McCutcheon v. FEC and Roberts v. Breyer: They're Both Right and They're Both Wrong

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In *McCutcheon v. FEC*,[1] the Supreme Court held that the current aggregate limit on the total amount of money that an individual may contribute to all federal candidates, parties, and political action committees in an election cycle – now $123,200 – violates the First Amendment rights of those who would like to give more. According to the opinion of the four-Justice plurality, written by Chief Justice John Roberts, as long as donors abide by the contribution limits applicable to candidates ($5200), political parties ($32,400 for national parties and $10,000 for state or local parties), and political action committees, commonly known as PACs ($5000), Congress may not constitutionally impose an aggregate cap to prevent circumvention of those limits – or for any other reason.[2] Justice Stephen Breyer dissented. In his view, there are both substantial possibilities of donors being able to direct their contributions in ways that evade limits on candidate contributions and other valid reasons that support a reasonable ceiling on spending in electoral races beyond the avoidance of corruption or the appearance of corruption that the majority has defined quite narrowly.

Given this chasm between the two justices, how can they both be right and both be wrong? The answer is that the Chief Justice is right that the prior decisions of the current Court, as well as some of its predecessors dating back to *Buckley v. Valeo*,[3] almost certainly support his conclusion on the invalidity of aggregate limits, and in particular, the lack of merit in the FEC's defense of the limits in *McCutcheon.* On the other hand, Justice Breyer has by far the better argument that our democracy and the Constitution permit campaign finance laws that prevent more than what the majority will allow. According to the majority, the only justifications for contribution or spending limits are to prevent corruption or the appearance of corruption, which the majority has interpreted to include no more than bribery or its appearance. But an even more basic flaw in the majority's approach is that it elevates election-related speech in the form of spending money above all other values. In doing so, it seemingly ignores a number of Supreme Court decisions that permit reasonable limits on other types of political or ideological speech that are comparable to campaign contributions and expenditures, such as those banning political

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[1] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014).

[2] Justice Clarence Thomas concurred, but would have overturned the portion of *Buckley v. Valeo*, 424 U.S. 1 (1976), that applied less than strict scrutiny to limits on campaign contributions established by the Federal Election Campaign Act (FECA) and held that the aggregate limits failed that stringent test.

[3] Buckley v. Valeo, 424 U.S. 1 (1976). *Buckley* held, briefly, that limits on contributions to candidates and PACs could withstand First Amendment scrutiny, but that limits on personal spending by candidates from their own funds, total spending by candidates from all sources, and independent expenditures by other individuals violate the First Amendment. It was the first case to directly address whether the spending of money in elections was subject to First Amendment protection and is the basis for most of the Court's campaign finance jurisprudence.

speech in or near polling places on Election Day,[4] those regulating the volume of concerts that might disturb residents late in the evening or early in the morning,[5] and a law criminalizing the burning of a draft card to protest the Vietnam War.[6] Although the majority seems unlikely to alter its basic position any time soon, change can only take place by creating the climate in which the flaws in *Buckley* discussed below are exposed and a basic re-examination in this area becomes acceptable.

I. Defending Aggregate Limits, Then and Now

The aggregate limits that were struck down in *McCutcheon* have been narrowly defended as a way to prevent circumvention of the contribution limits set forth above, mainly with respect to limits on contributions to candidates. That was the basis on which an earlier version of the law, with an aggregate limit of $25,000, was upheld in *Buckley*.[7] But at that time, although there were limits on how much an individual could give to a candidate ($1000) and a PAC ($5000), there were no limits on contributions to a political party. Thus, if there were a hotly contested U.S. Senate race in the donor's home state, he could make a $1000 contribution to his preferred candidate and make an unlimited (as long as it was not formally earmarked) contribution to the candidate's national party, expecting that it would be largely used to support that candidate and effectively circumventing the contribution limit for candidates. Hence the aggregate limit, while not preventing circumvention, limited its impact. Shortly after *Buckley* was decided, Congress stepped in to impose a more effective remedy: it set a limit on contributions to political parties in addition to those applicable to candidates and PACs. But when the challenge to aggregate limits was renewed in 2012, the only ground on which the law could be defended was the "anti-circumvention" argument because the Court had cut off other, more persuasive justifications as inconsistent with the First Amendment.

One reason that the law imposing aggregate limits was not challenged for so many years after *Buckley* was that even very wealthy donors do not mind being able to say, "I've maxed out" when the inevitable (lawful) solicitation calls arrive. In addition, as discussed more fully below, those who had maxed out were not frozen out because *Buckley* allowed them to make unlimited independent expenditures on their own, so long as they refrained from coordinating with the candidate or his party. And, of course, under the old $25,000 ceiling upheld in *Buckley*, as well as the limit of $123,200 struck down in *McCutcheon*, there were not many individuals who could afford that much after-tax generosity, let alone had a desire to spend that much for a candidate who might not win. Until Shaun McCutcheon and the Republican National Committee filed suit, no one objected enough to the aggregate limit to take it to court.

