruption entangles the Court in defining the legislator's role in our democracy."¹⁹⁴ Professor Hellman's analysis is particularly relevant in the wake of *McCutcheon* because she argues that the Court should stay out of determining the boundaries of corruption all together. She contends that defining corruption necessarily implicates a verdict on what constitutes good and bad governance by legislators, a decision for Congress and not the Courts.¹⁹⁵ Justice Breyer also articulates this concern in his *McCutcheon* dissent.¹⁹⁶

Professor Hellman notes that an understanding of corruption is based on a parallel theory for how a democracy, and its public officials, should operate.¹⁹⁷ For example, if the theory is that voters have trusted the legislator to employ her best judgment in making decisions, then corruption would be anything that undermines this judgment.¹⁹⁸ If the understanding is that the legislator should answer directly to her constituents, corruption exists when "a legislator weighs the preferences of some too heavily," particularly the predilections of rich donors.¹⁹⁹ Quid pro quo corruption is implicated in the final theory, that a legislator is acting pursuant to his obligations as long as she is not making decisions based on an exchange of money or other

190. Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385 (2013).

191. *Id.* at 1387; *see also* Adam Lamparello, *Citizens Disunited: McCutcheon v. Federal Election Commission*, 90 IND. L.J. SUPP. 43, 43 (2014).

192. *See, e.g.*, *FEC v. Beaumont*, 539 U.S. 146, 155 (2003); *McConnell v. FEC*, 540 U.S. 93, 137 (2003).

193. *See, e.g.*, S. Rep. No. 105-167, pt. V, at 7516–20 (1998).

194. Hellman, *supra* note 190, at 1387.

195. *Id.* at 1394–96.

196. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1481 (2014) (Breyer, J., dissenting) ("[This] decision . . . substitutes judges' understandings of how the political process works for the understanding of Congress.").

197. Hellman, *supra* note 190, at 1394–96.

198. *Id.* at 1397–98. Professor Hellman argues that this is the perception of corruption in *McConnell*. *Id.*; *see McConnell v. FEC*, 540 U.S. 93, 150 (2003) ("Our cases have firmly established that Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'" (quoting *Colorado II*, 533 U.S. 431, 441(2001))).

199. Hellman, *supra* note 190, at 1399 (citing *McConnell*, 540 U.S. at 153).

benefits for her votes.²⁰⁰ Professor Hellman argues that in this final scenario, a public official “need merely avoid bribery or its very close cousins in order to avoid corruption.”²⁰¹

The Supreme Court should recognize that it is overstepping its authority when it attempts to define corruption. In doing so, it “implicitly adopts one particular, contested conception of a legislator’s role in a well-functioning democracy” over others.²⁰² Though the Court has not apparently recognized the link between defining corruption and defining good governance, it has more generally addressed the importance of deferring to Congress in evaluating contribution limits.²⁰³ In *McConnell*, the Court noted the importance of evaluating contribution limits under a lower level of scrutiny, deferring to Congress’s “ability to weigh competing constitutional interests in an area in which it enjoys particular expertise.”²⁰⁴ Similarly, the Court in *Beaumont* found that “deference to legislative choice is warranted particularly when Congress regulates campaign contributions, carrying as they do a plain threat to political integrity.”²⁰⁵ The *McCutcheon* dissent also argued that Congress, rather than the judiciary, was “far better suited” to define corruption and the solutions for preventing it.²⁰⁶

The *McCutcheon* Court, rather than being concerned with overstepping its own authority, believed that Congress had gone too far.²⁰⁷ The plurality warned against deference to Congress, arguing that when Congress regulates campaign finance for purposes other than combatting quid pro quo corruption, it is essentially determining who should be in political power.²⁰⁸ The plurality contended that elected representatives should be the “last people to help decide who *should* govern.”²⁰⁹ Legal scholars have called this argument the “incumbent self-protection” rationale.²¹⁰ Under this theory, justices have rationalized striking down campaign finance regulations, arguing that they are a guise for incumbents to ensure their own reelection.²¹¹

200. *Id.* at 1400–01.

