

PARTY-BASED CORRUPTION AND *MCCUTCHEON V. FEC*

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Shaun McCutcheon contributed almost half a million dollars in campaign finance money over the last three years but wanted to contribute still more. In the 2011–2012 election cycle alone, he contributed to sixteen federal candidates, all three national Republican Party committees, and several other political action committees (PACs).¹ Nonetheless, he wanted to contribute money to at least a dozen more candidates and even more to the Republican Party committees. The problem for McCutcheon is that the additional \$100,000 that he wished to donate would have exceeded the federal aggregate contribution limit that capped the total amount an individual could contribute during that federal election cycle at \$117,000.² In a case popularly billed as the next *Citizens United*,³ McCutcheon challenged this aggregate limit under the First Amendment,⁴ and if successful, he and other wealthy individuals will be free to donate almost \$4 million in campaign finance contributions each election cycle.

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¹ See *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 136 (D.D.C. 2012). Of course, all his contributions complied with the base contribution limits that cap the maximum contribution to a candidate and the maximum contribution to a political committee. See 2 U.S.C. § 441a(a)(1) (2012).

² 2 U.S.C. § 441a(a)(3)(B) (2012); Price Index Adjustments for Contribution and Expenditure Limits and Lobbyist Bundling Disclosure Threshold, 76 Fed. Reg. 8368, 8369–70 (Feb. 14, 2011). The aggregate limit is now set at \$123,200 for the 2013–2014 federal election cycle, and comprises aggregate sublimits on contributions to candidates and contributions to political committees. One may not contribute an aggregate total of more than \$48,600 to federal candidates, subject to the individual contribution limit of \$2600 per candidate, during the 2013–2014 cycle, and no more than an aggregate total of \$74,600 to other political committees. The latter aggregate total of \$74,600 itself contains another sublimit of \$48,600 in contributions to committees other than the national party committees. Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013); Press Release, FEC, FEC Announces 2013–2014 Campaign Cycle Contribution Limits (Jan. 30, 2013), http://www.fec.gov/press/press2013/20133001_2013-14ContributionLimits.shtml.

³ See, e.g., Adam Liptak, *Supreme Court Again Weighs Spending Limits in Campaigns*, N.Y. TIMES (Oct. 8, 2013), <http://www.nytimes.com/2013/10/09/us/politics/supreme-court-weighs-campaign-contribution-limits.html>; Trevor Potter, *The Supreme Court Needs to Get Smarter About Politics*, WASH. POST (Oct. 11, 2013), http://www.washingtonpost.com/opinions/the-supreme-court-needs-to-get-smarter-about-politics/2013/10/11/806c9c44-31b7-11e3-8627-c5d7de0a046b_story.html.

⁴ *McCutcheon*, 893 F. Supp. 2d at 137.

The irony in *McCutcheon v. FEC* is that the Supreme Court is likely to strike down all or a substantial part of the aggregate limit without considering a government interest that provides the strongest plausible case for the limit's purpose. Ostensibly, all the litigants seem to agree that the government purpose for the aggregate limit is anti-circumvention of the base contribution limits. That is, the aggregate limit prevents an individual from circumventing the base limit on contributions to a particular candidate by barring the individual from donating large sums to other candidates or political committees who could then funnel those sums back to the original candidate. By capping the total amount an individual can contribute, the aggregate limit indirectly restricts the use of third-party conduits to fund a candidate beyond the base contribution limit. However, this rickety rationale does not capture the larger intuitive appeal of the aggregate limit, nor its most salient anti-corruption purpose.

The bedrock of campaign finance regulation's constitutionality is the government's interest in the prevention of actual and apparent quid pro quo corruption. Traditionally, corruption has been understood as arising between a contributor and a candidate, with only a candidate positioned to offer quids in exchange for money by virtue of the candidate's access to public office. But that myopic understanding of quid pro quo corruption as limited to individual candidates, each isolated from one another, makes little sense given the pervasiveness of political parties in national politics and campaign finance. The major parties today cannot be understood as separate from candidates and officeholders, but are constituted at their core by an alliance of candidates and officeholders who coordinate policymaking and campaign finance. The aggregate limit thus plausibly addresses the risk of quid pro quo corruption, not between the traditional dyad of high-level contributors and candidates, but between those contributors and *political parties*.

Individual candidates and officeholders are hardly independent of each other in any important sense, and the risk of quid pro quo corruption is analytically little different for a cartel of candidates and officeholders than it is for individuals.⁵ The aggregate limit caps the total volume of campaign finance money that a high-level individual contributor can transact with a

⁵ Solicitor General Donald Verrilli captured this intuition, almost in passing, in the following description of party campaign finance during the *McCutcheon* oral argument:

[E]very candidate in the party is going to be affected by [party campaign finance] because every candidate is going to get a slice of the money, and every candidate is going to know that this person who wrote the multimillion dollar check has helped, not only the candidate, but the whole team, and that creates a particular sense of indebtedness.

