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COMMENT

MONEY MOTIVES: FINDING THE BALANCE BETWEEN FREEDOM OF SPEECH AND CAMPAIGN FINANCE REGULATION

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I. INTRODUCTION

From advertisements on television to automated phone calls and campaign buttons, political speech can take many forms within the United States campaign process.[1] Perhaps the most prominent and powerful form of communication involves the light pieces of paper adorned with pictures of deceased U.S. Presidents and other important U.S. leaders. These tiny pieces of paper speak volumes when it comes to political campaigns in America.[2] The symbolic gesture of giving

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1. JOHN L. MOORE, ELECTIONS A TO Z 39 (2d ed. 2003).

2. Referenced as "the mother's milk of politics," money has made a substantial impact on campaigns "since the early days of the Republic" where "some candidates . . . reward[ed] their supporters with whiskey." *Id.* at 44. Since then, the increase in advertisements, specifically television ads, has escalated spending in campaigns. *Id.* at 44–45. The Federal Election Commission ("FEC") estimated that "[p]residential and congressional candidates . . . , political parties[,] and political action committees . . .

money—protected by the Constitution's First Amendment—proclaims an individual's preference for candidates and political questions.[3]

The profound influence of money in politics recently played a role in *McCutcheon v. FEC* when an individual contributor contested the constitutionality of the contribution aggregate limits[4]—the maximum amount of "money a donor may contribute in total to all candidates or committees."[5] This Comment includes a historical analysis of campaign finance laws and the difficulties encountered with their regulation. Then, it examines the *McCutcheon* opinion and discusses the outcome of the constitutionally based challenge. The remainder of this Comment focuses on some considerations that perhaps the Court chose not to humor, and it also provides a glimpse into what the future of campaign finance laws may look like after *McCutcheon*.

II. THE HISTORY OF CAMPAIGN FINANCE REGULATION

The history of campaign finance regulation extends all the way back to the birth of the United States.[6] Originally, newspapers were the medium of choice to advocate for or against candidates, but the concept of campaigning did not fully blossom until the early nineteenth century.[7] At that time, the money flowing in and out of campaigns was entirely unregulated.[8] The individuals who chose to make financial contributions to a campaign primarily provided investment to a candidate in exchange for employment, not as a voucher of support for a particular political cause.[9] As campaign finance regulation evolves, it continues to stumble without appearing to gain much ground. Indeed, this specialized area of law continually struggles to uncover the right balance between protecting the freedom of speech and enacting campaign finance laws that ensure

received more than $7.1 billion and disbursed nearly $7 billion in [the] 2011–2012 [election cycle]." Press Release, FEC, FEC Summarizes Campaign Activity of the 2011-2012 Election Cycle (Apr. 19, 2013), http://www.fec.gov/press/press2013/pdf/20130419release.pdf [https://perma.cc/WH4Z-H5HC?type=source].

3. Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam).

4. McCutcheon v. FEC, 134 S. Ct. 1434, 1443 (2014) (plurality opinion).

5. *Id.* at 1442.

6. *See History of Campaign Finance Laws*, EBSCOHOST CONNECTION, http://connection.ebscohost.com/politics/campaign-finance-reform/history-campaign-finance-laws [http://perma.cc/P9LU-7WQD] (last visited Oct. 30, 2015).

7. *Id.*

8. *Id.*

9. *Id.*

the presence of integrity in the election process.

A. The Regulation Fantasy

Concern for the honesty and reliability of campaign finance laws did not largely surface until after the Civil War.[10] Large corporations arose out of the debris of war and used massive monetary influence to completely consume the campaign process.[11] Many believed that these corporations could conveniently purchase and supervise public offices while simultaneously diluting an individual's vote.[12] Amidst public angst, some campaign finance laws slowly began to ease into view in an attempt to combat these concerns.[13]

The tipping point, however, occurred in 1904 when Theodore Roosevelt won the presidential election after accepting monetary contributions from various corporations.[14] Public uproar spilled over the brim, flooding President Roosevelt's term with concerns of corruption and forcing a nationwide movement toward campaign finance reform.[15] As a result, Congress enacted the Tillman Act of 1907, which "prohibited corporations and national banks from contributing money to Federal campaigns."[16] While this was a move in the right direction, the public remained wary of wealthy individuals' influence on campaigns.[17]

One after another, laws were set in place with the hope of providing a more honest system.[18] For example, Congress enacted the Federal Corrupt Practices Act of 1925, which "revised the disclosure rules" and "revised the spending limits."[19] Although well-intentioned, that Act was mostly ineffective because of circumvention techniques.[20] Congress later enacted the Taft–Hartley Act, which prohibited labor unions from

10. *See* Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, *in* THE NEW CAMPAIGN FINANCE SOURCEBOOK 7, 8–10 (Anthony Corrado et al. eds., 2005).
11. *See id.* at 10.
12. *See id.*
13. *See id.*
14. *Id.* at 10–11.
15. *Id.*
16. FEC, THE PRESIDENTIAL PUBLIC FUNDING PROGRAM app. 4, at 76 (1993) [hereinafter Appendix 4], http://www.fec.gov/info/appfour.htm [https://perma.cc/5P4H-2EAU?type=pdf].
17. Corrado, *supra* note 10, at 12–13.
18. *Id.* at 13.
19. *Id.* at 15.
20. *See id.* at 15.