Breyer's dissenting opinion in *McCutcheon* makes a solid case for the proposition that *some* circumvention on the limits on contributions to candidates may happen unless there is an aggregate cap. Justice Breyer provides three complex examples of how that might happen, which appear to be dependent on a significant number of contributors who are willing to spend several million dollars, a limited number of candidates among whom the money will be divided, party and PAC officials willing to restrict their contributions and other spending to a small number of candidates, and substantial planning (not rising to the level of unlawful coordination) among all

[4] Burson v. Freeman, 504 U.S. 191 (1992).
[5] Ward v. Rock Against Racism, 491 U.S. 781 (1989).
[6] United States v. O'Brien, 391 U.S. 367 (1968).
[7] *See Buckley*, 424 U.S. 1.

participants. Moreover, Justice Breyer's conclusion that the beneficiaries of such spending will surely be grateful for the indirect assistance is almost certainly correct, but it does not suffice under the majority's view of the First Amendment: "government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies or the political access such support may afford."[8]

In his plurality opinion, the Chief Justice does not seriously argue that such circumvention is impossible. Rather, his position is that it will not happen often, that it takes a real effort in planning and execution to pull it off, that attempts may fail, and that, all in all, the likelihood of serious circumvention is quite speculative and does not justify the burdens on those who wish to donate larger sums to support more of their candidates and parties in federal elections. In addition, the Court also suggested a number of less restrictive alternatives, while admitting that some may not work and that others may be invalid. In short, given what the majority saw as the limited ways in which political donations may constitutionally be controlled, and the heavy thumb that the First Amendment places on the scale opposing such restrictions, it is hardly surprising that the *McCutcheon* Court found the anti-circumvention rationale to be wanting.

Moreover, the additional money that will be unleashed as a result of *McCutcheon* is not likely to be great, because it applies only to the very few individuals who are in a position to give more than $123,200. This is especially true when the result is compared with the impact of a decision like *Citizens United v. FEC*,[9] where the Court gave for-profit corporations the green light to spend as much money as they want on independent expenditures. The Court previously destroyed the viability of systems providing for public financing of elections by banning efforts to offset the spending and fundraising of candidates who opt out of such systems.[10] And since the ultra-rich can already contribute as much as they want to PACs that make only independent expenditures but not contributions, also known as Super PACs, it is unclear how much added damage *McCutcheon* will do. Indeed, there are some who believe that *McCutcheon* will have the positive effect of directing money toward political parties and candidates, who tend to be less willing to engage in attack ads than are those who make independent expenditures.

II. Roberts was Right, the Seeds were Sown

There are two reasons why the anti-circumvention rationale should not have succeeded in 1976, let alone today. If circumvention were a problem, the fix that Congress did impose – putting a limit on how much could be given to political parties and/or how much parties could give to any candidate – was the much more direct way of dealing with the problem. At the very least, it should have been the first response, with aggregate limits as a backup if it did not work.

Second, avoiding end runs on other limits was almost surely not what Congress had in mind when the aggregate limits were originally enacted. There is no need to delve into legislative history to establish that fact. The statute itself is quite clear that aggregate limits were part and parcel of the overall plan of Congress to cap the amount of spending in federal elections, through five separate, but inter-related limits: (1) limits on contributions to candidates and PACs; (2) limits on how much a candidate could spend from his or her personal funds and those of

[8] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1441 (2014).
[9] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
[10] Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).

immediate family members; (3) caps on total candidate spending (with different numbers for the President, Senate and House); (4) limits on independent expenditures by individuals; and (5) aggregate individual limits. All of those laws were designed to take what Congress considered to be excess spending out of federal elections, with aggregate limits of $25,000 as one of the tools to achieve that goal. The *Buckley* Court upheld contribution limits (1), but struck down expenditure limits (2) through (4) as improper attempts to limit speech, in violation of the First Amendment.

Once the Court set aside those expenditure limits, there was no way that aggregate limits (5) could be sustained as a means of limiting overall spending. The Court in *Buckley* nonetheless sustained the $25,000 limit on an anti-circumvention rationale that was not the basis for the law, nor a ground urged by its defenders. Indeed, as the Court noted, this issue "has not been separately addressed at length by the parties," and the briefs filed by the United States and the principal intervenors defending the law (Common Cause and the Center for Public Financing of Elections) did not argue that the aggregate limits were enacted for that purpose.[11] For these reasons, unless the *Buckley* Court was in error in its expenditure rulings, Chief Justice Roberts was right in concluding in *McCutcheon* that anti-circumvention could not support today's limits. However, as I now argue, although the *Buckley* Court was correct in setting aside the particular expenditure limits challenged there, it did so on much broader grounds than were necessary, with the result that a number of campaign finance laws that were subsequently set aside might have been sustained had narrower rationales been employed.

III. How *Buckley* Could Have Been Narrower

A. Candidate Expenditure Limits

When the *Buckley* Court struck down dollar limits on personal spending by candidates from their own funds and total spending by a candidate from all sources, there is one argument that could have, and should have, proven decisive on its own, without the need to treat the unlimited spending of money in elections as no different from the unlimited making of speeches while standing on a soapbox in Lafayette Park. The main impact of both sets of candidate spending limits would be on challengers, in part because incumbents have many advantages, from name recognition, to taxpayer-paid staff, to franking privileges, and the ability to help out constituents. The *Buckley* Court specifically recognized these advantages in the context of discussing whether they rendered the contribution limits unconstitutional.[12] The Court nevertheless upheld the contribution limits because they applied equally to incumbents and challengers on their face, and then stated that, because it concluded that the expenditure limits were unconstitutional regardless of incumbent advantages, it did not have to "express any opinion with regard to the alleged invidious discrimination resulting from the full sweep of the legislation as enacted."[13] Thus, it did not address whether the candidate expenditure limits themselves resulted in invidious discrimination.

