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## AFTER *MCCUTCHEON*

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In *McCutcheon v. Federal Election Commission*,<sup>1</sup> the Supreme Court struck down the “biennial aggregate limit” — a federal law limiting the total amount of money that an individual may contribute to federal candidates, party committees, and political action committees (“PACs”) in each two-year period. The per-candidate and per-committee limits (known as the “base limits”) remain in place, so the practical effect of *McCutcheon* is that individuals may now contribute the maximum amount to as many federal candidates, parties, and PACs as they please.

Because the Supreme Court had upheld a similar aggregate limit in the landmark 1976 case *Buckley v. Valeo*,<sup>2</sup> its holding in *McCutcheon* led critics to declare that *Buckley* itself is on the chopping board. Inveighing against the decision, the *New York Times* editorial board speculated that “it will not be long before the constitutionality” of the limit on contributions to candidates — the linchpin of *Buckley* — “too, comes before the [C]ourt.”<sup>3</sup>

We agree that *McCutcheon* is significant, both in its immediate effect and what it portends about the future of campaign finance legislation. But we are skeptical that the death of *Buckley* — and, hence, all campaign finance restrictions — is near. Observers have long predicted that *Buckley* would fall, but the decision looks stronger today than it has in years. Significantly, the dispute between the plurality and dissent in *McCutcheon* was not over whether *Buckley* should stand, but instead about what the *Buckley* Court meant when it said that the government had a compelling interest in regulating corruption or its appearance.

This dispute has real-world consequences. Under the plurality’s view, the government may only regulate against the threat of actual or apparent *quid pro quo* corruption.<sup>4</sup> Under the dissent’s view, the government may also regulate against the corrosive effect of wealthy donors obtaining access to and influence over lawmakers — which

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<sup>1</sup> 134 S. Ct. 1434 (2014).

<sup>2</sup> 424 U.S. 1 (1976).

<sup>3</sup> Editorial, *The Court Follows the Money*, N.Y. TIMES, Apr. 3, 2014, at A26, archived at <http://perma.cc/4SQ8-Q7FY>.

<sup>4</sup> See *McCutcheon*, 134 S. Ct. at 1441 (plurality opinion).

means that it may regulate far more activity.<sup>5</sup> Critics of the plurality view lament that it will further empower wealthy individuals and large corporations at the expense of average Americans. There is some truth to that contention. But under the current system, where contributions to political parties are strictly limited but contributions to so-called “Super PACs” are not, wealthy individuals and large corporations already enjoy an outsized role. Accordingly, *McCutcheon* and subsequent developments in the law are unlikely to affect *who is financing* our campaigns as much as they determine *who is being financed* to wage those campaigns. And the big winner is likely to be the group that suffers most under today’s regime: political parties.

### I. THE PRUNING OF THE *BUCKLEY* TREE

The *New York Times* editorial board is not alone in suggesting that *McCutcheon* foreshadows the death of *Buckley*. In his concurrence, Justice Thomas derided the plurality opinion for failing to “acknowledge that today’s decision, although purporting not to overrule *Buckley*, continues to chip away at its footings” and contended that “what remains of *Buckley* is a rule without a rationale.”<sup>6</sup> This observation is not a new one. Former ACLU counsel Burt Neuborne observed in 1997 that “*Buckley* is like a rotten tree. Give it a good, hard push and, like a rotten tree, *Buckley* will keel over. The only question is in which direction.”<sup>7</sup>

*Buckley* has long been understood as creating a dichotomy between contribution limits (generally permissible) and expenditure limits (generally impermissible). The depiction of *Buckley* as an unsteady tree teetering before its final collapse is based on this understanding, with the left pushing against the proscription on expenditure limits and the right shoving back against the allowance for contribution limits. But in recent years, the Court’s center-right bloc has shifted its focus. Rather than advocating a repeal of *Buckley*, these Justices have recast the decision as standing for the proposition that government may regulate political speech only to prevent actual or apparent *quid pro quo* corruption. In so doing, the Court has steadied the tree, but pruned its branches significantly.