201. *Id.* at 1401.

202. *Id.* at 1402.

203. *See, e.g.*, *FEC v. Beaumont*, 539 U.S. 146, 155 (2003); *McConnell*, 540 U.S. at 137 (2003).

204. *McConnell*, 540 U.S. at 137. The Court also held that deference gives Congress “sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process.” *Id.*

205. *Beaumont*, 539 U.S. at 155.

206. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1480 (2014) (Breyer, J., dissenting).

207. *Id.* at 1441–42 (Roberts, C.J., concurring) (plurality opinion).

208. *Id.*

209. *Id.*

210. *See, e.g.*, Andrew Tutt, *McCutcheon Calls for a National Referendum on Campaign Finance (Literally)*, 114 COLUM. L. REV. SIDEBAR 84, 85 (2014).

211. *Id.* at 88–89.

This concern arguably has merit.²¹² However, allowing the justices to step in to counter incumbent self-protection problems raises line-drawing issues, and questions of how the Court would determine “[h]ow much entrenchment is too much” and when an official’s efforts to regain office are reasonable versus illicit.²¹³ These questions bear significant resemblance to political gerrymandering issues, which the Court has determined are non-justiciable.²¹⁴ It is true that deferring to Congress’s definition of corruption in campaign finance regulation could lead to entrenchment of incumbents. It is also apparent that the task of defining corruption in this context can be daunting and has plagued the Court and legal scholars alike.²¹⁵ However, this difficult policy-making is the type of challenge that Congress, not the Court, was designed to address.

Had the Court deferred to Congress’s definition, it is clear that the congressional definition encompasses corruption beyond quid pro quo, at least during the years prior to, and when, Congress passed BCRA.²¹⁶ In pushing for amendments to FECA to stop the flow of soft money in campaign finance, a Senate Report recognized that the “appearance of corruption, in which large contributions appear to be traded for access to government officials or favored treatment, and the resulting loss of public confidence in government,” were the most concerning impacts of soft money.²¹⁷ The Report cited numerous examples of large contributions leading to privileged access to the Executive Branch, as well as private events and

212. See, e.g., *id.* at 89. Professor Hellman also acknowledges the incumbent entrenchment concern. Hellman, *supra* note 190, at 1411. She notes, “[p]erhaps we need judicial supervision to ensure that the theory of democracy . . . [and corruption] is not intended to or does not succeed in overly entrenching incumbents.” *Id.* Hellman argues, however, that “this justification for judicial oversight nevertheless suggests only a limited role for the courts.” *Id.*

213. Hellman, *supra* note 190, at 1411–12. Justice Breyer poses similar questions in his dissent. *McCutcheon*, 134 S. Ct. at 1480 (Breyer, J., dissenting). He noted:

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 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.

Id.

214. Hellman, *supra* note 190, at 1412–13 (citing *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004)). Hellman notes that the Court in *Vieth* found that there are “no judicially discernible and manageable standards for adjudicating political gerrymandering claims.” *Id.*

215. See, e.g., Lamparello, *supra* note 191, at 43; Matt Titolo, *The Jargon of Corruption*, 43 SW. L. REV. 591 (2014); Teachout, *supra* note 176, at 342; Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127 (1997).

216. See, e.g., S. Rep. No. 105-167, pt. V, at 7516–20 (1998).

217. *Id.* at 7520. These concerns stand in stark contrast to the majority’s claims in *Citizens United* that the “appearance of influence or access . . . will not cause the electorate to lose faith in our democracy.” 558 U.S. 310, 360 (2010). The *Citizens United* Court concluded that, “[i]ngratiation and access, in any event, are not corruption.” *Id.*

photo opportunities with other prominent officials.²¹⁸ The Report also endorsed the *Buckley* Court’s definition of corruption as including “improper influence.”²¹⁹ Evidently the Senate’s concerns extended beyond blatant quid pro quo, and the *McCutcheon* plurality would have come to a broader definition of corruption had it deferred to Congress’s understanding at the time of the BCRA amendments.