The Court's decision to rule more broadly on the candidate expenditure issue has had serious consequences for many campaign finance laws, which might have been avoided if it had chosen the narrow ground that, although the statute treated incumbents and challengers

[11] *Buckley*, 424 U.S. at 38.
[12] *Id.* at 31 n.33.
[13] *Id.*

identically, the undisputed and very significant incumbent advantages destroyed that facial equality. Such a ruling would have been based more on Equal Protection than First Amendment principles, and it would have given Congress an opportunity to cure that defect. Thus, however unlikely it may be that Congress (or any legislative body) would ever consider evening up the incumbent advantage – for example, by allowing challengers to spend greater amounts than incumbents or appropriating funds for challengers to offset the advantages of incumbency – a decision based on Equal Protection grounds would have been far less controversial given the Court's other Equal Protection rulings. It would also have been more prudent for the Court to have issued a narrower ruling and given Congress the opportunity to remedy that defect rather than holding that no expenditure limits could ever be upheld.[14]

There is a second, and also more limited, basis why both sets of candidate expenditure limits should have been set side: the actual limits in the law were chosen by those whose re-election races would be affected by what those limits were. One does not have to be a complete cynic to appreciate that those amounts would be determined with one eye on the anticipated needs of the officeholder and another on the concern that a challenger might use personal funds or simply out-fundraise the incumbent. For example, the Court found that incumbency helped create an Equal Protection violation in *Baker v. Carr*,[15] where incumbents controlled the apportionment process that determined which voters would choose the winner in the legislators' bids for re-election.[16]

A ruling on the basis that the limits cannot be set by those who will be most affected by them would have left room for Congress and the states to enact expenditure limits that did not suffer from that problem. One option, which is not available at the federal level and not in all states, is the initiative process, by which citizens could determine the proper spending levels, without the inherent bias that incumbent legislators have. Another option would be to create a non-partisan commission, similar to those enacted by a number of states to deal with the analogous problem of incumbent self-protection in drawing legislative districts, to set appropriate spending levels that would take into account the needs of both challengers and incumbents. Those options might not have been enacted, but they should have been available. More important, relying on the more narrow approach would have provided a better basis on which to decide the issue of the validity of limits on independent expenditures and not set a precedent that foreclosed all future efforts at placing any limits on campaign expenditures, no matter how they were written or by whom.

In combination, or standing on their own, the incumbents' advantages, coupled with their ability to write rules that would maximize their protection and minimize the ability of non-incumbents to mount a successful attack, should have been more than enough to strike down the candidate expenditure limits at issue in *Buckley* without relying on an untested claim that the government never has an interest in limiting total spending in any and all circumstances.

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[14] In his dissent in *Citizens United*, Justice John Paul Stevens indicated that incumbent protection could be used in an appropriate case to strike down some campaign finance laws. *See Citizens United*, 558 U. S. at 461-62.

[15] Baker v. Carr, 369 U.S. 186 (1962).

[16] *See also* Gibson v. Berryhill, 411 U.S. 564 (1973) (upholding the district court's conclusions that the State Board of Optometry was so biased by prejudgment and pecuniary interest that it could not constitutionally conduct hearings looking toward the revocation of plaintiffs' licenses to practice optometry in competition with Board members).

B. Independent Expenditures

Having ruled broadly that expenditure limits imposed on candidates were unconstitutional, the *Buckley* Court followed the same approach for independent expenditure limits, which are those imposed on persons other than candidates and their committees. In contrast to what the Court did with contributions, where it recognized the First Amendment's applicability but allowed reasonable limits, it treated independent expenditures like candidate expenditures and ruled that no limits were permissible for either. According to the Court, spending money directly to support or oppose a candidate was a pure First Amendment activity, and therefore the government could never decide how much was too much. Once again, as with candidate expenditure limits, there were three narrower grounds that the Court could have and should have used to strike down the limit on independent expenditures, which was only $1000 in 1974.

First, the $1000 statutory ceiling was identical to the one applicable to direct contributions. Actually, it was only half, because $1000 contributions could be made in both a primary and a general election, but there was no comparable allowance for independent expenditures. The Court upheld limits on contributions because of the potential for their creating the appearance of corruption on the part of recipient. The Court claimed that independent expenditures are different from direct contributions in that they will have no impact on the level of appreciation that a candidate may have toward the independent spender. One need not fully accept that claim to agree that independent spending limits of half what a contributor could do make no sense and cannot be sustained under the First Amendment. Second, the independent limit applied even if the donor made no direct contributions, suggesting that they were identical in impact to direct contributions, or even worse because they could be made only for a primary or a general election, but not both, unlike direct contributions. Third, the $1000 limit applied to races for president as well as the House of Representatives, even though the impact in those two contexts would be very different. Thus, the Court could simply have said that $1000 for all elections was unreasonably low, and Congress could have decided how to respond, including imposing higher limits that might have been upheld.

However, the Court did more: it not only said the $1000 limit was too low, but it announced a blanket rule that *no* limits on independent spending would ever be acceptable. Not only was such a broad rule unnecessary to decide the case before it, but it was terribly unwise. The basic issue in *Buckley* was whether the spending of money in elections was subject to the First Amendment. While there were decisions of the Court that bore on the question, FECA, as amended in 1974, was the first comprehensive federal system for regulating campaign finance activities, and thus the Court was entering uncharted First Amendment waters. Until FECA, there was no ban on cash contributions, no disclosure or reporting requirements, no limits on spending, and no agency to manage the new system.[17]

[17] A ban on contributions by corporations had existed since 1906, followed by a ban applicable to government contractors enacted in 1940. The 1906 law was expanded in 1947 to forbid union contributions and independent expenditures by both unions and corporations, but no overall challenges had been made to those laws. There had been a limit on contributions to candidates of $5000 since 1940, but it was essentially a dead letter because there was no means to enforce it. Further, while the 1939 Hatch Act broadly regulated what federal, and then certain state, employees could do politically, the Act never prohibited those employees from making political contributions, although it did impose some restrictions on making contributions akin to time, place, and manner regulations.

