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RECENT CASES

MCCUTCHEON V. FEDERAL ELECTION COMMISSION

Supreme Court Holds Aggregate Limits on Campaign Contributions Unconstitutional

*Stephen M. DeGenaro**

INTRODUCTION

Campaign finance law “is a matter of First Amendment concern.”¹ Political speech has long enjoyed coveted status as a category of speech most fundamental to the U.S. system of governance, thus warranting robust protection.² A person choosing to spend money in connection with a candidate or ballot initiative implicates protections of the First Amendment because such actions are a form of both political expression and

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* Juris Doctor, Notre Dame Law School, Class of 2014; Bachelor of Arts, Georgetown University, Class of 2011. I would like to thank Professor Randy J. Kozel for providing invaluable background knowledge and assistance on a paper from which this Case Comment developed. I would also like to thank the staff of the *Notre Dame Law Review* for their top-notch editing in preparing this Case Comment for publication. All errors are my own.

1 *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring).

2 *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.” (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931) (internal quotation marks omitted)); *id.* at 270 (discussing the fact that the First Amendment reflects a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”).

association.³ Campaign finance regulation is demarcated based upon the form that the political expression or association takes.⁴ Restrictions on expenditures—money *spent* by the donor or speaker to express support for the candidate or issue—fail to satisfy strict scrutiny.⁵ Restrictions on contributions—money *given* by the donor or speaker directly to the candidate or issue—will be upheld by a court when “the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.”⁶ For purposes of establishing a sufficiently important interest, the government may seek to eliminate actual or apparent corruption in politics, but may neither seek to eliminate the amount of money spent in elections nor increase the influence of groups.⁷

McCutcheon v. Federal Election Commission involved a challenge to limits imposed on the amount a donor may contribute during a single election cycle.⁸ In *McCutcheon*, the Court was presented with the question of whether the aggregate limits placed on contributions to candidate and

3 *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (per curiam). Expressional freedoms under the First Amendment are so robust as to extend equal protection to unpopular as well as popular speech. *See, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (declaring unconstitutional a federal law criminalizing the act of lying about receipt of military decorations); *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (per curiam) (striking down a state statute that criminalized mere advocacy for violence to affect political change, rather than “incitement to lawless action,” thereby upholding the right of members of the KKK to hold a rally where the rally falls short of “incitement”). The Supreme Court has recognized associational freedoms within the realm of political speech both generally, *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (“It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”), and specifically, *see Kusper v. Pontikes*, 414 U.S. 51, 56–57 (1973) (“There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of orderly group activity protected by the First and Fourteenth Amendments.” (internal quotation marks omitted)).

4 *Buckley*, 424 U.S. at 12–13.

5 *Id.* at 58–59; *see also Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”).

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

7 *See Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825–27 (2011).

8 *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). The Federal Election Commission is an independent administrative agency tasked with administering and enforcing the laws that govern federal elections. *See About the FEC*, FEC, <http://www.fec.gov/about.shtml> (last visited Dec. 27, 2014). For a general discussion about the binding nature of various administrative agency actions, *see* Stephen M. DeGenaro, Note, *Why Should We Care About An Agency’s Special Insight?*, 89 NOTRE DAME L. REV. 909 (2013).

noncandidate committees either lacked a cognizable constitutional interest or were unconstitutionally too low.⁹ In a five to four decision, the Supreme Court held that the aggregate limits on campaign contributions burden substantial First Amendment rights without furthering a permissible government interest.¹⁰