And, of course, every member of the party . . . every officeholder in the party is likely to be leaned on by the party leadership to deliver legislation to the people who are buttering their bread.

Transcript of Oral Argument at 39–40, *McCutcheon v. FEC*, No. 12-536 (U.S. argued Oct. 8, 2013) [hereinafter *McCutcheon Oral Argument*], available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-536_21o2.pdf.

party or a party-based subgroup, much in the same way that base contribution limits cap the volume of money that the contributor can transact with a specific candidate. Understanding the aggregate limit through this lens as a structural check on party-based, group-level corruption better captures the corruption unease about an individual contributor donating close to \$4 million per federal election cycle and better comports with the constitutional law of campaign finance regulation than the anti-circumvention interest that dominated the *McCutcheon* case.

In truth, the type of group-level quid pro quo corruption that this Essay contemplates is less party corruption than party-based corruption. Substantive capture of an entire major party would be difficult given the sheer scale of the parties and multiplicity of interests they serve. However, the larger point is that politics is mediated pervasively by party linkages—interconnecting individual candidates and officeholders—and these linkages belie an assumption that corruption is conceivable only at the level of the individual candidate. While the traditional notion of quid pro quo corruption imagines only the individual contributor–candidate dyad, candidates and officeholders publicly coordinate in party and subparty blocs on both campaign finance and lawmaking—both sides of the potential corruption ledger.

Of course, this case for the constitutionality of the aggregate limit does not mean the limit is ideal public policy. We might not like its discouragement of contributions to candidates and parties vis-a-vis outside groups like Super PACs.⁶ We might prefer that the aggregate limit be set higher or lower based on what we estimate the risk of group-level corruption. As far as this Essay goes, such considerations are largely legislative matters for Congress to decide. The point is that the Court was not faced with the most intuitive case for the aggregate limit's constitutionality. Even if the Court strikes down the aggregate limit in *McCutcheon*, supporters of new substitute reforms might consider advancing constitutional rationales based on the sort of group-level corruption concerns articulated here, particularly if and when the Court's membership changes again.

I. *MCCUTCHEON* AND ANTI-CIRCUMVENTION

Federal law imposes an aggregate contribution limit on individual contributors in addition to the familiar recipient-specific limits. The recipient-specific contribution limits cap the amount that any individual may donate to a particular recipient—candidate, party, or other political committee—for a single election. The aggregate limit and associated sublimits are less known but cap the total amount that an individual may donate during a single election cycle collectively to all candidates. For the 2013–2014 election cycle, the aggregate limit is \$123,200, with no more

⁶ See *infra* note 42.

than \$48,600 of that limit allocated to candidates and no more than \$74,600 allocated to political parties and other political committees.⁷ The constitutionality of this aggregate limit is the question at bar in *McCutcheon v. FEC*.

The three-judge district court below upheld the aggregate limit based on an anti-circumvention theory.⁸ The court reasoned that the aggregate limit ensured that an individual could not indirectly contribute through a conduit more to a particular recipient than the recipient-specific base contribution limit permits.⁹ The court explained that a contributor could have made a \$500,000 donation to a joint fundraising committee, which might have in turn transferred the full amount to a single party committee.¹⁰ This half-million dollar donation would have exceeded the then-permissible \$30,800 limit applicable to the federal party committees and \$10,000 limit applicable to state and local party committees.¹¹ This type of circumvention is frustrated by an aggregate limit that caps the amount that an individual could give any recipient, therefore confining the total amount of money that could be re-distributed down the line.

The magic of this anti-circumvention theory, according to the limit's supporters, is that it comports with the restrictive definition of corruption that emerged from *Citizens United v. FEC*.¹² The decision in *Citizens United* struck down federal prohibitions on corporate electioneering based largely on its reasoning that only direct contributions from donor to recipient, or otherwise coordinated exchanges, produce the type of transaction that gives rise to a risk of quid pro quo corruption.¹³ Only the risk of quid pro quo corruption, or the appearance thereof, the Court seemed to indicate in *Citizens United*, permits the government to regulate campaign finance under the First Amendment.¹⁴ This conception of quid pro quo corruption connects with the anti-circumvention theory in *McCutcheon*. The anti-circumvention theory, consistent with *Citizens United*, envisions a dyadic relationship of potential corruption between a donor and recipient, which the government may regulate by limiting the amount of money that can be transferred between the two. While base contribution limits cap the amount a contributor can give directly to a single recipient, the aggregate limit constrains the amount a contributor might be able to give to the same recipient indirectly through other conduits.

⁷ See *supra* note 2 and accompanying text.

⁸ *McCutcheon*, 893 F. Supp. 2d at 138–42.