making contributions and expenditures.[21] Nevertheless, Political Action Committees ("PACs") were able to evade that Act by purporting to collect contributions from individuals, corporations, and unions and then subsequently contributing that money directly to candidates.[22] Congress's good intentions for these new laws led only to the creation of more loopholes to close. Although the public largely desired regulation, effective regulation remained a mere fantasy due to insufficient enforcement of the laws.[23]

B. Campaign Finance Laws Become a Reality

Campaign finance regulation gained some traction and credibility during the 1970s when Congress enacted the Federal Election Campaign Act of 1971 ("FECA").[24] FECA demanded reductions in excessive campaign costs, provided more rigorous disclosure requirements, and placed added limitations on campaign media outlets.[25] The Act imposed stricter requirements on the campaign process; however, its enforcement remained feeble.[26] Different entities tossed around cases involving potential violations like hot potatoes that no one wanted to catch.[27] The various entities designated to regulate campaign finance laws proffered incoherent direction, which resulted in improper enforcement of the laws.[28]

Enforcement procedures transformed when the Watergate Scandal pushed justification for reform to a new level.[29] In 1972, after discovering that President Richard Nixon received "illegal corporate gifts and . . . undisclosed slush funds" during his presidential campaign, Congress had no choice but to completely "overhaul[]" FECA.[30] President Nixon's national blunder[31] essentially "brought into being the first program of public campaign finance at the national level."[32]

21. *Id.* at 17.
22. *Id.* at 18; *see also* Appendix 4, *supra* note 16, at 77.
23. *See* Appendix 4, *supra* note 16, at 77.
24. *Id.*
25. Corrado, *supra* note 10, at 20–21.
26. Appendix 4, *supra* note 16, at 77.
27. *See id.*
28. *See id.* at 76–77.
29. Corrado, *supra* note 10, at 22.
30. *Id.*
31. *See id.*
32. *Id.* at 24.

Among the 1974 FECA amendments, two were the most critical.[33] First, FECA established the FEC—the sole entity charged with regulating campaign finance laws.[34] Second, FECA provided concrete limitations on "contributions and expenditures" in federal campaigns.[35] Although these two amendments were positive advancements in campaign finance regulation, they ultimately generated new constitutionally based concerns.[36]

C. Freedom of Speech Considerations

In 1976, *Buckley v. Valeo* addressed the 1974 FECA provisions' constitutionality, bringing the First Amendment right to freedom of speech to the front lines for the first time in campaign finance history.[37] FECA's opponents challenged the contribution and expenditure limits because they believed that the Act limited "free discussion of governmental affairs"—a constitutional right.[38] In *Buckley*, the Court "held that spending money is a form of political speech."[39] As a result, it concluded that some of the 1974 FECA provisions violated the First Amendment.[40] Specifically, the Court held that the Act's expenditure limitations were unconstitutional because they exhibited "substantial . . . restraints on the quantity and diversity of political speech";[41]

33. *See* Appendix 4, *supra* note 16, at 77.

34. *Id.* The FEC has "four primary duties": (1) "disclosure of campaign finance information;" (2) "administration of the presidential election public funds;" (3) "clearinghouse for election related material;" and (4) "enforcement of federal campaign finance laws." MAURICE C. SHEPPARD, THE FEDERAL ELECTION COMMISSION: POLICY, POLITICS, AND ADMINISTRATION 60 (2007).

35. Appendix 4, *supra* note 16, at 77.

36. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.3.6.3, at 1105 (4th ed. 2011).

37. *See* Buckley v. Valeo, 424 U.S. 1, 11 (1976) (per curiam) (deciding whether "the use of money for political purposes constitutes a restriction on communication violative of the First Amendment"); *see also* CHEMERINSKY, *supra* note 36, § 11.3.6.3, at 1105.

38. *Buckley*, 424 U.S. at 14 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)); *see also* CHEMERINSKY, *supra* note 36, § 11.3.6.3, at 1104–05.

39. CHEMERINSKY, *supra* note 36, § 11.3.6.3, at 1104; *see also Buckley*, 424 U.S. at 19 ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression . . . because virtually every means of communicating ideas in today's . . . society requires the expenditure of money.").

40. *Buckley*, 424 U.S. at 143–44.

41. *Id.* at 19.

however, the contribution limits were merely a "modest restraint."[42] Although the Court admitted that the contribution limits technically restricted freedom of speech, the purpose of that restriction was to "safeguard[] the integrity of the electoral process."[43]

The Court also discussed the purpose of the two distinct types of contribution limitations—base limits and aggregate limits.[44] While FECA capped the aggregate amount that an individual could contribute to a candidate at $25,000, it set the base contribution limits at $1,000.[45] The Court concluded that both the base and the aggregate contribution limits were constitutional because they prevented corruption in the campaign finance system.[46] The reason behind this decision, the Court explained, is that the base limits prevented quid pro quo corruption—a type of corruption that occurs when a contributor gives money to candidates in an attempt to influence the candidates' political decision making.[47] On the other hand, the aggregate limits prevented corruption because they supported the base limits.[48] Over time, various parties mounted attacks on this reasoning.