I. HISTORY

The Federal Election Commission Act (FECA), as amended by the Bipartisan Campaign Reform Act (BCRA),¹¹ has two different types of contribution limitations.¹² Base limits restrict the amount of money a donor may contribute to any single candidate or committee.¹³ Aggregate limits restrict the amount of money a donor may contribute to all candidates or committees during a single election cycle.¹⁴ Any single contribution may violate the base limits, aggregate limits, or both, depending on how much money the donor has already contributed during an election cycle. For example, during the 2013–2014 election cycle, FECA’s base limits permitted an individual to contribute up to \$2600 per election to any particular candidate, while FECA’s aggregate limits permitted contributions up to \$48,600 to federal candidates.¹⁵ A donor attempting to give \$3000 to a congressional candidate after having already contributed \$48,000 to other federal candidates would violate both the base and aggregate limits. If the donor instead chose to limit his contribution to the \$2600 amount permitted under the base limits, the donor would still violate the aggregate limits because the contributions exceed the \$48,600 limit. This would be true even for smaller contributions, because any amount donated to the candidate over \$600 would exceed the aggregate limits for the 2013–2014 election cycle.

Shawn McCutcheon is an Alabama resident who sought to make a series of contributions to various federal candidates for office during the 2011–2012 election cycle. In total, McCutcheon lawfully contributed \$33,088 to sixteen different federal candidates and \$27,328 to numerous noncandidate political committees.¹⁶ McCutcheon wished to contribute \$1776 to twelve additional candidates, but FECA’s aggregate limits

9 *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 137 (D.D.C. 2012).

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

11 52 U.S.C.A. § 30101 (West 2014).

12 *See id.* §§ 30116(a)(1), 30116(a)(3).

13 § 30116(a)(1).

14 § 30116(a)(3).

15 Senate General Election Expenditure Limits for the 2013–2014 Election Cycle, 78 Fed. Reg. 8532 (Feb. 6, 2013).

16 *McCutcheon v. FEC*, 134 S. Ct. 1434, 1443 (2014).

prevented him from doing so.¹⁷ McCutcheon, along with the Republican National Committee (RNC), brought a First Amendment challenge in federal court in 2012, seeking an injunction against the enforcement of the aggregate limits.¹⁸ McCutcheon and the RNC argued that the challenged aggregate limits were “unsupported by any cognizable government interest . . . at any level of review” and were unconstitutionally low.¹⁹

A three-judge district court panel denied McCutcheon and the RNC’s motion for a preliminary injunction and granted the Federal Election Commission’s motion to dismiss.²⁰ The district court rejected McCutcheon’s argument that strict scrutiny ought to be applied to the aggregate limitations based on First Amendment precedent.²¹ The district court found that the government’s sufficiently important interest in preventing corruption or the appearance of corruption is furthered by limits that prevent the circumvention of contribution limits. The district court first observed that the government’s interest in preventing corruption was limited to quid pro quo corruption—direct contributions to political candidates in exchange for political favors²²—and that mere influence or access to a candidate or officeholder did not rise to the level of corruption.²³ To that end, however, the district court found that the aggregate limits helped prevent the evasion of the base limits—the latter of which unquestionably implicate the government’s anticorruption interest.²⁴ In support of this conclusion, the district court mentioned that, without the aggregate limits, a donor would be able to:

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

17 *Id.* During the 2013–2014 election cycle, McCutcheon told the Court “he again wishe[d]t to contribute at least \$60,000 to various candidates and \$75,000 to noncandidate political committees.” *Id.*

18 *Id.*

19 *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 137 (D.D.C. 2012) (alteration in original) (internal quotation marks omitted).

20 *Id.* at 142.

21 *Id.* at 138.

22 *Id.* at 139 (“The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.” (quoting *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985))).

23 *Id.* (citing *Citizens United v. FEC*, 558 U.S. 310, 359 (2010)). In *Citizens United*, the Supreme Court explained that influence or access to a candidate is not corruption without more because “[i]t is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.” 558 U.S. at 359 (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003)).