Ultimately, the *McCutcheon* plurality erred in finding that the government’s interest in preventing corruption only extends to preventing quid pro quo corruption. The plurality broke with precedent in adopting this narrow definition.²²⁰ The Court arguably should not have defined corruption in the first place, and instead should have deferred to Congress’s definition of corruption, which encompassed more than simply quid pro quo arrangements.²²¹

B. The Court’s Decision Will—and Already Has—Led to Circumvention of Other FECA Limits

The *McCutcheon* Court should not have rejected aggregate limits as a means for preventing the circumvention of base limits. The plurality argued that the risk of circumvention was “far too speculative” and that new campaign finance laws and existing bribery laws had essentially eliminated the possibility of base limit circumvention.²²² In making this conclusion, the plurality failed to give enough weight to the dissent’s examples that aggregate limits do in fact prevent circumvention and also corruption, including quid pro quo.²²³ Second, in the wake of *McCutcheon*, it is clear that donors can and will work around other FECA limits, regardless of other FEC regulations in place.²²⁴

1. The Dissent’s Examples of Circumvention Establish That Aggregate Limits Are Necessary for Preventing Corruption

The dissent offered numerous examples of how individuals could thwart other campaign finance regulations in the absence of aggregate limits.²²⁵ The dissent noted that without aggregate limits, contributors could “find ways to channel millions of dollars to parties and to individual candidates, producing precisely the kind of ‘corruption’ or ‘appearance of cor-

218. S. Rep. No. 105-167, pt. V, at 7519 (1998).

219. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 27 (1976)) (internal quotation marks omitted).

220. *See supra* Part IV.A.1.

221. *See supra* Part IV.A.2.

222. *McCutcheon*, 134 S. Ct. 1434, 1453–56 (2014) (Roberts, C.J., concurring) (plurality opinion).

223. *See infra* Part IV.B.1.

224. *See infra* Part IV.B.2.

225. *McCutcheon v. FEC*, 134 S. Ct. at 1472–75 (Breyer, J., dissenting).

ruption' that previously led the Court to hold aggregate limits constitutional."²²⁶ In one example, based on warnings by the FEC, the dissent explained how an individual would be able to contribute approximately sixteen times the amount of funding to a given party than she could have otherwise if aggregate limits were in place.²²⁷

In this example, the dissent first explained the base limits²²⁸ and aggregate limits.²²⁹ The dissent noted that without aggregate limits, an individual could legally give either one of the major parties in the U.S. approximately \$1.2 million in a two-year election cycle.²³⁰ Each political party has 50 committees, thus the donor could donate \$10,000 each year to 50 political party committees, amounting to \$1 million in a two-year election cycle.²³¹ In addition, the individual could donate \$194,400 total to national party committees (base limits of \$64,800 per election cycle to a national party committee, multiplied by three national party committees for each national party).²³² Each party then could create a "Joint Party Committee,"²³³ made up of the national and state party committees, which would facilitate the process for contributors to make large donations to multiple party committees.²³⁴ Under this system, the individual would be able to write one check to the joint committee, which could then divide up the funds as necessary so that the individual would be in compliance with the base limits.²³⁵ By contrast to the total \$1.2 million a donor could give under this scenario,

226. *Id.* at 1472.

227. *Id.* at 1472–73.

228. Base limits:

\$5,200 per election cycle (\$2,600 per year) per candidate.

\$64,800 per election cycle (\$32,400 per year) to a national party committee (and each national party has three national party committees).

\$10,000 per year to state and local party committees.

\$5,000 per year to PACs.

See *McCutcheon*, 134 S. Ct. at 1472, 1485 Appendix B, Table 1 (citing 2 U.S.C. §441a(a)(1) (2012), reclassified as 52 U.S.C.A. § 30116 (West 2014)).