When the Court decided *Buckley*, there was no record of how a new system like FECA, as substantially modified by *Buckley*, might operate in practice, let alone how the rules on contributions and independent expenditures would play out for supporters (or opponents) of a particular candidate. The case was briefed and argued on an expedited basis so that the rules could be known for the upcoming 1976 elections. The Court's lengthy opinion, covering a multitude of issues, was handed down less than three months after argument. For all those reasons (and perhaps more), the Court should have proceeded cautiously, deciding only what it had to decide, and leaving broader pronouncements on the relation between campaign spending and the First Amendment to another day.

To be sure, deciding which limits on independent expenditures were unreasonable would not be easy. However, the Court has shown that it is able to decide when a state has been too strict.[18] For starters, if an individual can give $5000 to a broad-based PAC, which in turn can give that amount to candidates, $5000 would surely be the lowest possible limit on independent expenditures that could be sustained. Perhaps a more generous number, such as the $32,000 now allowed to be given to national parties, would be more reasonable. Even permitting an amount equal to the aggregate limit of $123,200 at issue in *McCutcheon* would not cause the kind of massive imbalance between what the very few can afford and what the rest of the country can spend. Moreover, if there were a reasonable cap on independent expenditures, there might never have been a *Citizens United*, and at least business corporations could be held to that level, which would be a significant improvement over the current rule. Indeed, if Congress had originally enacted more reasonable independent expenditure ceilings, it is not at all clear that they would have been challenged by anyone, just as the contributions limits for federal candidates have not been tested since *Buckley*, in part because the contribution limits were raised substantially in 2003 and are now indexed for inflation.

The main reason that the Court did not take a narrow approach in striking down the $1000 limit on independent expenditures is that the proponents of the law relied on a quite different rationale for defending it. As both the Government and the intervenors saw it, independent expenditures on behalf of a candidate were no different from direct contributions. Thus, to allow more than $1000 would, in their view, result in a wholesale evasion of the basic candidate contribution limits, even if the expenditures were made truly independently of the candidate. Under that approach, even a $5000 ceiling on independent expenditures would be unacceptable, although surely less so than no limit at all.

Moreover, the independent expenditure limit was part of a larger goal of the supporters of FECA: to limit the total amount of money spent in federal elections. To achieve that goal, the law included both contribution and expenditure limits, with the most significant being the cap on how much candidates could spend in their own election races. Congress had enacted detailed spending limits for congressional races, largely based on population, in which it decided how much was "enough" to spend. The clearest example of what Congress sought to achieve involved presidential elections, where Congress actually *reduced* the amount that could be spent from what had been spent in 1972, to $10 million in the primaries and $20 million in the general election. According to Congress, there was already too much money being spent in federal elections, and independent expenditures had to be capped at quite low levels or its new system would be thoroughly undermined. In effect, having set the goal at capping spending regardless of

[18] *See e.g.* Randall v. Sorell, 548 U.S. 230 (2006) (setting aside the contribution limits as unreasonably low).

the source, the supporters were boxed in and could not argue that, even if $1000 might be too low for an independent expenditure cap, Congress should be given a chance to come up with a more acceptable number.

Not only did Congress wish to reverse the overall spending in federal elections, but it was also clear in its desire to put a ceiling on how much any individual could spend. The principal stated justification for candidate contribution limits was to reach beyond laws forbidding bribery and enact limits that would avoid the appearance of corruption that arose when large donations to candidates appeared to buy favors or preferred access. However, Congress also set a limit of $50,000 on what a candidate and his immediate family could donate to the candidate's own campaign. The *Buckley* Court quite sensibly rejected an anti-corruption rationale for that limit because a candidate cannot corrupt himself by giving his own or his immediate family's money to his campaign. Moreover, the fact that this limit was part of a law that placed overall limits on campaign spending by candidates made its defense even more difficult.

C. Aggregate Limits, Then and Now

Given the outcomes of these other challenges in *Buckley*, what is most surprising is that the aggregate limits provision was sustained at all. Not only was it part of a plan to place overall limits on spending in federal elections, but the anti-circumvention rationale that the Court accepted was never advanced in the briefs or legislative history. Indeed, the principal loophole that the Court said was being plugged – the absence of a limit on individual contributions to political parties – seems to have been an oversight that Congress repaired soon thereafter. Thus, even though the aggregate limits in 2014 were more than five times what they were in 1976, they were almost impossible to defend because the main loophole had already been closed. For these reasons, it is hard to quarrel with Chief Justice Roberts's conclusion in *McCutcheon* that the aggregate limits do not prevent circumvention of the contribution limitations laws, which are the only limits that the Court has upheld. Moreover, because the *Buckley* Court had ruled that spending (as opposed to contributing) by individuals cannot be capped, the true goal of aggregate limits is out-of-bounds and thus an anti-circumvention rationale cannot save them.

For those reasons, the loss of aggregate limits was surely not unexpected and is also not likely to make the current situation much worse. The Center for Responsive Politics said that it could identify only 646 individuals who maxed out in the 2012 election cycle, when the limit was $117,000, but who still managed to contribute about $94.6 million in federal races.[19] Thus, it is not clear how many will be in a position, let alone willing, to give appreciably more money in any election cycle than they could pre-*McCutcheon*. Even with aggregate limits, the spending spicket was not turned off because independent expenditures were not capped. That is true whether the expenditure was directly made by the supporter, or made to a PAC which only made independent expenditures. Indeed, to the extent that lifting the aggregate limits may free up money to go to political parties (which may be one reason why the Republican Party sued along with Mr. McCutcheon), instead of to independent committees, parties are generally regarded as more responsible and less likely to engage in negative and sometimes factually erroneous advertising.