D. Circumvention Becomes the Intention

After *Buckley*, FECA was altered in several ways.[49] However, issues continued to seep through the gaping holes in campaign finance laws.[50] The late 1980s to the early 2000s revealed the abuse of soft money (i.e.,

42. *Id.* at 38.

43. *Id.* at 58.

44. *See id.* at 38 ("The overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate . . . . But this quite modest restraint . . . serves to prevent evasion of the $1,000 contribution limitation . . . ."); *see also* McCutcheon v. FEC, 134 S. Ct. 1434, 1444 (2014) (plurality opinion).

45. *Buckley*, 424 U.S. at 38.

46. *Id.* at 58.

47. *See id.* at 26–27; *see also id.* at 58 (explaining that the base and aggregate limitations "constitute the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions").

48. *Id.* at 38.

49. Congress amended FECA in 1976 and again in 1979. Corrado, *supra* note 10, at 29; *see also* Appendix 4, *supra* note 16, at 78.

50. The FECA amendments had "both intended and unintended" consequences; for instance, the disclosure requirements had improved, but "[c]ongressional campaign spending continued to rise" and PACs became a "significant" means of campaign funding. Corrado, *supra* note 10, at 30–31.

unregulated contributions), the prominence of PACs, and the creation of 527 organizations and 501(c) political committees under the tax code.[51] Organizations and individuals used these channels to evade campaign finance laws and to indirectly contribute to candidates or avoid disclosure requirements.[52] Therefore, Congress passed the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which replaced FECA and attempted to further strengthen campaign finance regulation.[53] BCRA mandated a new biennial aggregate contribution limit of $117,000 for individual contributors and increased the base limits previously set in FECA.[54] The expansion of these limitations maintained the regulation requirements and increased the amount of money that an individual could give to a candidate.[55] However, questions regarding the constitutionality of these limits would soon materialize.

Before there was a challenge to the new contribution limits, the Court heard *Citizens United v. FEC*.[56] That case involved the right to freedom of speech in the corporate context,[57] thrusting the opportunity to contest contribution limits into the background. Based on *Buckley*, the Court in *Citizens United* held that the limitation on corporate political speech "violates the First Amendment."[58] Thus, the Court "authorized unlimited independent expenditures by corporations."[59] However, *Citizens United* would not be the last case to consider the

51. *See* KURT HOHENSTEIN, COINING CORRUPTION: THE MAKING OF THE AMERICAN CAMPAIGN SYSTEM 243–45 (2007); *see also* Corrado, *supra* note 10, at 32–33; MOORE, *supra* note 1, at 316; Trevor Potter, *The Current State of Campaign Finance Law*, *in* THE NEW CAMPAIGN FINANCE SOURCEBOOK, *supra* note 10, at 48, 75–78.

52. *See* HOHENSTEIN, *supra* note 51, at 244–45; *see also* Corrado, *supra* note 10, at 32–33.

53. *See History of Campaign Finance Laws*, *supra* note 6.

54. *See Campaign Contribution Limits*, OPENSECRETS.ORG, https://www.opensecrets.org/bigpicture/limits.php [https://perma.cc/SN9B-QMFY?type=pdf] (last visited May 23, 2015); *see also* McCutcheon v. FEC, 893 F. Supp. 2d 133, 136 (D.D.C. 2012), *rev'd*, 134 S. Ct. 1434 (2014).

55. BCRA increased the contribution limit for individuals from $1,000 to $2,500. *Campaign Contribution Limits*, *supra* note 54; *see also* Corrado, *supra* note 10, at 39.

56. Citizens United v. FEC, 558 U.S. 310 (2010).

57. *See id.* at 365 (returning to the principle that there can be no suppression of "political speech on the basis of the speaker's corporate identity"); *see also* CHEMERINSKY, *supra* note 36, § 11.3.6.3, at 1119.

58. *Citizens United*, 558 U.S. at 365 (finding that there is "[n]o sufficient governmental interest [that] justifies limits on the political speech of . . . corporations" and concluding that the "limit [on] corporate independent expenditures" violates the First Amendment).

59. Mark Walsh, *A Season of Sequels: The Scripts—Campaign Funding, Affirmative Action—Are There, but Without the Star Quality*, A.B.A. J., Oct. 2013, at 16, 16.

constitutionality of limitations on contributions or expenditures in the campaign process. *McCutcheon* was next in line to grab the rope in this game of tug-of-war between campaign finance regulation and the First Amendment right to freedom of speech.[60]

III. *MCCUTCHEON V. FEC*

A. Facts

McCutcheon involved a direct challenge to the constitutionality of the aggregate contribution limitations that *Buckley* approved.[61] Shaun McCutcheon, an electrical engineer and businessman, was itching to spend his riches on several candidates and committees, but he was unable to contribute the desired amount due to the then-current campaign finance laws.[62] McCutcheon "contributed a total of $33,088 to [sixteen] different federal candidates" and "a total of $27,328 to several noncandidate political committees."[63] Although he stayed within the monetary base limit for each individual contribution, McCutcheon was unable to contribute to as many candidates or committees as he desired due to *Buckley* and the BCRA aggregate limits.[64] McCutcheon wanted to make contributions in excess of the aggregate limits to more candidates and committees in that election and in future elections.[65]