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

committees. After the fundraiser, the committees are required to divvy the contributions to ensure that no committee 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. That committee, in turn, might use the money for coordinated expenditures, which have no significant functional difference from the party's direct candidate contributions. The candidate who knows the coordinated expenditure funding derives from that single large check at the joint fundraising event will know precisely where to lay the wreath of gratitude.²⁵

Moreover, the district court rejected McCutcheon's argument that the limits were not closely drawn to furthering the anticircumvention interest.²⁶ McCutcheon argued that the limits were unconstitutionally low because, for example, if he had wanted to support a candidate in all 468 federal races in 2006, the aggregate limits then in effect would have restricted McCutcheon's contributions to \$85.29 per candidate—an amount far below a limit held unconstitutionally low in *Randall v. Sorrell*.²⁷ The district court found this argument unpersuasive because, even conceding the fact that McCutcheon would be so limited, he “remain[ed] able to volunteer, join political associations, and engage in independent expenditures” as means of expressing his political beliefs.²⁸

Following the district court's decision, McCutcheon and the RNC appealed directly to the Supreme Court.²⁹

II. ANALYSIS

Chief Justice Roberts announced the judgment in *McCutcheon* in an opinion joined by Justices Scalia, Kennedy, and Alito.³⁰ The Supreme Court first rejected the invitation to revisit *Buckley* because of its limited utility in analyzing the constitutionality of FECA's aggregate limits.³¹ *Buckley* itself only dedicated three sentences to aggregate limits because

²⁵ *Id.* (citations omitted) (internal quotation marks omitted). Although the Court acknowledged that gratitude is not itself corruption, the parties involved could implicitly agree to the above hypothetical as a means of masking quid pro quo corruption. *Id.*

²⁶ *Id.* at 141.

²⁷ *Id.* at 141 n.5 (citing *Randall v. Sorrell*, 548 U.S. 230, 239 (2006)).

²⁸ *Id.* at 142.

²⁹ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014); 28 U.S.C. § 1253 (2012) (“Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.”).

³⁰ *McCutcheon*, 134 S. Ct. at 1436.

³¹ *Id.* at 1445.

they “ha[d] not been separately addressed at length by the parties.”³² In contrast, the *McCutcheon* Court had been directly confronted with the constitutionality of aggregate limits.³³ The Court noted that subsequent legislative developments since *Buckley* warranted full review of the aggregate limits’ constitutionality.³⁴ Base limits on contributions made to political committees were enacted in 1976 “in part to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*.”³⁵ As further evidence of subsequent legislative developments, Chief Justice Roberts noted that “[t]he 1976 Amendments also added an antiproliferation rule prohibiting donors from creating or controlling multiple affiliated political committees[]”³⁶ that could be used to “direct funds in excess of the individual base limits.”³⁷ The Federal Election Commission has also enacted earmarking regulations that prevent a donor from making contributions to political committees supporting a candidate for whom the donor has reached the base contribution limits “if the individual knows that ‘a substantial portion [of his contribution] will be contributed to, or expended on behalf of,’ that candidate.”³⁸ Finally, the Court noted that *Buckley* did not involve an overbreadth challenge to the aggregate limits.³⁹ Each of these considerations led the Court to conclude that *Buckley* should not control the outcome of this case.⁴⁰

The Court, however, disagreed with *Buckley* that aggregate limits only pose a “quite modest restraint” on political speech.⁴¹ At the current aggregate limits, a donor could not support ten candidates up to the full amount permitted under the base limits; moreover, after the donor reached the aggregate limit, he or she was prevented from further supporting additional candidates through contributions of even one dollar.⁴² The aggregate limits thus worked substantial harm upon a would-be speaker from engaging in protected First Amendment activity well within the base

32 *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 38 (1976)) (alteration in original).

33 *Id.*

34 *Id.* at 1446.

35 *Id.* (quoting *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 197–198 (1981) (plurality opinion)).

36 *Id.*

37 *Id.* at 1447.

38 *Id.* (quoting 11 C.F.R. § 110.1(h)(2) (2014)) (alteration in original).