229. Aggregate limits:

Total limit: \$123,200 per election cycle.

\$48,600 to federal candidates.

\$74,600 to political committees.

Only \$48,600 of which can go to state and local party committees and PACs.

Only \$20,000 of which can go to state party committees (each political party has 50 state party committees).

See *McCutcheon*, 134 S. Ct. at 1472, 1485 Appendix B, Table 1; 2 U.S.C. § 441a(a)(1).

230. *McCutcheon*, 134 S. Ct. at 1472.

231. *Id.*

232. *Id.*

233. Also referred to as "Joint Fundraising Committees." See generally Robert K. Kelner, *The Practical Consequences of McCutcheon*, 127 HARV. L. REV. F. 380, 380–81 (2014).

234. *McCutcheon*, 134 S. Ct. at 1472.

235. *Id.*

with aggregate limits in place, the donor could only have contributed \$74,600 (the aggregate limit on contributions to political committees).²³⁶

During the 2012 election cycle, a similar scenario occurred in reality.²³⁷ Candidate Mitt Romney's joint fundraising committee Romney Victory was able to generate funds for "Republican Party committees in four non-competitive states . . . which were then able to make unlimited transfers to state GOP committees in 10 swing states."²³⁸ This strategy enabled contributors to work around the base limits on party committee contributions.²³⁹ The contributor would give the maximum amount to the joint committee, which would then distribute these funds to four state party committees in non-battleground states.²⁴⁰ In turn, the state party committees, which are allowed to make "unlimited transfers among themselves," could pass these funds on to a single state committee in a swing state.²⁴¹ Thus the individual's complete contribution "would end up boosting the Romney campaign in a key battleground."²⁴² The *Huffington Post* reports that a minimum of 174 contributors gave the joint committee the maximum committee contribution, which was then funneled to Republican Party committees in battleground states.²⁴³ Though this situation occurred even in the absence of aggregate limits, aggregate limits are an additional safeguard to make this type of circumvention less likely and more difficult to achieve.

The *McCutcheon* Court was incorrect to conclude that these scenarios do not raise corruption concerns. These situations will almost certainly lead party officials to "solicit . . . large contributions from wealthy donors" for joint party committees.²⁴⁴ Garnering these contributions allows officials to direct funds to the states where they are most needed and also accept larger donations, by distributing the donation so that it complies with base limits.²⁴⁵ Then the party official may "feel[] obliged to provide [the wealthy donor] special access and influence, and perhaps even a *quid pro quo* legis-

236. *Id.*

237. Paul Blumenthal, *Justice Alito's "Wild Hypotheticals" Claim in McCutcheon v. FEC Misses the Mark*, HUFF. POST (Oct. 8, 2013), http://www.huffingtonpost.com/2013/10/08/mccutcheon-v-fec-alito_n_4065441.html.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1472 (2014) (Breyer, J., dissenting).

245. *See, e.g.*, Blumenthal, *supra* note 237.

lative favor.”²⁴⁶ This is exactly the type of corruption the Court was concerned about when it upheld BCRA’s soft money limits in *McConnell*.²⁴⁷

2. *In the Real World, Circumvention Is Already Occurring in the Absence of Aggregate Limits*

The *McCutcheon* plurality also noted the “improbability of circumvention,” especially in light of regulations already in place.²⁴⁸ In support of this argument, the plurality in particular relied on an FEC regulation that prohibits individuals who have given to a candidate from “also contribut[ing] to a political committee that has supported or anticipates supporting the same candidate in the same election” if the contributor *knows* that some of the funds he gives to the committee will also go to the candidate.²⁴⁹ The actual impacts of the *McCutcheon* decision already call the plurality’s skepticism of circumvention into question and the plurality’s reliance on the FEC regulations are misplaced.