B. Procedural History

McCutcheon teamed up with the Republican National Committee ("RNC") to contest the contribution aggregate limits, contending that the limit was unconstitutional because it restricted their First Amendment rights to freedom of speech and association.[66] Specifically, McCutcheon asserted that the limits were unconstitutional because he could not contribute to as many candidates or political committees as he deemed desirable—a violation, as he alleged, of his right to freedom of speech.[67]

60. The claim concerned the constitutionality of the aggregate limits under the First Amendment. McCutcheon v. FEC, 134 S. Ct. 1434, 1443 (2014) (plurality opinion).
61. *Id.* at 1443–45.
62. Walsh, *supra* note 59, at 17.
63. *McCutcheon*, 134 S. Ct. at 1443 (plurality opinion).
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*

Joining in this contention, the RNC vied for abolishment of the aggregate limits because, as a national political party committee, it wished to receive the contributions that were in excess of the aggregate limit and comparable contributions in the future.[68] Meanwhile, the FEC asserted that the aggregate limits were constitutional because they "prevent[ed] circumvention of the base limits" and therefore prevented corruption in the campaigning process.[69]

The United States District Court for the District of Columbia agreed with the FEC's argument.[70] As a result, the court chose to dismiss the complaint.[71] In its analysis, the court assumed that the base limits were "valid expressions of the government's anticorruption interest."[72] Operating under that assumption, it subsequently determined that the aggregate limits served the same purpose because they "prevent[ed the] evasion of the base limits."[73] Moreover, the court explained that the base and aggregate limits served as a "system" that worked together to prevent corruption or the appearance of corruption.[74] In other words, the court concluded that the base limits could not work without the presence of the aggregate limits.

Additionally, the court reasoned that the aggregate limits restricted "First Amendment rights of association, not expression"; therefore, it applied a lesser standard than strict scrutiny.[75] It based this decision on the belief that the limitations did not violate the right to freedom of speech because the contributor still had other ways of expressing his political views, such as "volunteer[ing], join[ing] political associations, and engag[ing] in independent expenditures."[76] Consequently, the court upheld FECA's aggregate limits and declared them constitutional.[77]

McCutcheon and the RNC appealed the decision to the United States Supreme Court.[78] The Court considered the following issues: (1) whether the aggregate limits furthered a permissible governmental interest

68. *Id.*
69. *Id.* at 1442.
70. *See* McCutcheon v. FEC, 893 F. Supp. 2d 133, 139–40 (D.D.C. 2012), *rev'd*, 134 S. Ct. 1434 (2014).
71. *Id.* at 142.
72. *Id.* at 140.
73. *Id.*
74. *See id.*
75. *Id.* at 138.
76. *Id.* at 142.
77. *Id.* at 140–41.
78. McCutcheon v. FEC, 134 S. Ct. 1434, 1444 (2014) (plurality opinion).

(preventing quid pro quo corruption);[79] and (2) whether the governmental intrusion (the use of the aggregate limits) was narrowly tailored to meet the legitimate governmental interest of preventing quid pro quo corruption.[80] The Supreme Court found that the aggregate limits violated the First Amendment because they unjustifiably restricted speech and did not serve the permissible governmental interest of preventing quid pro quo corruption or the appearance of corruption.[81] Therefore, it reversed and remanded the district court's decision.[82]

C. Opinion

After examining the First Amendment and *Buckley*, the Court explained that the aggregate limits created a significant restriction on the First Amendment rights of those who provide monetary contributions to campaigns.[83] It reasoned that the aggregate limits thwarted an individual's ability to provide contributions to the desired amount of candidates and causes.[84] In other words, the aggregate limits curtailed an individual's ability to speak freely about his or her political preferences.[85]

Once it decided that there was a genuine issue regarding First Amendment rights, the Court considered whether there was a legitimate interest that would allow the government to intervene through the restrictions that the aggregate limits produced.[86] First, the Court noted that campaign speech cannot be suppressed simply to ensure financial equality and opportunity for individuals.[87] According to the Court, the only acceptable governmental interest is "preventing corruption or the appearance of corruption,"[88] namely, quid pro quo corruption.[89] As previously mentioned, quid pro quo corruption is the exchange of an official act for money.[90] The Court noted that it was applying a definition

79. *See id*. at 1450.
80. *See id*. at 1452.
81. *Id*. at 1456–57.
82. *Id*. at 1462.
83. *See id*. at 1448.
84. *Id*. at 1446.
85. *Id*. at 1446–47.
86. *See id*. at 1450.
87. *Id*.
88. *Id*.
89. *Id*. (quoting Buckley v. Valeo, 424 U.S. 1, 27 (1976) (per curiam)).
90. FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985).

of *corruption* that has been present in many previous cases, including *Buckley*.[91]

The Court ultimately concluded that because the aggregate limits did not prevent quid pro quo corruption, they did not present a legitimate governmental interest.[92] The FEC argued that the aggregate limits "prevent[ed the] circumvention of . . . base limits."[93] However, in the eyes of the Court, the aggregate limits were meaningless.[94] The Court reasoned that the aggregate limits put an undue restriction on freedom of speech because individual contributors could not make any other contributions to a candidate or political cause "of *any* amount" once they met the relevant aggregate limit.[95] Furthermore, the Court explained that the aggregate limits were unnecessary because the regulations, which the FEC created after *Buckley*, provided protection from an evasion of the base limits and also counseled Congress to consider and strengthen anticorruption measures.[96]