39 *Id.* The doctrine of overbreadth states generally that if the statute under which the speaker is prosecuted “sweeps in” too much protected speech that should not be covered, then the statute is unconstitutional. *Gooding v. Wilson*, 405 U.S. 518, 530–31 (1972). The concern motivating the doctrine is that “persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.” *Id.* at 521.

40 *McCutcheon*, 134 S. Ct. at 1447.

41 *Id.* at 1448 (quoting *Buckley v. Valeo*, 424 U.S. 1, 38 (1976)).

42 *Id.*

limits Congress found to prevent corruption or the appearance of corruption.⁴³

Moreover, the Court found unpersuasive the government's arguments that the aggregate limits furthered its interest in preventing corruption.⁴⁴ The aggregate limits did not further the goal of preventing corruption per se because once a donor reached the limits, the law prevented him from contributing even one additional dollar.⁴⁵ This, the Court stated, is contrary to Congress's conclusion that all contributions at or below the base limit do not pose a "cognizable risk of corruption."⁴⁶ The government was also unable to justify the aggregate limit as necessary for preventing circumvention of the base limits.⁴⁷ Post-*Buckley* campaign finance legislation prohibited each hypothetical scenario involving a donor circumventing the base limits.⁴⁸ For instance, earmarking and antiproliferation laws prevent the hypothetical donor channeling donations to a candidate through various political action committees (PACs).⁴⁹ Attempts to donate to unaffiliated PACs would dilute the corrupting influence of the donation because the donor's contribution would be pooled with other contributions and often times dispersed to candidates other than the intended target.⁵⁰ Furthermore, it is unlikely that a donor would make a large number of contributions to different PACs in order to funnel a small amount of money to one candidate when the donor is free to make an unlimited amount of expenditures on behalf of the same candidate without worrying the money would go to some other recipient.⁵¹

43 *Id.* The Court said that "[i]t is no answer to say that the individual can simply contribute less money to more people" to avoid the constitutional problem posed by the aggregate limits because "[t]o require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process." *Id.* at 1449.

44 *Id.* at 1450. The Court also reaffirmed the principle that the government may only permissibly regulate actual or apparent quid pro quo corruption: "As *Buckley* explained, Congress may permissibly seek to rein in 'large contributions [that] are given to secure a political *quid pro quo* from current and potential office holders.'" *Id.* (quoting *Buckley*, 424 U.S. at 26 (alteration in original)). In contrast, "[s]pending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption." *Id.*

45 *Id.* at 1452.

46 *Id.*

47 *Id.* at 1453.

48 *Id.* at 1452–53.

49 *Id.* at 1453; *see also supra* note 36 and accompanying text.

50 *Id.* at 1453.

51 *Id.* at 1454 ("On a more basic level, it is hard to believe that a rational actor would engage in such machinations. . . . [A] dedicated donor spent \$500,000 . . . to add just \$26,000 to [a hypothetical candidate] Smith's campaign coffers. That same donor . . . could have spent his entire \$500,000 advocating for Smith, without the risk that his selected PACs would choose not to give to Smith . . ." (citation omitted)).

The Court also found that the government failed to show proper fit between the aggregate limits and the furthered interest.⁵² The aggregate limits would only work as an anticircumvention measure if it could be shown that large amounts were being made and then subsequently recontributed to the actual intended recipient; yet, the Court found that experience suggests “recipients have scant interest in regifting donations they receive.”⁵³ In any event, Congress had a choice of many alternative means to further the anticircumvention interest without “‘unnecessary abridgment’ of First Amendment rights.”⁵⁴ For instance, Congress could have increased restrictions on transfers among candidates and PACs⁵⁵ or strengthened earmarking regulations.⁵⁶ Finally, the Court noted that disclosure requirements “deter actual corruption”⁵⁷ and “arm[] the voting public with information”⁵⁸ without imposing a “ceiling on speech” in the same way that aggregate limits do.⁵⁹

Justice Thomas provided the fifth vote to declare the aggregate limits unconstitutional, but wrote separately to voice his belief that *Buckley* should be overruled.⁶⁰ Justice Thomas found the bifurcation between political expenditures and contributions “tenuous” because both “‘generate essential political speech’ by fostering discussion of public issues and candidate qualifications.”⁶¹ For instance, *Buckley*’s rationale for allowing restrictions on contributions—that contributions only serve to generally express support without communicating the underlying basis of the

52 *Id.* at 1456.