First, circumvention is already occurring. Both parties have established joint fundraising committees envisioned by the dissent’s example.²⁵⁰ Joint fundraising committees have increased dramatically in number in recent years.²⁵¹ In 2012, 372 new joint fundraising committees were formed, compared to only 42 in 1994.²⁵² In 2013, there were 415 “new or continuing” joint fundraising committees and approximately 20 have been added since April 2014 when the Court decided *McCutcheon*.²⁵³ Though “[t]here has not been a flood of donations” to these new committees as of yet, “for individuals who can afford to give to dozens of campaigns, the new freedom offers yet another level of influence.”²⁵⁴ Furthermore, these committees in general have raised exponentially more funds for presidential campaigns over time, “nearly doubling from \$449 million in 2008 to \$953 million in 2012.”²⁵⁵

By the summer of 2014, just a few months after the *McCutcheon* decision in April, over 300 contributors had given \$11.6 million in excess of

246. *Id.*

247. *Id.* at 1472–73; see *McConnell v. FEC*, 540 U.S. 93, 182 (2003) (“Large soft-money donations at a candidate’s or officeholder’s behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder.”).

248. *McCutcheon*, 134 S. Ct. at 1456 (Roberts, C.J., concurring) (plurality opinion).

249. *Id.* at 1477 (citing 11 CFR § 110.1(h) (2014)).

250. Matea Gold, *Wealthy Political Donors Seize on New Latitude to Give to Unlimited Candidates*, WASH. POST (Sept. 2, 2014), http://www.washingtonpost.com/politics/wealthy-political-donors-seize-on-new-latitude-to-give-to-unlimited-candidates/2014/09/01/d94aeefa-2f8c-11e4-bb9b-997ae96fad33_story.html.

251. Kelner, *supra* note 233, at 382.

252. *Id.*

253. *Id.* at 382, 383.

254. Gold, *supra* note 250.

255. Kelner, *supra* note 233, at 382.

what they would have been allowed to donate before the decision.²⁵⁶ In total, contributions had reached \$50.2 million as of July 2014, not including funds given to super PACs.²⁵⁷ Of this total amount, \$16 million, or about 32%, of the funds had “gone directly to candidates.”²⁵⁸

Donors taking advantage of the eradication of aggregate limits have explicitly pointed to some of the types of corruption that the Court included in its definition prior to *Citizens United*. As one donor told the *Washington Post*, “You have to realize, when you start contributing to all these guys, they give you access to meet them and talk about your issues They know I’m a big supporter.”²⁵⁹ Another characterized the *McCutcheon* decision as allowing him to give the maximum amount of donations to a larger group of “good friends.”²⁶⁰ One donor had contributed to “25 Senate candidates and 16 House candidates.”²⁶¹

Second, the *McCutcheon* plurality’s reliance on other FEC regulations to prevent circumvention and corruption are misplaced.²⁶² The plurality in particular highlighted the effectiveness of an FEC regulation that prevents donors from giving to both a candidate, and a political committee that the donor *knows* will support (or has supported) the same candidate.²⁶³ As the dissent noted, “nine FEC cases decided since the year 2000 . . . refer to this regulation.”²⁶⁴ In every single case except for one, “the FEC failed to find the requisite ‘knowledge’” on behalf of the donor who contributed to both a candidate and a political committee supporting that same candidate.²⁶⁵ In fact, the FEC has become somewhat notorious for lack of enforcement or investigation of potential base limit circumvention.²⁶⁶ The FEC is composed of six members, four of which are needed to initiate an investigation.²⁶⁷ Ann Ravel, one of the commissioners, argues that the three Republicans on the Commission have blocked all investigations recently and

256. Gold, *supra* note 250.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. For more reading on the view that FEC rules are enough to prevent circumvention on their own, see Allen Dickerson, *McCutcheon v. FEC and the Supreme Court’s Return to Buckley*, CATO SUP. CT. REV. 95, 122–25 (2014).

263. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1477 (2014) (Breyer, J., dissenting) (citing 11 CFR § 110.1(h)(2) (2014)).