The FEC and the dissent offered scenarios where a contributor could circumvent the base limits with the help of political parties and committees; however, the Court quickly rejected those hypotheticals.[97] The Court reasoned that the hypothetical scenarios presented were "far too speculative" and "implausible" to actually transpire in reality.[98] Consequently, the Court concluded that "the indiscriminate ban on all contributions above the aggregate limits [was] disproportionate to the [FEC's] interest in preventing circumvention."[99]

Furthermore, the Court concluded that the aggregate limits violated the First Amendment because they were "not 'closely drawn to avoid unnecessary abridgment of associational freedoms.'"[100] The BCRA statute was "poorly tailored" to the legitimate governmental interest of anticorruption.[101] The Court reasoned that there was no justification for

91. *McCutcheon*, 134 S. Ct. at 1451 (plurality opinion).
92. *See id.* at 1462.
93. *Id.* at 1442.
94. *Id.* at 1452.
95. *Id.*
96. *Id.* at 1446–47.
97. *See id.* at 1453–56.
98. *Id.* at 1452–53.
99. *Id.* at 1458.
100. *Id.* at 1456 (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam)).
101. *Id.* at 1457.

this governmental intrusion because "experience" showed "that parties or candidates would not dramatically shift [contributor] priorities if the aggregate limits were lifted."[102] The Court discarded the layering of aggregate limits on top of base limits—a "prophylaxis-upon-prophylaxis approach"[103]—explaining that the aggregate limits did not add anything to the formula except a greater restriction on the freedom of speech.[104]

The Court proposed several "anticircumvention" regulations that could make a more significant difference in reaching the government's anticorruption objective, specifically focusing on an increase in disclosure.[105] It noted that an increase in disclosure requirements might increase transparency and decrease corruption.[106] In addition, the Court explained that amplifying disclosure requirements would bring contributors back from the largely unregulated 501(c) organizations (i.e., "dark money" groups).[107] The Court ultimately concluded that the disclosure requirements would be better than the aggregate limits.[108]

Unlike the FEC, the Court did not perceive the aggregate limits as being valuable to campaign finance reform.[109] Instead, the Court held that the aggregate limits were unconstitutional because they did not further the governmental interest of preventing quid pro quo corruption, and the limits unjustly interfered with an individual's right to freely express and associate with his or her political preferences.[110]

Justice Thomas concurred, yet he went significantly beyond the opinion of the plurality.[111] Specifically, he desired to completely overrule

102. *Id.* at 1458.

103. *Id.* (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 479 (2007)).

104. *See id.*; *see also id.* at 1459 (discussing several alternatives, such as increased disclosure requirements, that are potentially more beneficial and less restrictive on the right to freedom of speech).

105. *See id.* at 1458–59.

106. *Id.* at 1459.

107. *See id.* at 1460–61. Politically involved 501(c) organizations are often referred to as "dark money" groups "because these groups do not have to disclose the sources of their funding." *Political Nonprofits (Dark Money)*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/nonprof_summ.php [https://perma.cc/DJ36-WBGN?type=source] (last visited Nov. 30, 2015).

108. *See McCutcheon*, 134 S. Ct. at 1459–60 (plurality opinion).

109. *See id.* (suggesting that, while aggregate limits may only create a greater avenue for corruption, disclosure requirements are more likely to combat corruption within the campaign finance system).

110. *Id.* at 1462.

111. *See id.* at 1462–65 (Thomas, J., concurring).

the decision in *Buckley* and to move campaign finance closer to deregulation.[112] He suggested switching from the typical intermediate standard to strict scrutiny because in his view the contribution limits and expenditure limits equally restrain political speech.[113]

Conversely, the dissent disagreed with the plurality's definition of *corruption*, suggesting that it defined the term "too narrowly."[114] The dissent explained that the majority of precedential cases, excluding *Citizens United*, used an expansive meaning of *corruption*.[115] Justices Breyer, Ginsburg, Sotomayor, and Kagan suggested that the definition of *corruption* should include "efforts to 'garner "influence over or access to" elected officials or political parties.'"[116] Diverging from the typical presumption of First Amendment protection, the dissent reasoned that regulation is the key to taming corruption because it "breaks the constitutionally necessary 'chain of communication' between the people and their representatives," leaving the general public without a meaningful voice.[117]

The dissent agreed with the government's claim, concluding that circumvention of the base limits would be relatively certain without the aggregate limits.[118] The dissenters further explained that these evasive maneuvers would lead to the "channel[ing of] millions of dollars to parties and to individual candidates," invoking an obligation for the candidate "to provide . . . special access and influence."[119] The argument was that such strategies are essentially the broader type of corrupt practices that the campaign finance laws intended to prevent.[120] The dissent passionately concluded its argument by emphasizing the fact that money has more influence over campaigns than the plurality was willing to admit.[121]

112. *Id.* at 1464.
113. *Id.*
114. *Id.* at 1466 (Breyer, J., dissenting).
115. *Id.*
116. *Id.* (quoting *McCutcheon*, 134 S. Ct. at 1450–51 (plurality opinion) (quoting Citizens United v. FEC, 558 U.S. 310, 359 (2010))).
117. *Id.* at 1467–68.
118. *See id.* at 1472.
119. *Id.*
120. *See id.* at 1466.
121. *Id.* at 1481.