53 *Id.* at 1457. As an example, the Court observed that “the NRSC [National Republican Senatorial Committee] and DSCC [Democratic Senatorial Campaign Committee] spent just 7% of their total funds on contributions to candidates and the NRCC [National Republican Congressional Committee] and DCCC [Democratic Congressional Campaign Committee] spent just 3%.” *Id.*

54 *Id.* at 1458 (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)).

55 *Id.* at 1458–59. “One possible option for restricting transfers would be to require contributions above the current aggregate limits to be deposited into segregated, nontransferable accounts and spent only by their recipients.” *Id.* at 1458.

56 *Id.* at 1459 (“Congress might also consider a modified version of the aggregate limits, such as one that prohibits donors who have contributed the current maximum sums from further contributing to political committees that have indicated they will support candidates to whom the donor has already contributed.”).

57 *Id.* (quoting *Buckley*, 424 U.S. at 67).

58 *Id.* at 1460.

59 *Id.* at 1459.

60 *Id.* at 1462 (Thomas, J., concurring) (“I adhere to the view that this Court’s decision in *Buckley v. Valeo* denigrates core First Amendment speech and should be overruled.” (citation omitted)).

61 *Id.* (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 412 (2000) (Thomas, J., dissenting)).

support⁶²—cannot be squared with the fact that the Supreme Court “has never required a speaker to explain the reasons for his position in order to obtain full First Amendment protection.”⁶³ Justice Thomas also found unpersuasive the argument that “[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution,”⁶⁴ because contributions assist a candidate to increase the dissemination of his or her message.⁶⁵ Finally, Justice Thomas said that the plurality opinion itself rejected the last remaining rationale for allowing restrictions on contributions: contribution restrictions leave open alternative channels for expression.⁶⁶ In light of the plurality’s rejection of the last remaining rationale for restricting contributions, Justice Thomas concluded “*Buckley* is a rule without a rationale.”⁶⁷

Justice Breyer penned a dissenting opinion, which Justices Ginsburg, Sotomayor, and Kagan joined.⁶⁸ The dissent argued that the plurality opinion defined corruption “too narrowly” because the plurality ignored the important First Amendment interests that the government has in regulating money in politics.⁶⁹ In the eyes of the dissent, “the First Amendment advances not only the individual’s right to engage in political speech, but also the public’s interest in preserving a democratic order in which collective speech *matters*.”⁷⁰ Corruption, then, is any action that “derails the essential speech-to-government-action tie” between the general public will and its representatives, not the “limited definition of ‘corruption’” that involves direct exchange of money for political favors.⁷¹ By safeguarding the electoral process, campaign finance law ensures that the government remains responsive to the larger public, rather than a select few individuals.⁷²

According to the dissent, the Supreme Court’s jurisprudence confirms this broader understanding of corruption.⁷³ For example, the Supreme Court upheld a ban on direct contributions by corporations in *Federal Election Commission v. Beaumont* as a means of preventing individuals who own or work at a corporation from using the corporate form to

62 *Buckley*, 424 U.S. at 2.

63 *McCutcheon*, 134 S. Ct. at 1463.

64 *Buckley*, 424 U.S. at 21.

65 *McCutcheon*, 134 S. Ct. at 1463.

66 *Id.* at 1464; *see supra* notes 44–45 and accompanying text.

67 *Id.*

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

69 *Id.* at 1466.

70 *Id.* at 1467 (emphasis omitted).

71 *Id.* at 1468; *accord id.* at 1467.

72 *Id.* at 1468.