*Buckley* identified “the prevention of corruption and the appearance of corruption” as a sufficient government interest to justify restrictions on contributions to candidates and expenditures coordinated

<sup>5</sup> See *id.* at 1466–70 (Breyer, J., dissenting).

<sup>6</sup> *McCutcheon*, 134 S. Ct. at 1464 (Thomas, J., concurring).

<sup>7</sup> Adam Liptak, *Free Speech Through the Foggy Lens of Election Law*, N.Y. TIMES, May 4, 2010, at A20, archived at <http://perma.cc/MUU2-E3V4>.

with them.<sup>8</sup> But it did not precisely define what “corruption” meant. In justifying the constitutionality of the limits, the Court explained that “[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined” and “[o]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”<sup>9</sup> However, the opinion also noted that “laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action,” suggesting perhaps that *quid pro quo* corruption was not the only type of “improper influence” that the Court had in mind.<sup>10</sup>

In 2002, Congress enacted the Bipartisan Campaign Reform Act<sup>11</sup> (known as “BCRA” or “McCain-Feingold”). BCRA barred national parties from raising any money outside of federal limits (even for expenses other than contributions to or coordinated expenditures with federal candidates) and prohibited federal candidates and officeholders from soliciting any such “soft money” (even for state parties or other nonfederal actors).<sup>12</sup> BCRA’s restrictions were harder to justify as an effort to halt actual or apparent *quid pro quo* corruption. The law did not limit contributions to candidates; it targeted funds that flowed to political parties for use on activities other than contributions to or coordinated expenditures with federal candidates.

Yet, in a 5-4 vote, the Supreme Court upheld the restrictions in *McConnell v. FEC*.<sup>13</sup> The majority rejected the proposition that *Buckley* permitted government regulation solely to prevent actual or apparent *quid pro quo* corruption and argued that it allowed the government to regulate against a more expansive definition of corruption. The majority justified the soft money ban on the grounds “that candidates would feel grateful for such donations and that donors would

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<sup>8</sup> *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *see also id.* at 26 (“It is unnecessary to look beyond the [Federal Election Campaign Act’s] primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the . . . contribution limitation.”).

<sup>9</sup> *Id.* at 26–27.

<sup>10</sup> *Id.* at 27–28.

<sup>11</sup> Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 8, 18, 28, 36, and 47 U.S.C.).

<sup>12</sup> It also tried to limit spending on “electioneering communications” by outside groups, but those provisions have been struck down in the interim. *See Citizens United v. FEC*, 558 U.S. 310 (2010); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

<sup>13</sup> 540 U.S. 93 (2003).

seek to exploit that gratitude.”<sup>14</sup> It was sufficient for the government to show that donors received “access” in exchange for their donations and that “[i]mplicit . . . in the sale of access is the suggestion that money buys influence.”<sup>15</sup>

Justice Kennedy’s partial dissent in *McConnell* rejected this interpretation of *Buckley*. In his view, the *Buckley* analysis was a “functional” one.<sup>16</sup> The First Amendment permitted campaign finance restrictions to prevent actual or apparent *quid pro quo* corruption. Accordingly, Congress may “regulat[e] federal candidates’ and officeholders’ receipt of *quids*” but it may not “regulat[e] . . . any conduct that wins goodwill from or influences a Member of Congress” or provides that donor with “access” to members.<sup>17</sup> Under this view, the *quid pro quo* rationale justified limits on contributions to candidates and expenditures coordinated with candidates, and also justified limits on solicitations by candidates (because these were “quids”). But it did not justify limits on contributions to party committees unsolicited by candidates and ineligible for use to make contributions or coordinated expenditures (because these were not “quids”). When he was handed the pen for the majority in *Citizens United*, Justice Kennedy enshrined his view of *Buckley* in the opinion, writing that “[w]hen *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption” and the “appearance . . . of *quid pro quo* corruption.”<sup>18</sup>

The plurality opinion in *McCutcheon* completed the pruning of the *Buckley* tree. Rejecting the invitation to “revisit *Buckley*’s distinction between contributions and expenditures,”<sup>19</sup> the plurality reiterated that “while preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption — ‘*quid pro quo*’ corruption.”<sup>20</sup> Though the “line between *quid pro quo* corruption and general influence may seem vague at times,”<sup>21</sup> the plurality concluded that “there is a clear, administrable line between money beyond the base limits funneled in an identifiable way to a candidate — for which the candidate feels obligated — and money within the

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<sup>14</sup> *McConnell*, 540 U.S. at 145.

