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Shaun McCutcheon v. FEC: More Money, No Problem

Alexander S. Epstein*

INTRODUCTION

Unrestricted campaign contributions pose a straightforward threat: individuals with the deepest pockets will gain unfairly disproportionate access to political decision-making. In light of this threat, Congress imposes limits on campaign contributions.¹ Without these limits, our government—founded on the axiomatic notion of “by the people, for the people”²—risks becoming a government by the rich, for the rich. Today, the Federal Election Campaign Act of 1971 (FECA or the Act), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), permits an individual to contribute up to \$2,700 per election to a candidate (\$5,400 total for the primary and general elections); \$33,400 per year to a national party committee; \$10,000 per year to a state or local party committee; and \$5,000 per year to a political action committee (PAC).³ Likewise, a national committee, state or local party committee, or multicandidate PAC may contribute up to \$5,000 per election to a candidate.⁴ In addition to these base contribution limits, Congress also imposed important aggregate limits, which remained in effect until April 2014. The aggregate limits restricted how much money a donor could contribute, to all candidates or committees, in a

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1. See 52 U.S.C.A. § 30116 (West 2015).
2. Gettysburg Address, BRITANNICA, <http://www.britannica.com/event/Gettysburg-Address> (last updated Aug. 5, 2014).
3. 52 U.S.C.A. § 30116(a)(1) (West 2015); 80 Fed. Reg. 5750-02 (Feb. 3, 2015).
4. § 30116(a)(2).

two-year election cycle.⁵ The most recent aggregate limits capped a donor's contributions at \$48,600 for federal candidates and \$74,600 for political committees.⁶

In June 2012, Shaun McCutcheon, joined by the Republican National Committee, challenged the aggregate contribution limits by suing the Federal Election Commission (FEC).⁷ McCutcheon is a political activist and vocal member of the Republican Party.⁸ The FEC is an independent regulatory agency tasked with disclosing campaign finance information, overseeing the public funding of presidential elections, and enforcing FECA.⁹ In the 2011–2012 election cycle, FECA's aggregate limits prevented McCutcheon from contributing to a number of federal candidates.¹⁰ McCutcheon argued that the aggregate limits violated his First Amendment's right to free speech.¹¹ The Supreme Court agreed and held that the aggregate limits were unconstitutional.¹²

This Comment discusses the implications of *McCutcheon v. FEC*. Specifically, it argues that Justice Roberts's opinion, coupled with *Citizens United v. FEC*, "eviscerates our Nation's campaign finance laws."¹³ The plurality's position drastically contravenes public policy, overlooks its own precedent, and erroneously ignores *McCutcheon*'s inevitable effects.

Part I of this Comment introduces FECA and describes the two cases that set the stage for campaign finance regulation before *McCutcheon*. Part II then discusses the Court's rationale in *McCutcheon*. Part III.A argues that the Court's narrow definition of corruption is misguided. Finally, Part III.B illustrates three instances where wealthy donors can now take advantage of *McCutcheon*'s holding and circumvent FECA's base limits, thereby dismantling any semblance of campaign finance regulation.

5. 2 U.S.C.A. § 441a(a)(3) (West 2015), *invalidated by* *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). The current version of the statute still lists aggregate limits, but they are unenforceable: the FEC deleted section 110.5 of the Code of Federal Regulations, which implemented FECA's aggregate limits. 79 Fed. Reg. 62335-01 (Oct. 17, 2014).

6. § 441a(a)(3), *invalidated by* *McCutcheon*, 134 S. Ct. at 1434; 78 Fed. Reg. 8530-02 (Feb. 6, 2013).

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

8. *About Shaun McCutcheon*, SHAUNMCCUTCHEON.COM, <http://shaunmccutcheon.com/about/> (last visited Oct. 1, 2015).

9. *About the FEC*, FEC.GOV, <http://www.fec.gov/about.shtml> (last visited Oct. 1, 2015).

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

11. *Id.*

12. *Id.* at 1462.

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

I.