IV. AN OPINION ON THE OPINION

Contrary to the Supreme Court's ruling against aggregate contribution limits, the history of campaign finance laws and the overall purpose of preventing corruption show that regulation potentially affords individuals with a better means of political speech.[122] It can be argued that, although the aggregate limits may restrain the freedom of speech to some extent, these limits do not preclude all political speech in the campaign system.

A. It's Not About the Money

The Court's determination that the aggregate limits "deny . . . *all* ability to exercise . . . expressive [or] associational rights" is inaccurate because this conclusion does not consider the other effective and easily accessible ways to support a candidate or a political cause.[123] In the political context, the First Amendment limits governmental intrusion in order to "protect . . . free discussion of governmental affairs."[124] Political discussions are not limited, as the Court seems to suggest, to the symbolic gesture of contributing to a campaign or to a political cause.[125] In fact, individuals can, among other things, volunteer for a candidate, make promotional signs and clothing, or hold debates on a controversial political topic.[126]

In addition, the Internet and other technological advancements have been driving forces in politics, especially during the 2008 election.[127] User-generated video content, social-networking sites, and weblogs allow individuals to advocate for candidates and causes to an exponentially large audience.[128] However, the Court suggested that any

122. *See* SHEPPARD, *supra* note 34, at 60 (indicating that the FEC's administration and enforcement of campaign finance regulation help in "the continuing effort of safeguarding and enhancing democratic elections and the campaign system in the United States").

123. *McCutcheon*, 134 S. Ct. at 1448 (plurality opinion) (emphasis added).

124. CHEMERINSKY, *supra* note 36, § 11.3.6.3, at 1104 (quoting Mills v. Alabama, 384 U.S. 214, 218–19 (1966)).

125. *See* MOORE, *supra* note 1, at 39.

126. *See id.*

127. *See generally* Cristian Vaccari, *"Technology Is a Commodity": The Internet in the 2008 United States Presidential Election*, 7 J. INFO. TECH. & POL. 318 (2010) (surveying numerous operatives and consultants from both republican and democratic campaigns).

128. *See* Jonathan A. Obar et al., *Advocacy 2.0: An Analysis of How Advocacy Groups*

form of political speech other than monetary contributions is "not a realistic alternative."[129] It also suggested that the aggregate limits place a burden on individuals without providing an alternative outlet for support.[130] The Court reasoned that "[o]ther effective methods . . . are reserved for a select few, such as entertainers capable of raising hundreds of thousands of dollars in a single evening."[131] However, the Court did not consider that—even with an aggregate limit—both wealthy and ordinary Americans can communicate through technology with and for multitudes of candidates and share the need for political change around the nation without ever leaving their homes.

Thus, it appears that the Court lost focus of the central issue in this case—the First Amendment right to freedom of political speech. Perhaps the Court's interpretation of free speech actually boils down to who can *afford* the most freedom of speech.[132] Aggregate limits only restrict the total amount of monetary contributions that an individual can make, but these restrictions do not completely eradicate *all* of an individual's rights to express and associate with his or her political views.[133] Once an individual meets the aggregate limits, there are still plenty of other effective and easily accessible channels to continue expressing political speech.[134]

B. Consistently Inconsistent Regulation of Corruption

The Court misinterpreted precedent and lost focus on the claim at hand when it opted to utilize a narrow definition of *corruption*. Here, the Court relied on *Citizens United*, which concluded that *Buckley* intended the term *corruption* to mean only direct quid pro quo corruption (i.e., bribery).[135] In considering the term's definition, the Court noted that it

in the United States Perceive and Use Social Media as Tools for Facilitating Civil Engagement and Collective Action, 2 J. INFO. POL'Y 1, 13–14 (2012).

129. McCutcheon v. FEC, 134 S. Ct. 1434, 1449 (2014) (plurality opinion).

130. *See id*. at 1448–49.

131. *Id.* at 1449.

132. *See* Bill Haltom, *When "Free Speech" Becomes an Oxymoron*, TENN. B.J., May 2014, at 36, 36–37.

133. *See McCutcheon*, 134 S. Ct. at 1441 (plurality opinion).

134. PEW RESEARCH CENTER, POLITICAL POLARIZATION IN THE AMERICAN PUBLIC: HOW INCREASING IDEOLOGICAL UNIFORMITY AND PARTISAN ANTIPATHY AFFECT POLITICS, COMPROMISE AND EVERYDAY LIFE § 5, at 74 (2014), http://www.people-press.org/files /2014/06/6-12-2014-Political-Polarization-Release.pdf [http://perma.cc/2U9H-M8KF].