[19] *See* Bob Biersack, McCutcheon's *Multiplying Effect: Why An Overall Limit Matters*, OPEN SECRETS (Sept. 17, 2013), http://www.opensecrets.org/news/2013/09/mccutcheons-multiplying-effect-why/.

All of this discussion leads to two conclusions regarding the Chief Justice's decision in *McCutcheon.* First, while perhaps not literally compelled by prior rulings, *McCutcheon* applied them faithfully and had to take only a very small step in order to conclude that anti-circumvention required a far closer fit to justify the aggregate limits than the series of complicated and unlikely-to-occur events that the dissent postulated. Second, while increasing to some degree the amount of money that will be spent on federal elections, the change is not likely to be significant, either for the donor or for the system as a whole, especially when compared to the impact of earlier rulings. It is these prior rulings, however, that sowed the seeds for the current system, and it is Justice Breyer's dissent in *McCutcheon*, combined with the dissent of Justice Stevens in *Citizens United*, that show how the Court should have ruled.

IV. Breyer is Right on the Fundamental Issue

As I have tried to show, *McCutcheon* is a very small and almost certainly inevitable step from the Court's recent campaign finance decisions. More important, those decisions, such as *Citizens United* and *Arizona Tribal Council*, are the end product of the portion of *Buckley* concluding that *any* limit on independent spending by individuals violates the First Amendment, which, according to the majority of the current Court, privileges the right to spend money in elections over all other values. That conclusion follows from *Citizens United*, where the Court overruled *Austin v. Michigan Chamber of Commerce* and found free speech, in the form of unlimited spending by corporate speakers, trumped all other considerations.[20] Thus, if any change is to come in our campaign finance laws, the Court must re-consider the *Buckley* holding that all limits on individual expenditures violate the First Amendment.

For the reasons I gave above, I do not take issue with the conclusion that a limit of $1000 on independent expenditures by individuals is unconstitutional because that figure is unreasonably low. But suppose the number in 1976 was $1,000,000: would, or should, the result be the same, and if not, why not? I leave aside the question of whether anyone would have wanted to bring such a challenge, or would have had standing to do so, at a time when total spending by individuals, mainly in the form of contributions before the current rules were in place, was only a tiny fraction of what it is today. As I now explain, if Congress were to set reasonable limits on independent expenditures, they should be upheld because other interests our society values to sustain our democracy must be taken into account alongside the First Amendment and are sufficient to support such limits on the biggest spenders today. [21]

A. The Stevens and Breyer Dissents

The heart of this argument is contained in the dissents of Justice Stevens in *Citizens United* and Justice Breyer in *McCutcheon* and consists of two prongs: (1) the majority has defined corruption too narrowly, and (2) however corruption is defined, there are other

[20] Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

[21] Perhaps the easiest way to see how spending by the largest donors has exploded since the days before FECA is to look at what the biggest donors spent then and now. When FECA was enacted, Stuart Mott was the example of excess spending on the Democratic side. He gave $350,000 to George McGovern's Presidential campaign in 1972, plus $50,000 in personal expenses. W. Clement Stone on the Republican side gave more than $2 million to Richard Nixon in 1972. In today's dollars, those would be about $1 million and $11 million. In 2012 Sheldon Adelson spent about $150 million on federal elections, while David and Charles Koch are reportedly planning on spending $300 million in the 2014 election cycle to support Republican campaigns, and Tom Steyer is planning on spending $100 million, mainly to support candidates who support action to deal with climate change.

constitutionally permissible reasons supporting campaign finance regulation that the majority has simply discarded in favor of unlimited expenditures. As to the proper meaning of corruption, Justice Stevens observed:

> Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf. Corruption operates along a spectrum, and the majority's apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics.[22]

In response to the majority's objection that there were no examples of dollars exchanged for votes, Justice Stevens rejoined that it "would have been quite remarkable if Congress had created a record detailing such behavior by its own Members. Proving that a specific vote was exchanged for a specific expenditure has always been next to impossible: Elected officials have diverse motivations, and no one will acknowledge that he sold a vote."[23]

For further support, Justice Stevens went to the trial record in *McConnell v. FEC*[24] and in particular to the findings of the district court which provided "a remarkable testament to the energy and ingenuity with which corporations, unions, lobbyists, and politicians may go about scratching each other's backs."[25] He then quoted extensively from those findings which established the close relation between the makers of independent expenditures and those candidates that the expenditures sought to assist. Those findings included routinely notifying candidates when ads were run, with Members expressing appreciation for those ads, in particular "when negative issue advertisements are run by these organizations, leaving the candidates free to run positive advertisements and be seen as 'above the fray.'"[26] Those findings also showed "that Members suggest that corporations or individuals make donations to interest groups with the understanding that the money contributed to these groups will assist the Member in a campaign [and that] [a]fter the election, these organizations often seek credit for their support."[27] His conclusion best sums up the illogical narrowness of the majority's understanding of abuses of the election process:

> Many of the relationships of dependency found by Judge Kollar-Kotelly seemed to have a *quid pro quo* basis, but other arrangements were more subtle. Her analysis shows the great difficulty in delimiting the precise scope of the *quid pro quo* category, as well as the adverse consequences that *all* such arrangements may have. There are threats of corruption that are far more destructive to a democratic society than the odd bribe. Yet the majority's understanding of corruption would leave lawmakers impotent to address all but the most discrete abuses.[28]

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[22] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 447-48 (2010).
[23] *Id.* at 455.
[24] McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).
[25] *Citizens United*, 558 U.S. at 448 (Stevens, J., concurring in part and dissenting in part) (citing *McConnell*, 540 U.S. 93 (2003)).
[26] *Id.*
[27] *Id.* at 449.
[28] *Id.*