LEGAL BACKGROUND: CAMPAIGN FINANCE JURISPRUDENCE BEFORE
*MCCUTCHEON*A. *The Federal Election Campaign Act of 1971*

FECA, enacted in 1971, originally sought to address the rising costs of campaign advertisements by cabining federal candidates' expenditures on advertising—specifically, radio and television.¹⁴ The Act also required disclosure of both campaign expenditures and contributions.¹⁵ The Act in its original form, however, had several deficiencies: it repealed prior prohibitions on contributions, the expenditure limits applied only to broadcast media, and Congress's ability to enforce the Act itself was unclear.¹⁶

To combat these deficiencies, Congress amended in the Act in 1974.¹⁷ First, the 1974 Amendments introduced both the base and aggregate limits on campaign contributions for individual donors and PACs.¹⁸ In addition to the familiar base and aggregate contribution limits, it limited independent expenditures by individuals and groups “relative to a clearly identified candidate.”¹⁹ The Amendment also limited campaign spending by the candidates themselves.²⁰

B. *Buckley v. Valeo*

*Buckley v. Valeo*²¹ laid the foundation for campaign finance reform jurisprudence. Though campaign finance reform predates *Buckley* (and FECA) by many years,²² the decision introduced the conflict between campaign finance reform and free speech—specifically, campaign contribution and expenditure restrictions impinge upon an individual's right to political expression.²³ Like *McCutcheon*, *Buckley* also involved a challenge to FECA, which had been amended just two years prior to the Court's decision.²⁴ The plaintiffs raised constitutional challenges to all of FECA's key provisions, including the

14. Gregory Comeau, *Bipartisan Campaign Reform Act*, 40 HARV. J. ON LEGIS. 253, 257 (2003).

15. *Id.*

16. Debra Burke, *Twenty Years After the Federal Election Campaign Act Amendments of 1974: Look Who's Running Now*, 99 DICK. L. REV. 357, 359 (1995)

17. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) [FECA].

18. *Id.*

19. *Buckley v. Valeo*, 424 U.S. 1, 7 (1976) (per curiam) (quoting FECA § 332(b)).

20. *Id.*

21. 424 U.S. 1 (1976).

22. *See, e.g.*, Tillman Act of 1907, ch. 420, 34 Stat. 864 (1907) (prohibiting corporations from making money contributions in connection with political elections).

23. *Buckley*, 424 U.S. at 14–19.

24. *Id.* at 6.

contribution limitations—base and aggregate alike—and expenditure limitations.²⁵

The plaintiffs in *Buckley* included two political candidates, a potential contributor, and several political committees, all sharing general libertarian ideologies.²⁶ Operating under the presumption that political speech is at the core of First Amendment protection, the plaintiffs argued that if the government can control the resources needed for communication—in other words, campaign funds—then the government could control the communication itself.²⁷ The Court agreed, recognizing that “contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities.”²⁸ The Court ultimately held that limits on expenditures—not contributions—by individuals, groups, and candidates were unconstitutional: expenditure limits restricted protected political expression while simultaneously failing to address the government’s legitimate interest in preventing corruption.²⁹ In contrast, the Court upheld both the base and aggregate contribution limits.³⁰ It explained that contribution limits effectively prevent large donations from undermining our representative democracy.³¹ According to the Court, this weighty interest in preventing political corruption was “sufficient to justify the limited effect upon First Amendment freedoms.”³²

C. *Citizens United v. FEC*

More than thirty years after *Buckley*, the Court faced a strikingly similar issue in *Citizens United*: whether a ban on electioneering communication—broadcast communication that refers to a clearly identifiable candidate for federal office made within thirty days of a primary or sixty days of a general election—was an unconstitutional abridgment of a corporation’s right to free speech.³³ The Court held that such restrictions on corporate independent expenditures were unconstitutional.³⁴ The plaintiff, a conservative lobbying group, sought to air its documentary, *Hillary: The Movie*, within thirty days of the 2008 primary elections.³⁵ The documentary was critical of then-Senator Hillary Clinton.³⁶

The Court justified its conclusion by explaining that the ban on electioneering communication was a ban on speech—“an essential mechanism

25. *Id.* at 6–7.

26. Ralph K. Winter, *The History and Theory of Buckley v. Valeo*, 6 J.L. & POL’Y 93, 93 (1997).

27. *Id.* at 95.

28. *Buckley*, 424 U.S. at 14.

29. *Id.* at 45, 53, 55.

30. *Id.* at 38.

31. *Id.* at 26–27.

32. *Id.* at 29.

33. *Citizens United v. FEC*, 558 U.S. 310, 318–20 (2010).

34. *Id.* at 365.

35. *Id.* at 321.