135. Citizens United v. FEC, 558 U.S. 310, 359 (2010).

has "not always spoken about *corruption* in a clear or consistent voice."[136] In fact, the Court has inconsistently defined the term, leaving the definition consistently unclear.[137] As noted by the dissent, the plurality misconstrued the extent to which corruption reaches.[138] Although the Court acknowledged the inconsistencies, it failed to properly discover the actual form of corruption that campaign finance laws were intended to prevent when it continued to rely on the misinterpretation of *Buckley* in *Citizens United* and subsequently adopted a tapered definition of corruption.[139]

In *Buckley*, the Court suggested that the definition of *corruption* included bribery, but it noted that this was not the only form of corruption that campaign finance laws sought to prevent.[140] The Court upheld the ceilings on contributions "to limit the actuality and appearance of corruption"[141] and to "avoid[] . . . improper influence" for the purpose of protecting the integrity of the electoral process.[142] Although *Buckley* did not provide a specific definition of *corruption*, it implied the existence of an expansive definition when it explained that the "taking of bribes deal[s] with only the most blatant and specific attempts of those with money to influence governmental action[s]."[143] Therefore, despite what the Court found in *McCutcheon*, protecting against the exchange of money for a political favor was not the sole objective of campaign finance regulation.

Even if the Court intended a narrow definition of *corruption*, the aggregate limits are still constitutional because they serve the legitimate governmental interest of preventing actual corruption or the appearance of corruption.[144] The FEC's main contention was that aggregate limits prevent quid pro quo corruption "by preventing circumvention of the base limits."[145] Indeed, it appears only logical to conclude that the base

136. *McCutcheon*, 134 S. Ct. at 1451 (plurality opinion) (emphasis added) (quoting *Citizens United*, 558 U.S. at 447 (Stevens, J., concurring in part and dissenting in part)).
137. *Id.*
138. *Id.* at 1466 (Breyer, J., dissenting).
139. *Id.*
140. *See* Buckley v. Valeo, 424 U.S. 1, 28 (1976) (per curiam).
141. *Id.* at 26.
142. *Id.* at 27.
143. Marc E. Elias & Jonathan S. Berkon, *After McCutcheon*, 127 HARV. L. REV. FORUM 373, 375 (2014) (quoting *Buckley*, 424 U.S. at 27–28).
144. *See McCutcheon*, 134 S. Ct. at 1480 (Breyer, J., dissenting) (noting that the aggregate limit is an anticircumvention measure that ultimately prevents corruption).
145. *Id.* at 1442 (plurality opinion).

limits cannot survive or operate effectively without aggregate limits.[146] Furthermore, the FEC was correct in its contention because wealthy individuals are capable of coordinating their funds back to the candidate through various committees in complete disregard of the base limits. Consequently, if there is a removal of the aggregate limits, then there should also be a removal of the base limits. Without more, the base limits are only the skeleton of the structure.[147]

Going further than simply supporting the base limits, the aggregate limits alone represent a realistic anticorruption objective because they regulate the various political parties and committees that are influential and have a hand in campaign finance corruption.[148] The Court rejected the scenarios that the FEC and the dissent provided and regarded them as "divorced from reality."[149] However, the Court failed to consider the effect of these scenarios from the perspective of a political party. Political parties rely on loyal and very wealthy individuals for funding.[150] The more an individual donates to a political party, the more likely it is that the political party will go out of its way to ensure that it meets the particular contributor's "agenda."[151] Political parties may be more inclined to move in the direction of an individual who is capable of paying the base limit amount to several of the parties' branches and fellow committees. This type of behavior seems to qualify as an act of corruption because it results in the "subversion of the political process."[152]

146. For example, suppose Ronald needs to lose weight, but he unfortunately has an unlimited access to hamburgers. If one places a one-hamburger-a-day base limit on the number of hamburgers Ronald can eat, he still has the opportunity to eat one hamburger every single day. On the other hand, if one limits Ronald to one hamburger every three days, he is more likely to meet his weight-loss goals. Aggregate limits would have a similar effect on campaign finance because they support the base limits' ultimate goal of anticorruption. *See id.* at 1466–67 (Breyer, J., dissenting).

147. A structure that, as Ronald would argue, needs to be "beefed up" and supported by the aggregate limits.

148. Michael S. Kang, *Party-Based Corruption and* McCutcheon v. FEC, 108 NW. U. L. REV. ONLINE 240, 241 (2014), http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1021&context=nulr_online [https://perma.cc/Z2J9-FX48?type=source].

149. *McCutcheon*, 134 S. Ct. at 1456 (plurality opinion).

150. Kang, *supra* note 148, at 246.

151. *Id.* at 246–47.

152. *McCutcheon*, 134 S. Ct. at 1468 (Breyer, J., dissenting) (quoting FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985)).

C. Insufficient Substitutes Offered

The Court claims that an increase in disclosure requirements is a better option than the aggregate limits because those requirements will increase transparency and prevent more corruption in the campaign finance system.[153] The Court maintains that aggregate limits move individuals "away from entities subject to disclosure" and toward entities that have unlimited contribution capabilities.[154] Indeed, these entities—"dark money" groups—are capable of receiving unlimited contributions without having to identify the contributors.[155] The Court suggests that amplifying the disclosure requirements and eliminating the aggregate limits will make these highly unregulated groups less appealing and place a lighter burden on free speech.[156] However, this is not necessarily the case. In fact, increasing transparency and eliminating the aggregate limits may actually push individuals toward these types of "dark money" groups.[157]