In *McCutcheon*, Justice Breyer similarly objected to the limited reach of the majority's view of corruption as confined to quid pro quo corruption, which he understood the majority to have defined "to mean no more than 'a direct exchange of an official act for money' [and which] does *not* include efforts to garner influence over or access to elected officials or political parties."[29] He then argued:

> [T]he anticorruption interest that drives Congress to regulate campaign contributions is a far broader, more important interest than the plurality acknowledges. It is an interest in maintaining the integrity of our public governmental institutions. And it is an interest rooted in the Constitution and in the First Amendment itself.[30]

Justice Breyer put it this way in explaining why excessive spending of any kind is a form of corruption not protected by the First Amendment:

> It derails the essential speech-to-government-action tie. Where enough money calls the tune, the general public will not be heard. Insofar as corruption cuts the link between political thought and political action, a free marketplace of political ideas loses its point.[31]

Furthermore, according to Justice Breyer, the majority's cramped understanding of the meaning of the appearance of corruption made "matters worse [by leading] the public to believe that its efforts to communicate with its representatives or to help sway public opinion have little purpose. And a cynical public can lose interest in political participation altogether."[32] In his view, this broader meaning of corruption is rooted in the First Amendment and these laws are a

> constitutional effort to create a democracy responsive to the people—a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects. Given that end, we can and should understand campaign finance laws as resting upon a broader and more significant constitutional rationale than the plurality's limited definition of "corruption" suggests.[33]

Because *McCutcheon* was a case about contributions, not independent expenditures, Justice Breyer did not discuss other factors besides corruption that would support campaign finance regulation, whereas Justice Stevens did so in his dissent in *Citizens United.* Thus, Justice Stevens noted that the Court had previously expressed

> a concern to *facilitate* First Amendment values by preserving some breathing room around the electoral "marketplace" of ideas, the marketplace in which the

[29] *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1446 (2014) (Breyer, J., dissenting) (internal quotations omitted).
[30] *Id.* at 1466-67.
[31] *Id.* at 1467.
[32] *Id.* at 1468.
[33] *Id.*

> actual people of this Nation determine how they will govern themselves. The majority seems oblivious to the simple truth that laws [limiting independent expenditures] do not merely pit the anticorruption interest against the First Amendment, but also pit competing First Amendment values against each other.[34]

His conclusion, although directed at corporations, is equally applicable to wealthy individuals like Shaun McCutcheon. Whether they are using their great wealth to directly fund candidates, political parties, or unaffiliated PACs that make direct contributions, or they are spending their money by making independent expenditures on their own, or donating to committees that make the expenditures for their supporters,

> At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.[35]

B. Case Authority Supporting Restrictions on Speech in Furtherance of Other Values

There is significant Supreme Court authority to support the argument that massive independent expenditures can produce serious negative consequences and that, therefore, granting them total First Amendment immunity is misplaced. In *Caperton v. A.T. Massey Coal Co*,[36] the Court held, 5-4, in an opinion by Justice Kennedy, that there was a due process violation arising from a litigant's massive financial support – mainly through independent expenditures – for the election of a judge on the West Virginia Supreme Court.[37] Specifically, a vote for the donor in a case pending at the time of the election was decisive in reversing a judgment against that donor. Despite what everyone seemed to recognize to be inappropriate influence on a pending case, the breadth of the opinion in *Buckley* presented a clear bar to laws limiting independent expenditures, even for judicial elections, which were never considered by the Court in *Buckley*.[38] The only option at the time of *Caperton* was an after-the-fact due process

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[34] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 473 (2010) (Stevens, J., concurring in part and dissenting in part) (emphasis in original internal citations omitted).

[35] *Id.* at 479.

[36] Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).

[37] The dissent, written by Chief Justice Roberts, did not disagree that the donor had exerted improper influence, but disagreed that the conduct violated the Due Process Clause, or that the federal courts could draw sensible lines in this area.

[38] For well over a century, most states have conducted elections for some or all of their judges, but it is only in recent years that the amounts of money raised for those elections, both direct contributions and more recently independent expenditures, have become significant. *See generally*, Alicia Bannon, Eric Velasco, Linda Casey, Lianna Reagan, *The New Politics of Judicial Elections, 2011-2012: How New Waves of Special Interests Spending Raised the Stakes for Fair Courts*, THE BRENNAN CENTER FOR JUSTICE (2013), http://newpoliticsreport.org/content/uploads/JAS-NewPolitics2012-Online.pdf. *See also*, Joanna Shepard, *Justice At Risk: An Empirical Study of Campaign Contributions and Judicial Decisions*, THE AMERICAN CONSTITUTION SOCIETY (June 2013), http://www.acslaw.org/ACS%20Justice%20at%20Risk%20%28FINAL%29%206_10_13.pdf. As harmful as unlimited independent expenditures are in elections for legislatures and executive branch officials at

claim in circumstances that cried out for modest prophylactic rules that would prevent such conduct before it occurred. Justice Stevens fully appreciated this point in his *Citizens United* dissent.[39] However, the majority, without further explanation, simply rejected the notion that there was any connection between a due process violation stemming from independent expenditures and the constitutionality of a law designed to limit those expenditures before they occurred.[40]