<sup>15</sup> *Id.* at 154.

<sup>16</sup> *Id.* at 293 (Kennedy, J., dissenting in part).

<sup>17</sup> *Id.* at 294.

<sup>18</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 909–10 (2010).

<sup>19</sup> *McCutcheon v. FEC*, 134 S. Ct. 1434, 1445 (2014) (plurality opinion).

<sup>20</sup> *Id.* at 1450.

<sup>21</sup> *Id.* at 1451.

base limits given widely to a candidate's party — for which the candidate, like all other members of the party, feels grateful.”<sup>22</sup>

So, notwithstanding the protestations of the *New York Times* and Justice Thomas, *Buckley* survives. But its central “rule” has been recast: government may only impose campaign finance restrictions to prevent actual or apparent *quid pro quo* corruption.

## II. THE FRUITS OF *MCCUTCHEON*

The impact of the *McCutcheon* holding itself is relatively straightforward. At the federal level, individuals may now donate the maximum amount to each candidate (\$2,600 per election), political committee (\$5,000 per year), state party (\$10,000 per year), and national party committee (\$32,400 per year) without having to stay within aggregate limits. The party committees are most likely to benefit from this change. Prior to *McCutcheon*, a donor who contributed the maximum to the Democratic National Committee in each calendar year could contribute less than \$10,000 combined to the Democratic Senatorial Campaign Committee and Democratic Congressional Campaign Committee in the biennial cycle. Naturally, the limit caused the national party committees to compete with each other for the same donors, rather than work with each other to persuade donors to support each committee. With the incentives now changed, party committees have already seen an uptick in contributions from donors who would have been “maxed out” under the pre-*McCutcheon* regime.<sup>23</sup> While it is possible, as Robert K. Kelner argues, that nonparty actors will organize outside of the party structure to the detriment of party committees,<sup>24</sup> we suspect that party committees will continue to benefit from the ability of wealthier donors to give the maximum to each party committee.

The same is true in the twelve states whose statutes feature a similar aggregate limit. Already, regulators in Massachusetts and Maryland have announced that they would not enforce their states' aggregate limits, and a federal court in Minnesota cited *McCutcheon* in striking down a state contribution limit that revolved around aggregate limits.<sup>25</sup> Furthermore, the state of Wisconsin has agreed to stop

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<sup>22</sup> *Id.* at 1460.

<sup>23</sup> Russ Choma, *Koch, Goldman, Other Megadonors Already Blowing Through Pre-McCutcheon Caps*, OPENSECRETSBLOG (May 21, 2014), <https://www.opensecrets.org/news/2014/05/koch-goldman-other-megadonors-already-blowing-through-pre-mccutcheon-caps/>.

<sup>24</sup> Robert K. Kelner, *The Practical Consequences of McCutcheon*, 127 HARV. L. REV. F. 380, 384 (2014).

<sup>25</sup> See Press Release, Mass. Office of Campaign and Political Finance, OCPF's Statement on Today's Supreme Court Decision, *McCutcheon vs. FEC*, available at <http://www.ocpf.net/releases/statement.pdf> (last visited June 14, 2014); Press Release, Md. State Bd. of Elections, Contribution

enforcing its aggregate limit, ending a federal lawsuit that had been put on hold pending the outcome in *McCutcheon*.<sup>26</sup> In Wisconsin, the impact is particularly significant. State law had imposed an aggregate limit of \$10,000 on an individual's contributions to all registered Wisconsin committees (including candidates, parties, and PACs) in a calendar year but did not separately limit what individual could contribute to a party committee or PAC. With the aggregate limits gone, an individual may now contribute an unlimited amount to party committees (and PACs) in the state. This change will give the parties a chance to regain their influence in a state where outside group spending during the 2011 and 2012 recall elections dwarfed spending by the party committees.