36. *Id.* at 319–20.

of democracy.”³⁷ The Court reaffirmed precedents, including *Buckley*, which extended First Amendment rights to corporations.³⁸ It explained that the government’s interest in preventing political corruption was not sufficient to overcome the ban’s First Amendment violations.³⁹ What’s more, the Court established strict limitations on the corruption Congress is permitted to address. The Court held that the government’s interest was limited exclusively to quid pro quo corruption, i.e., dollars exchanged for political favors.⁴⁰ This narrow definition of corruption would have far-reaching implications—most strikingly seen in its decisive role in *McCutcheon*.

II.

SHAUN MCCUTCHEON V. FEC

The Court in *McCutcheon* further relaxed campaign finance regulation by holding that FECA’s aggregate contribution limits were unconstitutional.⁴¹ In the 2011–2012 election cycle, Shaun McCutcheon contributed a total of \$33,088 to sixteen different federal candidates and \$27,328 to several political committees, complying with both the base and aggregate limits.⁴² McCutcheon alleged that he wished to contribute to additional candidates and committees but was precluded by the aggregate limits.⁴³

In June 2012, McCutcheon and the Republican National Committee filed a complaint against the government in the district court.⁴⁴ They moved for a preliminary injunction against enforcement of the aggregate limits.⁴⁵ A three-judge district court panel denied the plaintiffs’ motion and granted the government’s motion to dismiss.⁴⁶ The plaintiffs appealed directly to the Supreme Court.⁴⁷ On April 2, 2014, the Court ruled for the plaintiffs, finding that the aggregate limits imposed by FECA, as amended by BCRA, unconstitutionally infringed upon the plaintiffs’ First Amendment right to free speech.⁴⁸

In reaching its conclusion, the Court began by addressing *Buckley* in two respects. First, the Court reemphasized the familiar notion that campaign finance reform “operate[s] in an area of the most fundamental First Amendment

37. *Id.* at 339.

38. *Id.* at 342–46.

39. *Id.* at 357.

40. *Id.* at 359.

41. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1462 (2014).

42. *Id.* at 1443.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 1444. In a case involving a direct appeal from a three-judge panel of the district court, the Supreme Court has no discretion, under 28 U.S.C. § 1253 (2012), to refuse adjudication of the case on its merits.

48. *McCutcheon*, 134 S. Ct. at 1462.

activities.”⁴⁹ Second, the Court turned to the portion of *Buckley* where aggregate limits were previously held constitutional.⁵⁰ The Court determined that *Buckley*’s conclusion about the aggregate limits was not controlling.⁵¹ It emphasized that *Buckley* spent a total of three sentences, in a 139-page opinion, analyzing the aggregate limits.⁵² Moreover, the Court explained that the aggregate limits in *Buckley* had not been “separately addressed at length by the parties.”⁵³

After quickly discounting its own precedent, the Court turned to the government’s only legitimate interest: preventing corruption or the appearance of corruption.⁵⁴ It further held that Congress may only target quid pro quo corruption, reaffirming the exceptionally narrow definition of corruption from *Citizens United*.⁵⁵ The possibility that a wealthy donor may garner “influence over or access to” elected officials or political parties is not quid pro quo corruption.⁵⁶ Thus, the Court ultimately concluded that the aggregate limits did not further the government’s only permissible objective of preventing quid pro quo corruption.⁵⁷ It is illogical to conclude that there is no corruption concern in giving nine candidates up to \$5,200, but there is an immediate corruption concern in giving a tenth candidate \$1,801.⁵⁸

Because the aggregate limits did not adequately address quid pro quo corruption in and of themselves, the Court stated that the government “must defend the aggregate limits by demonstrating that they prevent circumvention of the base limits.”⁵⁹ Unconvinced by the government’s claim that the aggregate limits prevented circumvention, the Court reasoned that current statutory and regulatory schemes—such as the antiproliferation rule prohibiting donors from controlling multiple affiliated political committees—adequately address the government’s anticircumvention interest.⁶⁰ Therefore, because the aggregate limits on contributions did not further the only governmental interest established in *Citizens United*, the Court held that the limits impermissibly intruded on a citizen’s ability to exercise free political expression.⁶¹

49. *Id.* at 1444 (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)).

50. *Id.* at 1445.

51. *Id.* at 1446.

52. *Id.* at 1445–46.

53. *Id.* at 1445 (quoting *Buckley*, 424 U.S. at 38).