⁹ See *id.* at 140.

¹⁰ *Id.*

¹¹ See *id.*

¹² 558 U.S. 310 (2010).

¹³ See *id.* at 359–61.

¹⁴ See *id.* at 359.

However, at the threshold, the aggregate limit serves this purpose only by prohibiting any further federal candidate and party contributions, regardless of recipient. Of course, the aggregate limit prevents any money beyond the maximum amount from leaking back to candidates for whom a particular donor has already tapped the base limit. But the aggregate limit prevents the donor from giving to other recipients even when there seems no risk of circumvention. The cost of achieving anti-circumvention through the aggregate limit thus imposes some First Amendment costs. As Bob Bauer put it, “Most contributions are made specifically to someone or some entity, and the limit on contributions decreases the risk of corrupting that *particular* someone or entity[,] . . . [while] [t]he overall limit might seem more like a ceiling on spending.”¹⁵ It indiscriminately prevents contributions to candidates and parties beyond the aggregate maximum that otherwise would comply with the applicable base limits, at least for a small group of wealthy donors who otherwise would continue to give.¹⁶ The Center for Responsive Politics found 646 people in the 2012 federal election cycle who tapped the then-current aggregate limit of \$117,000.¹⁷ This group gave a total of \$93.4 million directly to federal candidates and committees.¹⁸ In the absence of an aggregate limit, those donors each would be free to contribute more than \$3.6 million to a major party’s committees and its candidates for a single election cycle by giving the maximum contributions to the party committees and every one of the party’s federal candidates.¹⁹

Supporters of campaign finance regulation subtly touted suppression of campaign spending as a benefit of the aggregate limit, but the constitutional problem is that the bare purpose of capping aggregate spending by individuals extends beyond the conception of quid pro quo corruption articulated in *Citizens United*. The Court there framed quid pro quo corruption as essentially dyadic, between a particular donor and recipient.²⁰ The base limits address the risk of quid pro quo corruption inherent in a contribution by limiting the money involved. This makes sense because the potential for undue influence increases as the amount of money given to a particular recipient increases. However, the aggregate limit prohibits

¹⁵ Bob Bauer, *The McCutcheon Case and the Contribution/Expenditure Limit Problem*, MORE SOFT MONEY HARD L. (Apr. 26, 2013), <http://www.moresoftmoneyhardlaw.com/2013/04/contributions-and-expenditures-in-campaign-finance-jurisprudence>.

¹⁶ See, e.g., Michael S. Kang, *The Year of the Super PAC*, 81 GEO. WASH. L. REV. 1902, 1917–18 (2013) (providing examples of motivated billionaires who financed presidential campaigns with eight-figure commitments).

¹⁷ Bob Biersack, *McCutcheon’s Multiplying Effect: Why an Overall Limit Matters*, OPENSECRETS (Sept. 17, 2013, 11:38 AM), <http://www.opensecrets.org/news/2013/09/mccutcheons-multiplying-effect-why.html>.

¹⁸ *Id.*

¹⁹ See Brief of the Campaign Legal Center et al. as Amici Curiae in Support of Appellee at 6, *McCutcheon v. FEC*, No. 12-536 (U.S. July 25, 2013).

²⁰ See *Citizens United v. FEC*, 558 U.S. 310, 356–61 (2010).

contributions to a recipient at the maximum not because the donor has already given a large amount to that recipient, but because the donor has given a large amount to *other* recipients. Under a dyadic conception of corruption, there is little logic in regulating the relationship between the donor and the recipient through an aggregate limit based on what that donor has transacted with other recipients outside that relationship. For instance, the aggregate limit allows a donor to make seventeen maximum candidate contributions, but does not quite allow an eighteenth that would put the donor over the limit. As Shaun McCutcheon himself argued, it is illogical to assume that the eighteenth candidate would be more likely to be corrupted by a \$2600 contribution than the seventeenth candidate who just legally received the same amount.²¹ It is unclear why, under a dyadic conception of corruption, the earlier contributions under the aggregate limit are permissible, but the later ones that would violate the aggregate limit are not.

Of course, the government's position in *McCutcheon* is that, hypothetically, the donor's eighteenth maximum contribution could wind its way back to the seventeenth recipient, in which case its prohibition does relate to the preceding contributions.²² However, as several Justices expressed during oral argument, this risk of circumvention seems uncertain and empirically unestablished.²³ In the constitutional parlance, aggregate limits may not be sufficiently tailored to the government interest in anti-circumvention. There are other more direct means of regulating circumvention through anti-earmarking and other types of prohibitions that are far from foolproof but lead to less costly overinclusiveness.