*McCutcheon* has already spawned additional challenges to laws that disadvantage party committees. The Republican National Committee and Libertarian Party have filed separate lawsuits challenging the federal ban on political parties raising unlimited contributions for independent expenditure activities.<sup>27</sup> And lawyers from both parties will closely examine federal and state laws to identify additional restrictions that cannot be justified by the government's interest in regulating actual or apparent *quid pro quo* corruption and that "reduce the voice of political parties . . . to a whisper."<sup>28</sup>

In practice, therefore, the ongoing dispute over *Buckley* is a debate over the role that political parties will play in American campaigns. Even the *McCutcheon* dissenters' broad view of the government's interest in regulating campaign finance is insufficient to justify limits on large contributions to outside groups that spend independently of candidates. Accordingly, wealthy individuals and corporations will be able to finance election-related activity in support of their favored candidates. The only question is who the spender will be. The McCain-Feingold law and subsequent court decisions have created a severe imbalance in the current system. *Politico* recently reported that Americans for Prosperity plans to spend at least \$125 million on elections this year, which rivals the Democratic and Republican

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Limits (Apr. 11, 2014), available at [http://elections.maryland.gov/campaign\\_finance/documents/Aggregate\\_limits\\_04112014\\_final.pdf](http://elections.maryland.gov/campaign_finance/documents/Aggregate_limits_04112014_final.pdf); Seaton v. Wiener, No. 14-1016, 2014 WL 2081898 (D. Minn. May 19, 2014).

<sup>26</sup> See Young v. Vocke, No. 13-CV-635 (E.D. Wis. May 22, 2014) (order), available at [http://gab.wi.gov/sites/default/files/news/young\\_v\\_vocke\\_dkt\\_12\\_order\\_pdf\\_80804.pdf](http://gab.wi.gov/sites/default/files/news/young_v_vocke_dkt_12_order_pdf_80804.pdf).

<sup>27</sup> See Complaint, RNC v. FEC, No. 1:14-cv-00853 (D.D.C. May 23, 2014), available at [http://www.fec.gov/law/litigation/rnc\\_rnc\\_complaint.pdf](http://www.fec.gov/law/litigation/rnc_rnc_complaint.pdf); Complaint, Rufer v. FEC, No. 1:14-cv-00837-CRC (D.D.C. May 21, 2014), available at [http://www.fec.gov/law/litigation/rufer\\_rufer\\_complaint.pdf](http://www.fec.gov/law/litigation/rufer_rufer_complaint.pdf).

<sup>28</sup> Randall v. Sorrell, 548 U.S. 230, 259 (2006) (internal quotation marks omitted).

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congressional committees.<sup>29</sup> Americans for Prosperity does not have to disclose its donors or a large chunk of its spending. None of its members are elected officials who must remain accountable to voters. And though the group seems poised to invest in field efforts this cycle, it is best known for running negative, scorched-earth advertisements against candidates.

Obviously, if they are freed from some of the more serious restrictions under which they currently live, political parties will also spend additional funds on these types of ads. However, it is likely that they will invest more than their outside group counterparts on maintaining voter records, hiring field staff to work with grassroots volunteers, and investing in technological infrastructure to make voter contact more efficient. In 2008 and 2012, the Obama campaign invested heavily in these efforts. The result was higher turnout and more participation in the political process by grassroots volunteers. To replicate that effort in races where presidential candidates are not on the top of the ticket requires a significant investment of money and time by political parties. The current system's base contribution limits make this a difficult feat to achieve, but it will be less difficult after *McCutcheon* and the relief it offers parties.

The *Buckley* tree still stands. After *McCutcheon*, the political parties have a better chance to stay on their feet as well.

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<sup>29</sup> Kenneth P. Vogel, *Koch Brothers' Americans for Prosperity Plans \$125 Million Spending Spree*, POLITICO (May 11, 2014, 12:29 PM), <http://www.politico.com/story/2014/05/koch-brothers-americans-for-prosperity-2014-elections-106520.html>, archived at <http://perma.cc/3QSQ-J5HG>.