Increasing disclosure requirements may influence an individual who wishes to remain anonymous to relocate funds to "dark money" groups that do not require the disclosure of their donors' identities.[158] An individual who owns a business or maintains a particular reputation in society may have to anonymously donate to a "dark money" group for fear of public backlash over his or her political views.[159] For example, Brendan Eich, the former CEO of Mozilla, had to resign from his position after the public became aware of his contribution in support of a same-sex marriage ban.[160] Similarly, in 2011, Starbucks saw its consumers boycott its coffee shops after it opposed the Defense of Marriage Act, causing a substantial reduction in the company's sales and profits.[161] Regardless of the contributor, increased disclosure

153. *Id.* at 1459 (plurality opinion).
154. *See id.* at 1460.
155. *Id.*
156. *See id.* at 1459–60.
157. *See* Sarah C. Haan, *The CEO and the Hydraulics of Campaign Finance Deregulation*, 109 NW. U. L. REV. ONLINE 27, 27–28 (2014), http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1015&context=nulr_online [https://perma.cc/MHZ2-G2SE?type=source].
158. *See id.* (arguing that increased disclosure requirements will not necessarily direct the majority of contributions away from "dark money" groups).
159. *See id.* at 28.
160. *Id.*
161. *Id.* at 31.

requirements can negatively affect a person's reputation, career, and livelihood. Individuals that do not want to face similar public backlash or to contribute to "dark money" groups may choose not to participate at all in the election process because of the potential repercussions of public controversy.[162]

Admittedly, no campaign finance law is perfect. There is no law that will completely wipe out corruption. Congress has the potential to enact sufficient laws, but someone will always find a loophole. However, considering the flaws in the current campaign finance requirements, intensifying disclosure requirements may not be a better option than the aggregate limits.

D. Moving Backward

The Court took campaign finance back to the past when it banned the aggregate limits, reverting to an even more unregulated system that resembles the one prior to the Watergate Scandal.[163] Until the 1970s, no one took campaign finance regulation seriously.[164] The Watergate Scandal was one of the keys to unlocking the restrictions on contributions and expenditures, creating a positive foundation for establishing campaign finance regulation in FECA and eventually leading to the more inclusive regulations in 2002 under BCRA.[165]

Although it is important for the Court to protect the right to freedom of speech, it must also consider the reason for campaign finance laws—to protect the sea of political speech from being tainted by the black oils of corruption.[166] Congress enacted laws, such as the limits on expenditures and contributions, in an effort to combat a political climate saturated with corporations and wealthy individuals that wield power over the ordinary citizen and his or her voting power.[167] Many thought reform was necessary to unsaturate this seemingly corrupt climate and to save the "democratic process."[168] People wanted to prevent corporations

162. *See id.* at 34.
163. *See* Corrado, *supra* note 10, at 22.
164. *See id.*
165. *See id.* at 22, 35–38.
166. *See* SHEPPARD, *supra* note 34, at 60.
167. *See* Corrado, *supra* note 10, at 10 (discussing the corruption concerns regarding campaign contributions from corporations and wealthy individuals in the early 1880s that eventually led to some of the first campaign finance laws).
168. *Id.*

and the wealthiest individuals from suffocating the electoral process by monopolizing campaign funding.[169] However, if the Supreme Court continues to peel apart campaign finance regulation—like it did in *McCutcheon*—there will be nothing left but a sliver of the past.

Reverting to a more unregulated campaign finance system will unravel the net that the FEC uses to catch corrupt individuals who attempt to subvert the system. Furthermore, tightening the definition of corruption and eliminating aggregate limits will make it more difficult for the FEC to regulate campaign finance. Investigators already have to jump through hoops to find evidence capable of supporting a corruption charge.[170] The Speech or Debate Clause of the United States Constitution, paired with the tightened definition of *corruption*, protects almost every official duty and makes it more difficult to prove corruption.[171]

If the Supreme Court continues to deregulate campaign finance, make corruption unyieldingly difficult to prove, and automatically overstate political-speech rights, then the FEC may eventually dissolve right along with the aggregate limits. It becomes increasingly difficult for the FEC to properly regulate campaign finance without the assistance of effective laws. Continuing down this road, the Court has the potential to pick away at what is left of the laws until campaign finance becomes a completely unregulated area.

V. CONCLUSION

The Supreme Court's decision in *McCutcheon v. FEC* ignores the purpose of campaign finance regulation, which is to secure the right to freely discuss political preferences while simultaneously protecting that voice.[172] Creating a completely unregulated system will make it increasingly difficult to define and prosecute corrupt activities and will potentially cause the campaign finance regulation system to collapse

169. *See id.*

170. *See* Ryan J. Reilly & Paul Blumenthal, *The Only Form of Corruption the Supreme Court Cares About Is Almost Impossible to Prosecute*, HUFFINGTON POST (Apr. 7, 2014, 7:34 AM), http://www.huffingtonpost.com/2014/04/07/supreme-court-corruption_n_5093485.html [http://perma.cc/Y3XS-U9WL] (discussing how the Speech or Debate Clause already makes it difficult to "obtain access to congressional materials that could implicate a corrupt congressman or senator" in corruption investigations).

171. *See id.*

172. *See* SHEPPARD, *supra* note 34, at 7, 60.

from within. The Court's failure to acknowledge alternative means of political speech, its inconsistent definitions of *corruption*, and its lackluster alternatives for regulation serve only to prove that the plurality has lost sight of the overall purpose of campaign finance regulation—both to protect the integrity of the electoral process *and* to protect political speech.[173]

173. *Id.*