There is also case law substantiating the argument that the First Amendment does not always trump all other interests in campaign finance cases. Recently, the Court upheld the law that bans all contributions and independent expenditures from individuals who are neither U.S. citizens nor permanent resident aliens.[41] The plaintiffs were a lawyer and a doctor from Canada and Israel, who were lawfully in the United States under three-year work visas, and there could be no doubt that the modest amounts of money that they wanted to spend came from their own lawful earnings in this country. Because of the broad definition of expenditure, the law banned even yard signs, candidate buttons, or letters of support – if the individual paid money to acquire them. The lower court upheld the law under Congress' power over aliens, and the Supreme Court decided that the decision was so plainly right that it did not need further briefing and oral argument. Surely, if that same law had also forbidden the plaintiffs from speaking out against the President in Lafayette Park, no one would have claimed that the law could be upheld just because the speaker was not a U.S. citizen. I would have come out the other way on the merits in *Bluman*, but the point of the case, at a minimum, is that the First Amendment does not automatically trump all other interests when the law involves spending money for contributions or independent expenditures.[42]

Another line of cases provides further support for the argument that the First Amendment should not always prevail over all other interests. The cases are factually distinguishable from the campaign finance context, and are at best analogies, but they do undermine the absoluteness that *Buckley* and *Citizens United* conveyed. Perhaps the most significant case holding that political speech does not trump all other values is *Burson v. Freeman*.[43] The Court there stated the question presented as follows: "Whether a provision of the Tennessee Code, which prohibits the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place, violates the First and Fourteenth Amendments." The plaintiffs were passing out materials designed to inform and/or persuade voters, but there was no evidence that they were actually disrupting the election by their activities. Nonetheless, the Court found that other interests, such as the potential for disruption, overrode their First Amendment right to communicate about an election being held that day. For these purposes, the correctness of where the Court struck the balance is irrelevant. Rather, the point is that the Court's holding that

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all levels, they are far more pernicious in judicial elections where the electorate is generally ill-informed about the candidates, and where expenditures that would be considered modest in a race for governor or state Senate can have an outcome-determinative impact. At the very least, given the due process concerns raised by the impact of campaign spending on particular cases in court, the Court should not assume that independent expenditures in judicial races are as benign as the Court assumed for other elections in *Buckley*.

[39] *See Citizens United v. Fed. Election Comm'n*, 558 U. S 310, 458-459 (2010) (Stevens, J., concurring in part and dissenting in part).

[40] *See id.* at 360 (majority opinion).

[41] Bluman v. Fed. Election Comm'n, 132 S. Ct. 1087 (2012), *summarily aff'd* 800 F. Supp.2d 281 (D.D.C. 2011).

[42] Disclosure: I was an informal adviser to the lawyers for the plaintiffs in *Bluman*.

[43] *Burson v. Freeman*, 504 U.S. 191, 193 (1992).

engaging in election-related speech is not the answer to all questions where the First Amendment is at issue.[44]

Other examples are cases like *Ward v. Rock Against Racism*,[45] in which the Court upheld what it has called "time, place, and manner" restrictions on otherwise fully-protected speech by sustaining a ban on loud speech during certain hours as a means of preserving the quiet enjoyment of one's home. A candidate for office would surely lose a case in which he was accused of violating an ordinance that banned sound trucks from blaring at more than 100 decibels at midnight in a residential neighborhood, despite a claim that he was simply exercising his First Amendment right to support his campaign for elected office. Laws like that are upheld as long as they are content neutral and leave "reasonable" alternative means by which the speaker can get his message to his intended audience. Whether such reasonable alternatives are available, and under whose definition of reasonable, may present difficult questions at the margins, but that has not caused the Court to abandon its decisions sustaining those kinds of limitations.

Then there is *United States v. O'Brien*,[46] where the Court upheld a conviction of a man who burned his draft card in circumstances that everyone agreed constituted a protest against the Vietnam War. The Court concluded that, because the statute served the legitimate goal of assuring that all draft-age men had their draft cards with them at all times, the interference with free speech did not override that purpose. I disagree with the decision on the merits, largely because the asserted interest seemed to be created out of whole cloth, with no basis in the history of the law or in how the draft laws were implemented. But the principle that free speech, even that protesting government action, can sometimes be trumped by other interests, is quite correct and can be used to defend reasonable limits on independent expenditures where those limits advance strong interests in preserving our democracy and in not having those with extreme wealth dominate our political debates.

The *Buckley* ruling rejecting all limits on independent expenditures rests on the theory that any dollar limit imposes a ceiling on the total amount of speech that can be made, but, in a practical sense, so do time, place, and manner rules. There are only 24 hours in a day to speak, and if some times of the day are off limits to a person handing out leaflets door-to-door (such as between 9 p.m. and 9 a.m.), that law places a ceiling on the number of people that the speaker can engage. Or take the sound truck example: many more people will hear my message if I can use a very forceful amplifier, although it is likely to disturb, and perhaps even harm the hearing of, some of those who are close by. Again, the result is an effective cap on speech, but one that is constitutional because our society recognizes other values besides free speech that sometimes outweigh the First Amendment value of such speech, let alone spending that enables such speech to be made by others. If anything, laws regulating how much money can be spent should stand on stronger constitutional footing than the laws in these analogous cases because spending money is not an act of speech itself, but receives First Amendment protection because it enables speech to take place.

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[44] *Burson* was followed in Marlin v. D.C. Bd. of Elections & Ethics, 236 F.3d 716 (D.C. Cir. 2001), *cert denied*, 532 U.S. 1039 (2001), where the plaintiff only wanted to wear a campaign button in the polling place, but the court upheld the law forbidding even that. I assisted the losing plaintiffs in both cases.

[45] *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

[46] *United States v. O'Brien*, 391 U.S. 367 (1968).