II. PARTY CAMPAIGN FINANCE AT THE AGGREGATE LIMIT

The aggregate contribution limit sits uneasily with the traditional candidate-based understanding of quid pro quo corruption, but a party-based understanding of money's influence in politics, grounded in the practice of modern campaign finance, helps clarify the plausible anticorruption purposes of the aggregate limit. Viewed through a party-based understanding of campaign finance, the transacting counterparty for the type of wealthy donor affected by the limit may be one of the major parties or a party-based subgroup as a collective, rather than a particular candidate.

The traditional dyadic conception of the relationship between contributor and candidate almost entirely leaves out the regular role of the major parties in campaign finance. It imagines quid pro quo corruption as a bilateral exchange between the contributor advancing private interest on

²¹ Shaun McCutcheon, Op-Ed., *Donation Caps Hurt Democracy*, POLITICO (Oct. 6, 2013, 9:56 PM), <http://www.politico.com/story/2013/10/mccutcheon-how-campaign-spending-caps-hurt-american-democracy-97834.html>.

²² See Brief for the Appellee at 35–39, *McCutcheon v. FEC*, No. 12-536 (U.S. July 18, 2013).

²³ See, e.g., *McCutcheon Oral Argument*, *supra* note 5, at 35–42.

one hand and the candidate on the other hand. The salience of this scenario is exemplified in the corruption worry in *Caperton v. Massey*.²⁴ There, the Court found a risk of actual bias from Don Blankenship's \$3 million in support of Brent Benjamin's campaign for state supreme court justice.²⁵ The Court focused on what just as well could have been an isolated quid pro quo exchange, actual or perceived, because the corruption worry in constitutional law is limited to just this sort of trade as its core concern. The Court never considered the larger partisan political context, nor would it have been important to the Court's constitutional analysis, but the relationship between Blankenship and Benjamin was mediated by their common Republican Party ties. A long-time Republican operative running Benjamin's campaign introduced the pair and helped orchestrate Blankenship's spending in support of Benjamin.²⁶ Blankenship not only funded Benjamin's candidacy but also sponsored scores of Republican candidates as part of GOP legislative and electoral initiatives to win the state legislature.²⁷

In today's high-level campaign finance, the major parties play an important brokering role in coordinating contributors and candidates. The major parties are pervasively involved in American electoral politics at virtually every level and branch of government. They nominate and help elect candidates to public office who will advance the party's shared agenda. As part of that work, the major parties cultivate and maintain a deep infrastructure of professional fundraisers, campaign finance lawyers, and wealthy supporters who bring to bear modern campaign finance on behalf of the party's candidates.²⁸ The major parties match up campaign finance contributors with their candidates on an ongoing basis more efficiently and effectively than candidates could accomplish individually.²⁹ In my empirical work with Joanna Shepherd, we found that the influence of the major parties is so critical that judicial campaign finance is predictably associated with the preferred outcomes of contributors mainly in partisan elections where the parties play a role and little or not at all in nonpartisan elections.³⁰ High-level campaign finance, particularly at the federal level where the aggregate limit applies, runs through the major parties.

²⁴ *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

²⁵ *See id.* at 2263.

²⁶ *See* LAURENCE LEAMER, *THE PRICE OF JUSTICE: A TRUE STORY OF GREED AND CORRUPTION* 211–13 (2013).

²⁷ *See* Michael S. Kang & Joanna M. Shepherd, *The Partisan Foundations of Judicial Campaign Finance*, 86 S. CAL. L. REV. 1239, 1241–42 (2013).

²⁸ *See* PETER L. FRANCA ET AL., *THE FINANCIERS OF CONGRESSIONAL ELECTIONS: INVESTORS, IDEOLOGUES, AND INTIMATES* (2003); PAUL S. HERRNSON, *CONGRESSIONAL ELECTIONS: CAMPAIGNING AT HOME AND IN WASHINGTON* (5th ed. 2008).

²⁹ *See* Kang & Shepherd, *supra* note 27, at 1241–42; Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 109 (2011).

³⁰ *See* Kang & Shepherd, *supra* note 27, at 1275–85; Kang & Shepherd, *supra* note 29, at 111–19.

The major parties aggressively court and cater to the type of dedicated high-level donor who hits the aggregate contribution limit. The political lives of contributors such as Don Blankenship and Shaun McCutcheon are tied up with their respective major party. The Republican National Committee itself is a co-plaintiff with McCutcheon in his lawsuit, and the very idea for the case appears to have been conceived at the 2012 Conservative Political Action Conference, a Republican gathering in Washington, D.C.³¹ Like Blankenship, McCutcheon is a generous sponsor of the Republican Party and an involved leader in party affairs. He serves as the finance director and member of his county's Republican Party executive committee, is the chairman of a party-allied Super PAC, and was the founding member of the Alabama GOP President's Council, the top tier of a dozen highest donors to the Republican Party.³² As McCutcheon's state party chairman explained, "[McCutcheon] wanted to make a difference, and do whatever it takes to help the party achieve its goal. . . . He never hesitated, whatever we asked him to do."³³