54. *Id.* at 1450.

55. *Id.*

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

57. *Id.* at 1452.

58. *Id.*

59. *Id.*

60. *Id.* at 1446–47, 53.

61. *Id.* at 1462.

III. CASE ANALYSIS

A. *McCutcheon's Limitation to Quid Pro Quo Corruption is Too Narrow*

Limiting the government's interest in preventing corruption to quid pro quo corruption directly conflicts with the Framers' intent.⁶² Lawrence Lessig, a constitutional law professor at Harvard, wanted to test that theory “the [F]ramers meant something more by ‘corruption’ than ‘quid pro quo’ corruption alone.”⁶³ Lessig's researchers collected every use of the term “corruption” in the debates surrounding the Constitution's adoption.⁶⁴ They found a total of 325 instances when “corruption” was used.⁶⁵ Of the 325 instances, only six referred to an improper quid pro quo.⁶⁶ Instead, the Framers were ordinarily speaking of institutional corruption unrelated to any quid pro quo, such as the corruption of Parliament. Indeed, the most common form of institutional corruption the Framers discussed was an institution that developed an “improper dependence.”⁶⁷

Furthermore, *McCutcheon's* excessively narrow definition of corruption not only conflicts with the Framers' intent, it also overlooks other substantial and plausible forms of undue influence. Today, money and politics are seemingly inseparable—often beyond any quid pro quo. This modern link between money and politics was sparked in 1994 after congressional power switched hands following a nearly sixty-year reign by a Democratic majority.⁶⁸ By putting the control of Congress in play, campaign fundraising reached its highest levels in history.⁶⁹ As a result, “leaders were chosen at least in part on their ability to raise campaign cash.”⁷⁰ This shift in campaign fundraising gave rise to campaign cash suppliers working for special-interest clients rather than the candidate.⁷¹ **In other words**, the modern American lobbyist gained a foothold in Congress.⁷² Since then, the need for extensive fundraising has resulted in enormous pressure on members of Congress to maximize their capital, a pressure “relieved” by lobbyists.⁷³

62. See Lawrence Lessig, *The Court Case that Pivots on What ‘Corrupt’ Really Means*, DAILY BEAST (Sept. 26, 2013, 2:45 AM), <http://www.thedailybeast.com/articles/2013/09/26/the-court-case-that-pivots-on-what-corrupt-really-means.html>.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 94 (2011).

69. *Id.*

70. *Id.*

71. *Id.* at 100–01.

72. *Id.* at 101.

73. *Id.* at 132.

Consequently, the improper influence of markedly high levels of campaign financing extends far beyond simple quid pro quo. Retired members of Congress have confirmed this proposition. For example, Tim Penny, a former member of the House, stated, “[t]here’s not tit for tat in business, no check for a vote. But nonetheless, the influence is there. Candidates know where their money is coming from.”⁷⁴ Furthermore, we cannot deny that “[w]e are bent to those to whom we are obliged, even when we believe, honestly, that we are not.”⁷⁵ Moreover, there is an irrefutable divergence between the public’s view of the most important problems facing the country today and the concerns of the Washington, D.C., lobbying community.⁷⁶ Consequently, lobbying efforts distort the representatives’ allocation of effort in favor of groups rich enough to finance expensive lobbying.⁷⁷ This phenomenon directly undermines our representative democracy.

What’s more, public policy and popular opinion demand that money, and the inescapable corruption that it generates, should play a far smaller role in politics. For example, “[t]he vast majority of Americans believe money buys results in Congress.”⁷⁸ And, in a recent Bloomberg Politics national poll, 78 percent of those responding said the *Citizens United* ruling should be overturned.⁷⁹ In contrast, responders were more equally divided on other politically charged issues, such as same-sex marriage, the Affordable Care Act, and abortion.⁸⁰ Unhappiness with *Citizens United*, and the undue influence of wealth in politics, in general, “cuts across demographic and partisan ideological lines.”⁸¹

Finally, by following the misguided reasoning of *Citizens United*, *McCutcheon* ignores significant Supreme Court precedent defining corruption well beyond a basic quid pro quo. For example, in *Nixon v. Shrink Missouri Government PAC*, the Court recognized that improper influence includes the broad threat from politicians being too compliant with the wishes of large contributors.⁸² Further, in *FEC v. Beaumont*, the Court again recognized that corruption is understood “not only as *quid pro quo* agreements, but also as undue influence on an officeholder’s judgment.”⁸³ Finally, in *McConnell v. FEC*, the

74. *Id.* at 133.