73 *See id.*

circumvent individual base contribution limits.⁷⁴ *Beaumont* characterized the government's interest as preventing "not only . . . *quid pro quo* agreements, but also . . . undue influence on an officeholder's judgment."⁷⁵ Similarly, "undue influence" was considered an acceptable government interest in limiting coordinated campaign expenditures among candidates and political parties,⁷⁶ state law contribution limits,⁷⁷ and soft money contributions.⁷⁸ Thus, to the dissent, the plurality wrongly goes further down the path that *Citizens United* started when it confines its definition of corruption to actual or apparent *quid pro quo* corruption.⁷⁹

The dissent also took issue with the plurality's contention that aggregate limits were no longer needed to further an anticircumvention interest.⁸⁰ To demonstrate the necessity of the limits, Justice Breyer listed three hypotheticals, which he argued reflected gaps in campaign finance law that can only be closed by aggregate limits.⁸¹ In the first, a donor legally contributes \$1.2 million to a Joint Party Committee soliciting funds for all federal and state political committees where the donor would otherwise be capped at contributing \$74,600.⁸² In the second, a donor legally contributes a total of \$3.6 million to all of a party's candidates for the House or Senate during a single election cycle, with the understanding that over \$2.3 million of that total could be funneled to a single candidate.⁸³ In the third, party members could create 200 PACs, which would then in turn solicit \$10,000 donations each from a single donor and contribute it to a single candidate.⁸⁴ Each hypothetical created the opportunity for the donor to curry strong favor with the party of his or her choice and, according to the dissent, invited the chance of *quid pro quo* favors from the appreciative recipients that other existing checks could not guard against.⁸⁵

74 See *FEC v. Beaumont*, 539 U.S. 146, 155–56 (2003).

75 *Id.* at 156 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001)) (citation omitted).

76 *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 441.

77 *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 388–89 (2000).

78 *McConnell v. FEC*, 540 U.S. 93, 144 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010). "Soft money" is a term used to describe funds that went to political parties for purposes other than directly helping a candidate; such activities include "voter registration, 'get out the vote' drives, and advertising that d[oes] not expressly advocate a federal candidate's election or defeat." *McCutcheon*, 134 S. Ct. at 1469 (citing *McConnell*, 540 U.S. at 122–24).

79 *McCutcheon*, 134 S. Ct. at 1470–71.

80 *Id.* at 1471–72.

81 *Id.* at 1472–75.

82 *Id.* at 1472; *accord id.* 1472–73.

83 *Id.* at 1473–74.

84 *Id.* at 1474–75.

85 *Id.* at 1475–78.

Finally, the dissent criticized the portion of the plurality that pertained to the fit of the aggregate limits.⁸⁶ While the plurality suggested that the government could take any number of different steps other than aggregate limits to further its anticircumvention interest without restricting as much protected speech, the dissent observes that the plurality could not show how each alternative “could effectively replace aggregate contribution limits.”⁸⁷ Moreover, each alternative had been “similarly available at the time of *Buckley*” when the Court upheld the constitutionality of the aggregate limits in 1976, and yet the plurality made no attempt to demonstrate how the same limits had become “poorly tailored” in *McCutcheon*.⁸⁸

CONCLUSION

In the wake of *McCutcheon*, proponents of campaign finance reform have decried *McCutcheon* as the latest example of the Supreme Court rolling back necessary restrictions on campaign spending and gradually chipping away at *Buckley v. Valeo*.⁸⁹ This latter concern seems unlikely at this juncture for two reasons.