The major parties have mastered the administrative process for receiving and distributing maximum contributions across many party recipients in compliance with the aggregate limit and sublimits. The parties have invested in the development of joint fundraising committees that ease the administrative challenge of legal compliance. These joint fundraising committees enable a sympathetic contributor to write a single check up to the aggregate limit, which the joint fundraising committee then distributes across individual candidates, party committees, and other PACs in compliance with all applicable limits.³⁴ Thus the party can relieve the individual donor of almost all the transaction costs of broad party-based giving to dozens of party-related recipients. The joint fundraising committees associated with the major parties' presidential candidates collected almost \$1 billion together in 2012.³⁵

³¹ Paul Blumenthal, *Next Citizens United? McCutcheon Supreme Court Case Targets Campaign Contribution Limits*, HUFFINGTON POST (July 31, 2013, 2:50 PM), http://www.huffingtonpost.com/2013/07/31/mccutcheon-supreme-court_n_3678555.html.

³² See Kim Chandler, *Hoover Businessman at Center of U.S. Supreme Court Case on Contribution Limits*, AL.COM (Aug. 9, 2013, 12:43 PM), http://blog.al.com/wire/2013/08/hoover_businessman_at_center_o.html; *Shaun McCutcheon*, ALA. REPUBLICAN PARTY (May 23, 2012), <http://algop.org/shaun-mccutcheon>.

³³ See Mary Orndorff Troyan, *Alabama GOP Donor Challenges Limits*, USA TODAY (Aug. 9, 2013), <http://www.usatoday.com/story/news/politics/2013/08/09/alabama-gop-donor-challenges-limits/2634671> (quoting Alabama Republican Party Chairman Bill Armistead).

³⁴ See Paul Blumenthal, *McCutcheon v. FEC's Other Threat: Case Could Super-Size Joint Fundraising Committees*, HUFFINGTON POST (Oct. 7, 2013, 2:33 PM), http://www.huffingtonpost.com/2013/10/07/mccutcheon-joint-fundraising-committees_n_4057547.html.

³⁵ See Ctr. for Responsive Politics, *Joint Fundraising Committees*, OPENSECRETS, <http://www.opensecrets.org/pres12/jfc.php?cycle=2012> (last visited Mar. 12, 2014).

It is precisely the party-based organization of campaign finance at the highest level of giving that worries reformers about the demise of the aggregate limit. The partisan invention of the joint fundraising committees, coupled with high-level donors sympathetic to party centralization of campaign finance, raises the prospect of individual donors giving up to \$3.6 million per federal election cycle in the absence of an aggregate limit.³⁶ This party-centered character of campaign finance at the aggregate limit explains why the briefing and advocacy regarding *McCutcheon* assumes without explanation that the maximum a high-level donor would contribute, in the absence of an aggregate limit, is \$3.6 million. The calculation of the figure includes maximum contributions for all federal candidates of one major party along with maximum contributions to that party's national and state committees. Of course, if a high-level donor was inclined to do so, she could double the \$3.6 million figure by giving equally to both major parties, but no one imagines that a high-level donor would contribute at such levels to both.

Indeed, high-level contributors at the aggregate limit overwhelmingly tend to be coupled faithfully to one of the major parties. The Sunlight Foundation looked at the top 1000 donors for the 2012 federal election, all of whom gave at least \$134,300, and found that only thirty-three of the top 1000 split their money roughly evenly between the major parties.³⁷ In fact, 886 of the 1000 gave at least 90% of their contributions to one party, and 744 gave all their contributions to one party.³⁸ Among contributors who hit the aggregate sublimit for national party committees, nearly all gave 90% or more of their party contributions to one major party.³⁹ What's more, the major parties appear heavily reliant on these high-level donors. The Republican national committees, for instance, took in a third to half of their 2012 contributions from the top 0.01% of the U.S. population who contributed the most federal campaign money.⁴⁰

³⁶ See Scott Lemieux, *McCutcheon, the Next Victory for the 1 Percent*, AM. PROSPECT (Oct. 9, 2013), <http://prospect.org/article/mccutcheon-next-victory-1-percent>.

³⁷ Lee Drutman, *The 1000 Donors Most Likely to Benefit from McCutcheon—and What They Are Most Likely to Do*, SUNLIGHT FOUNDATION (Oct. 2, 2013, 8:00 AM), <http://sunlightfoundation.com/blog/2013/10/02/top1000donors>.