75. *Id.* at 132.

76. *Id.* at 142–43.

77. *Id.* at 147.

78. *Id.* at 132–33.

79. Greg Stohr, *Bloomberg Poll: Americans Want Supreme Court to Turn off Political Spending Spigot*, BLOOMBERG POLITICS (Sept. 28, 2015, 2:00 AM), <http://www.bloomberg.com/politics/articles/2015-09-28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spending-spigot>.

80. *Id.*

81. *Id.*

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

83. *FEC v. Beaumont*, 539 U.S. 146, 156 (2003).

Court relied on the vast record from the district court to find that large donations result in privileged access, whether or not there is an actual quid pro quo.⁸⁴

B. McCutcheon Erroneously Discounted the Possible Circumvention of the Base Limits

Even if the Court is bound to an incredibly narrow definition of corruption, the aggregate limits still advance the government’s legitimate interest in preventing circumvention of the base limits. There are three main examples of how, in the absence of aggregate limits, political donors will be able to circumvent the base limits.⁸⁵

First, individuals are now able to contribute to all party committees while staying within the base limits.⁸⁶ Currently, the law permits an individual to give \$33,400 per year to a national party committee.⁸⁷ The two major political parties each have three national committees.⁸⁸ Federal law also permits an individual to give \$10,000 per year to a state or local party committee.⁸⁹ Each major political party has fifty such committees.⁹⁰ Thus, without aggregate limits, an individual could donate \$600,200 to either major political party—or both—every year. Moreover, to make contributions of this size easier to disseminate, each party could create a “Joint Party Committee” tasked with appropriately divvying up the funds.⁹¹

Second, donors are now able to contribute to all party candidates.⁹² FECA permits an individual to contribute \$5,400 to each party candidate over a two-year election cycle.⁹³ There are 435 party candidates for House seats and thirty-three party candidates for Senate seats in any given election year.⁹⁴ Thus, after *McCutcheon*, an individual can write an additional check, over a two-year election cycle, for \$2.5 million to benefit his political party and its candidates. Additionally, parties could utilize Joint Party Committees to assist wealthy donors making large contributions.⁹⁵

Third, donors, through the proliferation of PACs, can now channel excessive amounts of money to their party’s most embattled candidates.⁹⁶ Instead of directly donating to their own party, rich contributors can donate to an

84. See *McConnell v. FEC*, 540 U.S. 93, 146–52 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

85. See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1472–75 (2014) (Breyer, J., dissenting).

86. *Id.* at 1472.

87. 52 U.S.C.A. § 30116(a)(1) (West 2015); 80 Fed. Reg. 5750-02 (Feb. 3, 2015).

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

89. § 30116(a)(1).

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

91. *Id.*

92. See *id.* at 1473.

93. § 30116(a)(1).

94. *McCutcheon*, 134 S. Ct at 1473 (Breyer, J., dissenting).

95. *Id.*

96. *Id.* at 1474.

unlimited number of PACs while staying within the requisite base limit for each PAC.⁹⁷ Each PAC can claim to use the funds to raise support for several party candidates, but it will undoubtedly favor those who are most endangered.⁹⁸ Thus, the rich contributor can donate a substantial sum of money while staying within the base limits, and the embattled candidate will ultimately collect that sum.⁹⁹

In each scenario, even if the money does not reach the party or candidate through an obviously direct channel, the beneficiary will know where that money originated from,¹⁰⁰ thus perpetuating the unavoidable reality of undue influence in politics.

CONCLUSION

In the wake of *McCutcheon*, campaign finance regulation is seemingly nonexistent. In one fell swoop, the Court facilitated the inevitable influx of excess money into the political arena. All the while, the Court reinforced the unjustifiable notion that Congress is only permitted to address quid pro quo corruption. This simply cannot be. Surely other forms of corruption warrant the government's attention. Whether or not a dollar is directly exchanged for a vote, the potential for corruption is unquestionably present, even arguably pervasive. By ignoring this manifest truth, *McCutcheon* exists as a critical piece in a line of Supreme Court decisions that promote the interests of the rich at the expense of the majority.

97. *See id.*

98. *Id.*

99. *Id.*

100. *See id.* at 1475.