First, *McCutcheon* is not as hostile towards *Buckley* as some initially feared. Justice Thomas appears to be the only member of the Supreme Court ready to overturn *Buckley*; the four justices in dissent certainly would uphold a constitutional challenge to base contribution limits, and the plurality is still willing to accept that base contributions do in fact serve as a necessary measure for preventing actual or apparent corruption. In fact, the plurality opinion assumed the constitutionality of the base contributions in order to highlight throughout its opinion the problems with aggregate limits.⁹⁰ *McCutcheon* also never stated the applicable scrutiny to be applied to aggregate contributions because the plurality found that the

⁸⁶ *Id.* at 1479.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See, e.g., David Schultz, *Amend the Constitution to Restore the Democracy the Roberts Court Killed*, THE HILL (Aug. 29, 2014, 6:01 AM), <http://thehill.com/blogs/congress-blog/economy-budget/216168-amend-the-constitution-to-restore-the-democracy-the> (“The Supreme Court under Chief Justice Roberts continued to hack away at efforts such as McCain-Feingold to limit the power of money in politics. *Citizens United* and *McCutcheon* are only the most recent examples of how the Court is letting money and privilege entrench itself, preventing the political system from functioning.”).

⁹⁰ E.g., *McCutcheon*, 134 S. Ct. at 1448 (plurality opinion) (“To put it in the simplest terms, the aggregate limits prohibit an individual from fully contributing to the primary and general election campaigns of ten or more candidates, even if all contributions fall within the base limits Congress views as adequate to protect against corruption.”); *id.* at 1452 (noting that “Congress’s selection of a \$5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption.”).

aggregate limits could not even satisfy the lower, “closely drawn” standard applied to contribution limits.⁹¹ Significantly, *McCutcheon* did not explicitly state, nor implicitly suggest, that base contributions ought to be analyzed under strict scrutiny—which would make it more challenging for the government to justify restrictions on base contributions. *McCutcheon* still leaves room for the government to utilize base contributions to combat actual or apparent quid pro quo corruption. Whatever effects *McCutcheon* may have on the Supreme Court’s campaign finance jurisprudence going forward,⁹² providing the means to overrule *Buckley* does not appear to be one of them.

Second, *McCutcheon* left undisturbed—indeed, it even spoke favorably of—components of campaign finance law pertaining to disclosure.⁹³ This portion of the majority’s opinion is by no means an academic exercise. It is true that, depending on one’s perspective, money is either the most powerful form of political speech or is an extraordinarily powerful tool for enabling effective political speech.⁹⁴ Yet, money is not the be-all, end-all form of speech that critics of *Citizens United* suggest it is. American politics is rife with examples of high-profile elections in which other, more cost-effective forms of speech trumped well-financed speech.⁹⁵ To put it simply, “dollars do not vote.”⁹⁶ Under a First

91 *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 in this case.”).

92 It remains to be seen to what extent *McCutcheon* limits the ability of state laws that impose similar aggregate limits on campaign contributions. Federal courts have imposed preliminary injunctions against enforcement of state aggregate limits in both Wisconsin and Minnesota. See *CRG Network v. Barland*, No. 14-C-719, 2014 WL 4391193, at *1 (E.D. Wis. Sept. 5, 2014); *Seaton v. Wiener*, No. 14-1016 (DWF/JSM), 2014 WL 2081898, at *1 (D. Minn. May 19, 2014). It is likely that other state aggregate limits will be found similarly preempted by *McCutcheon*—including state courts following the Supreme Court’s decision. For an examination of how state courts perform preemption analysis, see Stephen M. DeGenaro, *Obstacle Preemption: Federal Purpose in State Courts*, 29 NOTRE DAME J.L. ETHICS & PUB. POL’Y ONLINE (forthcoming 2015).

93 *McCutcheon*, 134 S. Ct. at 1459–60 (“Disclosure requirements burden speech, but—unlike the aggregate limits—they do not impose a ceiling on speech. For that reason, disclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech. With modern technology, disclosure now offers a particularly effective means of arming the voting public with information.” (citations omitted)).

94 EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* 445 (4th ed. 2011) (“Most effective speech—publishing a newspaper, buying a newspaper ad . . . printing and distributing leaflets, and the like—requires spending money. . . . Restrictions on spending money to speak thus diminish people’s ability to speak effectively.”).