³⁸ *Id.*

³⁹ See Michael Beckel, *Supreme Court 'McCutcheon' Case Could Aid GOP*, CTR. FOR PUBLIC INTEGRITY (Oct. 7, 2013, 5:36 PM), <http://www.publicintegrity.org/2013/10/07/13510/supreme-court-mccutcheon-case-could-aid-gop> (citing a finding by the Center for Responsive Politics that just 2% of contributors capped by the party aggregate sublimit donated money to a combination of national committees representing each party). What is more, seventeen of the top twenty political donors during the first three quarters in 2013 gave exclusively to one party, and all the top twenty donors gave at least 95% of their donations to only one party. Ctr. for Responsive Politics & Sunlight Found., *Most Likely to Exceed: Who's Poised to Double Down Post-McCutcheon*, OPENSECRETS (Jan. 15, 2014, 11:00 AM), <http://www.opensecrets.org/news/2014/01/most-likely-to-exceed-whos-poised-to-double-down-post-mccutcheon.html>.

⁴⁰ See Lee Drutman, *The Political 1% of the 1% in 2012*, SUNLIGHT FOUNDATION (June 24, 2013, 9:00 AM), http://sunlightfoundation.com/blog/2013/06/24/1pct_of_the_1pct.

Without an aggregate limit, the parties' joint fundraising committees could conceivably enable individual donors to write one seven-figure check for their respective party, instead of undertaking the prohibitively difficult exercise of distributing millions in individual contributions, subject to base limits, across hundreds of candidates and committees. The major parties, through their general administrative capacity, enable individual donors to overcome the practical challenges of campaign finance and maximize the partisan advantage from their generosity.

III. PARTY-BASED CORRUPTION

The party-centered practice of campaign finance at, or prospectively beyond, the aggregate limit raises a concern about a slightly different form of quid pro quo corruption than the usual dyadic conception of corruption with a particular candidate. High-level donors at the aggregate limit may effectively transact with the party itself, or at least an important subparty group, as much as they do with any individual candidate or official. These donors intend to support the party's broader efforts beyond any particular person, and the party cultivates these donors as long-term sponsors of the party's or subparty group's agenda across many campaigns, elections, and candidates. Joint fundraising and party committees represent the parties concretely in campaign finance as identifiable legal entities, but a major party extends beyond its legal entities. It coordinates electoral and legislative action along myriad political lines that encompass and transcend those legal entities. Contributors and candidates are likely to be connected by a major party that manages its relationship with important contributors and can carefully track and account for the contributors' generosity and political interests. As a result, high-level donors who bump up against the aggregate limit obtain access to party actors' attention and agendas at the highest level.

The aggregate limit thus serves a sort of base contribution limit to party-based giving by these high-level donors. If one forgets the role of the major parties in campaign finance, it is easy to question why a \$2600 contribution limit to one candidate is more corrupting when it follows similar contributions to other candidates. From a dyadic conception of quid pro quo corruption at the candidate level, one contribution appears unrelated to subsequent ones to different recipients. But in high-level campaign finance among contributors capped by the aggregate limits, maximum contributions across many recipients often are highly related. An individual contributor may not even know all the candidates to whom she has contributed, perhaps through a joint fundraising committee or other party-related mechanism, but she is likely to believe that the contributions advance the party's cause and are recognized by those who run the party across its many manifestations. The aggregate limit therefore caps this maximum amount that an individual contributor can donate to the party's cause per election cycle and addresses the most extreme worries about the

contributor's influence with the party as a result of campaign finance considerations.⁴¹

Once the major parties, or at least cognizable subparty groups, are identified as a transacting counter-party to high-level contributors, the aggregate limit's anti-corruption purpose makes far greater sense. Although a particular candidate may not feel directly indebted to a contributor based on contributions to other candidates, even a major party is likely to be indebted and reliant on a contributor who can donate \$3.6 million per election cycle to the party, its committees, and its candidates.⁴² The aggregate limit and sublimits suppress any corruptive potential for high-level campaign finance at a collective party-based level analogous to the way that base contribution limits suppress the corruptive potential of an individual contribution at the candidate level. The aggregate limit and sublimits recognize that the corruptive potential of a campaign contribution increases with the magnitude of the dollars involved, and therefore bound that magnitude for the relevant contributor-recipient dyad.

The risk of quid pro quo transactions at the collective party-based level is not too difficult to imagine. Indeed, the Rehnquist Court in *McConnell v. FEC* essentially adopted the view that “[t]he idea that large contributions to a national party can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible.”⁴³ In upholding a prohibition on soft money contributions to the national party committees, the Court recognized the “special relationship and unity of interest” between the party and its candidates such that contributions to the party effectively bought access and influence over party candidates.⁴⁴ Although the Roberts Court has distanced itself from this earlier reasoning,⁴⁵ the analysis in *McConnell* and other decisions actually *understates* the risk of quid pro quo corruption in high-level party campaign finance.