Other analogies could be advanced – some closer and others less close than these – but none fit exactly. However, they all identify one principle that does fit this issue exactly: in some situations, even pure political speech may be constitutionally limited by other important societal interests unrelated to speech. Perhaps those who support *Buckley*'s holding on independent expenditures would accept that principle, but conclude that the interests put forth in capping independent expenditures are insufficient to justify any limits whatsoever. That argument might prevail, but it would be quite a different argument than the one that persuaded the Court in *Buckley*. Rather, the argument that persuaded the Court in *Buckley* in effect dismissed as illegitimate any interest other than that of an individual being able to spend as much money as he chooses to make independent expenditures in support of a candidate for elected office.

V. *Buckley* Re-Envisioned

In *Lawrence v. Texas*,[47] Justice Kennedy said the decision in *Bowers v. Hardwick*, "was not correct when it was decided, and it is not correct today."[48] I am less sure that the *Buckley* ruling on independent expenditures was wrong when it was decided, but it is surely wrong today. Perhaps the primary reason for that change is that the amounts of money now being spent were unthinkable in 1976 when the Court approved annual aggregate contribution limits of $25,000. While the extent of the increase in spending in elections is outside the purview of this issue brief, it has been thoroughly documented in other publications.[49]

In arguing that some limits on independent expenditures are constitutional, I do not contend that contributing or spending money in elections is entirely outside the protection of the First Amendment. But the Court has never held, and never should hold, that giving money to a candidate to be used to speak is an activity that the First Amendment wholly precludes from being regulated. Surely, no one, even Justice Thomas, would argue that making a contribution to an elected official with an express agreement that the official will speak on behalf of the contributor, let alone cast a vote in support of a bill or nomination that he favors, whether technically bribery or not, is beyond regulation. The reason is that there are other values in our society besides the freedom to speak, whether through words or through dollars. This is why the Court has upheld reasonable limits on campaign contributions even when they cannot be characterized as bribery or even quid pro quo favoritism.

My principal objection to legislative line-drawing in the area of campaign spending is that, as long as incumbents draw the lines, they will set spending levels to give maximum advantage to themselves at the expense of their challengers. As is true for line drawings used to establish district boundaries for legislative seats, incumbent self-protection is a very forceful incentive. Moreover, even if the ceiling were to be set by a truly neutral body, with the goal of keeping campaign spending to a "reasonable" level, there may be no neutral standards by which the appropriate amount of spending can be determined. In addition, because the circumstances of

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[47] Lawrence v. Texas, 539 U.S. 558 (2003).
[48] *Id.* at 578 (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).
[49] For a recent history of increased spending, *see Total Cost of US Elections (1998-2012)*, OPEN SECRETS, https://www.opensecrets.org/bigpicture/; *see also Total Outside Spending by Election Cycle, Excluding Party Committees*, OPEN SECRETS, https://www.opensecrets.org/outsidespending/cycle_tots.php. For a longer history, *see also* Dave Gilson, *The Crazy Cost of Becoming President, From Lincoln to Obama*, MOTHER JONES (FEB. 20, 2012, 7:00 AM), http://www.motherjones.com/mojo/2012/02/historic-price-cost-presidential-elections. *See also* note 21, *supra.*

each election inevitably differ, a single spending rule is likely to be in error in a fair number of cases, more likely on the low, rather than the high side, when the First Amendment would counsel the opposite result.

Equally important, as long as contribution limits are in place, there is a real world limit to how much any candidate can raise and therefore realistically spend. Put another way, limiting the supply of money by limiting the size of contributions puts an effective limit on spending by most candidates. If some candidates raise much more money than others, that may be because they are more popular than their opponents, which is what elections are supposed to decide. Of course, that theory fits less well with self-funded candidates, but in general voters do not seem to support those whose main financial backing comes from their own personal or family wealth. And if some self-funded candidates do prevail, in part because of how much they have donated to their own campaigns, that does not seem a heavy price to pay to enable individuals who choose to spend their own money to gain elected office to continue to do so, especially when it is spent to get a campaign off the ground to the point where others will support it. Finally, as the Eric Cantor example shows, even when an incumbent raises more than $5 million and his opponent raises only $200,000, money is sometimes not the deciding factor.[50]

The ultimate question that requires re-examination is whether it is correct that any limits on what anyone may spend on independent expenditures in elections violates the First Amendment. My goals here were not to answer that question definitively but rather (1) to identify the unnecessarily broad ruling in *Buckley* on the $1000 limit on independent expenditures in FECA as the source of the current problems that the Court has created in the campaign finance area; (2) to describe in general terms an alternative way to look at the issue; (3) to show that the Court has recognized other countervailing interests in other First Amendment cases, and found some of them strong enough to trump First Amendment interests; and (4) to urge that the Court take those and other interests into account in its rulings on expenditure limitations in future campaign finance cases.

This essay is just the beginning of a journey in which I and others will explore this issue from a perspective not taken by the majority of the Court so far. I have no illusions that the Court – especially the current one – will suddenly realize the error of its ways and change its approach to campaign finance laws and the First Amendment. But change can only come with a re-focus on the causes of the current situation, which means a re-examination of the independent expenditure rationale in *Buckley*, instead of obsessing about *Citizens United* and perhaps now *McCutcheon.* Justice Breyer's dissent is fundamentally right about balancing the First Amendment and other legitimate interests of society, but to get to that point, the Court needs to return to the erroneous part of *Buckley* from which the current decisions inevitably flow.

[50] *See* David A. Fahrenthold, Rosalind S. Helderman, and Jenna Portnoy, *What Went Wrong for Eric Cantor?*, THE WASHINGTON POST (June 11, 2014), http://www.washingtonpost.com/politics/what-went-wrong-for-eric-cantor/2014/06/11/0be7c02c-f180-11e3-914c-1fbd0614e2d4_story.html.