264. *Id.*

265. *Id.*

266. See, e.g., Daniel I. Weiner, *McCutcheon’s Anti-Circumvention Folly*, BRENNAN CTR. FOR JUSTICE (Apr. 9, 2014), <http://www.brennancenter.org/blog/mccutcheon-anti-circumvention-folly>; Ann Ravel, Op-Ed, *How Not to Enforce Campaign Laws*, N.Y. TIMES (Apr. 2, 2014), http://www.nytimes.com/2014/04/03/opinion/how-not-to-enforce-campaign-laws.html?_r=1.

267. Ravel, *supra* note 266.

warns that the “judiciary’s misguided deference [to the FEC]—in effect, a rubber-stamp approval of inaction—encourages the commissioners not to cooperate with one another.”²⁶⁸

The Court’s own precedent warns against relying too heavily on anti-circumvention measures already in place. For example, in *Colorado II*, the Court found that an earmarking provision in the U.S. Code, similar to the FEC regulation discussed above, “would reach only the most clumsy attempts to pass contributions through to candidates.”²⁶⁹ The Court concluded that considering the earmarking rule as the extent of the government’s ability to prevent circumvention would undermine its attempts to stop more subtle methods “through which parties could effectively pass excessive contributions on to candidates.”²⁷⁰

These real world examples coming just weeks and months in the wake of *McCutcheon* raise serious questions about the future of campaign finance regulations. Without aggregate limits, base limits arguably are becoming meaningless. Now the only true limit on how much an individual can spend comes down to the number of state and local party committees and PACs affiliated with each party. As long as there are different committees for the individual to donate to, there is nothing to stop her from pouring in contributions. In the meantime, it will be critically important to protect the only true remaining limits on campaign spending—the base limits—by strengthening regulations of joint committee spending and reforming the FEC so that it can become a true campaign finance watchdog.²⁷¹

V. CONCLUSION

The Supreme Court should have upheld FECA’s aggregate limits in *McCutcheon*. First, the Court mischaracterized the government’s interest in preventing corruption, defining corruption too narrowly, breaking with precedent in this definition, and failing to defer to Congress’s understanding

268. *Id.* Ravel notes that the consequence of this deference is that “voters will again be bargained with political advertising from unknown sources, making it difficult for them to make informed decisions. If we continue on this path, we will be betraying the public and putting our democracy in jeopardy.” *Id.*; see also S. Rep. No. 105-167, pt. V, at 6290 (1998) (“A fundamental premise of [FECA] is that voters are entitled to know who is funding candidates’ campaigns. . . . The ability of wealthy contributors to finance million-dollar advertising blitzes without disclosing their identity to voters fundamentally undermines the spirit and letter of current campaign finance laws.”).

269. 533 U.S. 431, 462 (2001) (citing 2 U.S.C. §441a(a)(8) (2012)) (current version at 52 U.S.C. § 30116(a)(8) (West 2014)) (“For the purposes of . . . this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate.”); see also Weiner, *supra* note 266.

270. Weiner, *supra* note 266; see also *Colorado II*, 533 U.S. at 462.

271. See, e.g., Weiner, *supra* note 266.

of corruption when the Act was amended.²⁷² Second, without aggregate limits, individuals can and have been able to work around FECA's valid base limits.²⁷³ Donors have been able to engage in precisely the types of behavior that the Court was concerned with in its pre-*Citizens United* definition of corruption.²⁷⁴ Perhaps even more concerning is that fact that as long as the numbers of candidates, state and local party committees, and PACs continue to grow, the base limits will become an empty formality without an overall ceiling on individual contributions.²⁷⁵ This reality leaves open the question of whether *McCutcheon* has essentially eradicated meaningful campaign finance regulation altogether.

272. *See supra* Part IV.A.

273. *See supra* Part IV.B.

274. *See supra* Part IV.B.2.

275. *See supra* Part IV.B.2.