⁴¹ An obvious result of striking down the aggregate limit would be an increase in fundraising by candidates and party committees, because at least some high-level donors would contribute more in the limit's absence. A portion of this increase would likely be money redirected from Super PACs and other unconnected committees as a result of a reverse hydraulic redirection of funds in response to deregulation. See Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 41–43 (2012). A shift of money away from independent groups, like Super PACs and other unconnected committees, may be normatively beneficial, as I have suggested in earlier work. See *id.* at 47–52. However, for this Essay I focus on the separate question of whether there is a constitutional ground for the aggregate limit.

⁴² See Justin Levitt, *Symposium: Aggregate Limits and the Fight over Frame*, SCOTUSBLOG (Aug. 16, 2013, 9:57 AM), <http://www.scotusblog.com/2013/08/symposium-aggregate-limits-and-the-fight-over-frame> (“It’s not hard to imagine leaders’ incentive to give special legislative favors for donors willing to give maximal support to *all* of the party’s candidates.”).

⁴³ 540 U.S. 93, 144 (2003).

⁴⁴ See *id.* at 145.

⁴⁵ See Kang, *supra* note 41, at 23–25.

First, in its campaign finance cases, the Court has traditionally viewed the major parties formalistically as separate from their candidates and officeholders. The Court has conceptualized the parties as close but separate partners of their candidates and officeholders, rather than, as they are, composed of and led by their candidates and officeholders. Even as the Court in *FEC v. Colorado Republican Federal Campaign Committee* worried about the role of parties as “a funnel from donors to candidates,” serving as pass-through conduits for money from individuals to candidates,⁴⁶ the Court nonetheless earlier in the same litigation rejected the notion that “the party, in a sense ‘is’ its candidates.”⁴⁷ The Court ruled, for instance, that the party committees’ independent expenditures on behalf of their candidates should be understood as independent from their candidates “no less than . . . the independent expression of individuals, candidates, or other political committees.”⁴⁸ The Court’s formal view of parties as separate from candidates and officeholders is attributable in part to the fact that the framing of the cases demanded distinction between the national party committees’ accounts and candidate accounts as legally, if not politically, defined entities. However, these party committees were centrally composed of and led by candidates and officeholders from their respective parties, as they always are. A conceptualization of formal party entities as removed and independent from the control of their candidates and officeholders, at least in high-level campaign finance, is difficult to maintain. At their heart, the parties are their candidates and officeholders.

Second, flowing from the understanding of the national parties as separate from candidates and officeholders, the Court has understood the risk of corruption in party campaign finance as mainly one of access and circumvention. In *Colorado II*, the Court upheld restrictions on the relevant party committees there as necessary to prevent the “circumventing [of] contribution and coordinated spending limits binding on other political players.”⁴⁹ In *McConnell*, the Court upheld party restrictions to prevent the “national party committees [from] peddling access to federal candidates and officeholders”⁵⁰ Of course, as mere conduits or support groups for candidates and officeholders, the parties could do little more than serve as pass-through conduits for money, or with the benefit of more agency, sell access by virtue of their special association with their candidates and officeholders. What a party cannot do, at least when understood as distinct from its candidates and officeholders, is directly engage in the type of quid pro quo exchange that the Roberts Court takes as the core concern of campaign finance law. A party itself, under this view, wields no

⁴⁶ *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 461 (2001).

⁴⁷ *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado I)*, 518 U.S. 604, 622 (1996).

⁴⁸ *Colorado II*, 533 U.S. at 444 (quoting *Colorado I*, 518 U.S. at 616).

⁴⁹ *See id.* at 455.

⁵⁰ *See McConnell v. FEC*, 540 U.S. 93, 150 (2003).

government authority to sell off. For this reason, the Court's analysis of the government's interest in party-based campaign finance regulation has been limited to concerns about *access* to candidates and officeholders, or about circumvention of campaign finance limits on candidates and officeholders.

As a result of this understanding, the Court has thus far posited that parties sell and trade only access, not lawmaking authority itself. However, if political science teaches us anything about modern politics, it is that officeholders organize themselves into and lead political parties, and that these parties matter in lawmaking.⁵¹ The party enables these sufficiently like-minded officeholders to act in concert and coordinate their legislative activity to their mutual benefit. Every party member knows that each vote or other action dictated by the member's party will not necessarily offer a positive individual payoff, but every member also bets that he or she will benefit over the long run across a full accounting of party votes and actions.⁵² In this context, parties are inextricably connected to candidates and officeholders. These officeholders that constitute the core of the parties do wield lawmaking authority, and hard-money contributions to the parties they control and constitute may pose a similar worry of actual or apparent quid pro quo corruption as contributions to candidates and officeholders themselves.