95 In the week leading up to the 2012 Presidential Election, Governor Romney’s campaign ran a targeted advertisement in Ohio related to the alleged closing of a Jeep plant in Ohio. The *Washington Post* published an article shortly thereafter discrediting the

Amendment regime where the best ideas emerge when speech enjoys robust protection,⁹⁷ being able to critically evaluate the message and its speaker will always provide a check against even the most pervasive and well-funded message. As long as the First Amendment continues to uphold reasonable regulations requiring disclosure of campaign contributions, candidates and voters will be armed with facts they can argue show why they believe there is too much money in politics. Nothing but their own desire to spread the message will limit the scope of their speech.

This latter point is crucial. If one imagines a counterfactual scenario in which *McCutcheon* upheld the aggregate limits, an unknown number of people would be prohibited from participating as fully in the political process as they otherwise might wish. Moreover, although some people do not find large contributions to be a virtue of modern politics, others do, and they may wish to participate robustly in that manner. So, in this respect, *McCutcheon* is more protective of political speech than the counterfactual scenario because all speakers can participate to the fullest extent they desire. Rejecting aggregate limits ultimately affords greater protection to

advertisement for deceptively portraying the facts surrounding the plant. See Glenn Kessler, *4 Pinocchios for Mitt Romney's Misleading Ad on Chrysler and China*, WASH. POST (Oct. 30, 2012, 6:02 AM), http://www.washingtonpost.com/blogs/fact-checker/post/4-pinocchios-for-mitt-romneys-misleading-ad-on-chrysler-and-china/2012/10/29/2a153a04-21d7-11e2-ac85-e669876c6a24_blog.html. Although the author is not privy to specific numbers, it is far more likely that the Romney campaign spent more money on its media buy in the quintessential presidential election swing state than the total amount of money: (i) paid by the *Washington Post* for the salary of the staff to investigate and write the article, and (ii) time spent by numerous Ohio residents who read the article and shared it by email or social media. As a resident of Ohio, the author can confirm that the *Washington Post* article fact-checking the Romney ad was just as pervasive as the television buy made by the campaign. From a purely financial perspective, the speech associated with discrediting the Romney ad proved far more cost-effective than the ad itself—and given the fact that President Obama carried Ohio during the 2012 election, it may have been more effective from a tactical perspective for supporters of President Obama to share the *Washington Post* article.

More recently, House Majority Leader Eric Cantor lost his seat to David Brat in Virginia's Seventh District, despite outspending Brat by a ratio of more than 25 to 1. See Jon Greenberg, *Rare Feat: Cantor Spent more at Steakhouses than Opponent Did on Campaign*, POLITIFACT (June 11, 2014, 4:49 PM), <http://www.politifact.com/punditfact/statements/2014/jun/11/chuck-todd/rare-feat-cantor-spent-more-steakhouses-opponent-d/>. Brat's success is largely attributed to a strong message that portrayed Cantor as a Washington insider who did not spend enough time in his district. See *How Did Virginia Underdog David Brat Beat DC Political Player Eric Cantor?*, FOX NEWS (June 11, 2014), <http://www.foxnews.com/politics/2014/06/11/how-did-virginia-underdog-david-brat-beat-dc-political-player-eric-cantor/>.

⁹⁶ See *How Did Virginia*, *supra* note 96.

⁹⁷ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”).

citizens wishing to engage in collective self-governance—the very ideal the dissent seeks to protect through the imposition of aggregate limits. When speech is afforded maximum protection, the processes of collective self-governance, such as counter-speech and other forms of vigorous public debate, are safeguarded against government evaluation. The People, not the judiciary, are then empowered to govern themselves by making evaluative decisions about the worth of any type of speech.⁹⁸

98 STEPHEN G. BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 15 (2005) (“The concept of active liberty . . . refers to a sharing of a nation’s sovereign authority among its people.”).