The parties are therefore composed at their core of a cartel of allied lawmakers who can leverage their collective action and economies of scale in campaign finance. Together these lawmakers develop a campaign finance apparatus and share major contributors. In this effort, they care not simply whether they individually receive any particular contribution, but whether a contribution, wherever it is formally received, benefits the coordinated party effort of which they are an important part. Again, party lawmakers know, in the spirit of mutual benefit, that every contribution and expenditure may not advance the lawmaker's individual interest, but over the entirety of activity, they should benefit both individually over the long run and collectively from the party's advancement.⁵³ A party-based view of the aggregate limit best captures the intuition that allowing an individual to

⁵¹ See generally JOHN H. ALDRICH, *WHY PARTIES?: THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* (1995) (explaining the essential functions of political parties in American politics).

⁵² See generally GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* (2d ed. 2007) (describing parties as just such legislative cartels); ALDRICH, *supra* note 51 (same).

⁵³ There is significant pooling of campaign finance money among candidates and parties. Not only does much of party spending benefit individual candidates, but most congressional officeholders contribute money to their party committees. For instance, among congresspeople in 2012, 170 of 193 Democrats in the House donated to the Democratic Congressional Campaign Committee for a total of \$25.5 million, while 211 of 242 House Republicans donated to the National Republican Congressional Committee for a total of \$44.6 million. Russ Choma, *Supreme Court and Campaign Finance: McCutcheon Chapter*, OPENSECRETS (Oct. 8, 2013, 9:16 PM), <http://www.opensecrets.org/news/2013/10/supreme-court-and-campaign-finance-mccutcheon-chapter.html>.

contribute close to \$4 million in contributions per election cycle might buy something more than the sum of all the individual \$2600 and \$5000 contributions.

As an analytical matter, the risk of corruption is not very different at the group level from the individual level. What can be exchanged between two individuals—contributor and candidate—can be exchanged between a contributor and a group of candidates as well. To illustrate, imagine a club of lawmakers that decides to sell their votes as a bloc, which increases their value. The club aggregates certain contributions and shares significant money to the benefit of the club members, then agrees to vote together as a group as the club dictates. In this case, members should not care whether the money is deposited dyadically from contributors to their individual account, nor will they limit their responsiveness to those contributors who deposited only in their account. Members will care less where the money goes if they are secure that the club will pool the money and spend it to their mutual benefit.⁵⁴ This arrangement to sell votes certainly would constitute quid pro quo corruption, and indeed it is sometimes how actual corruption works.⁵⁵ The reform worry is that a similar type of coordination, albeit less explicit, can take place at the party level if campaign finance law provides the incentive, in the absence of an aggregate limit, of \$3.6 million in contributions from a single individual per election cycle.

This depiction overstates the collectivization of campaign finance through the parties, but far less so with respect to how party fellowship may play out for high-level contributors freed from the aggregate limit. Without a doubt, officeholders and candidates rationally prioritize their personal fundraising that they control exclusively and differentiate between their campaign funds and those of even their dearest, most trusted party allies. But their interest in assisting party allies becomes far more salient with respect to high-level contributors near the aggregate limit, who have already maxed out base contributions directly to them. Specifically, such party officeholders and candidates can receive no more money directly from those contributors but can benefit further if their contributors are willing to invest additional money in their favored party colleagues and institutions.⁵⁶ Once the most generous supporters have maxed out their direct contributions to party leaders and candidates, those leaders and candidates are more than happy to have their supporters give even more money

⁵⁴ See *Colorado II*, 533 U.S. at 453 (“In other words, the party is efficient in generating large sums to spend and in pinpointing effective ways to spend them.”).

⁵⁵ See, e.g., Eliza P. Nagel, Note, *For the People or Despite the People: The Threat of Corporations’ Growing Power Through Citizens United and the Demise of the Honest Services Law*, 63 RUTGERS L. REV. 725, 741–49 (2011) (discussing the Corrupt Bastards Club and *United States v. Weyhrauch*, 548 F.3d 1237 (9th Cir. 2008), *vacated*, 130 S. Ct. 2971 (2010)).

⁵⁶ See, e.g., *McConnell v. FEC*, 540 U.S. 93, 125 (2003) (describing how candidates directed maxed-out contributors to donate money to their respective national party committees and other organizations aligned with their party).

through separate contributions to party committees and fellow candidates. The aggregate limit arguably targets the ability of only a few hundred very high-level contributors who can transact in this way at the wholesale level.

Obviously, there are other differences between party-based quid pro quo and the corruption worry at the level of individual candidates. Party-based quid pro quo corruption implicates no less of the well-recognized theoretical complications for candidate corruption,⁵⁷ and actually even more. At least in theory, an individual candidate may be so reliant on the sponsorship of one contributor—as the Court seemed to think about Justice Benjamin’s relationship with Don Blankenship in *Caperton*—that the risk of actual or apparent corruption is particularly acute. By contrast, a major party aggregates a far greater diversity of interests and constituents, which limits the influence of any specific individual no matter how much money the individual devotes to the party. Parties by definition are broader, larger enterprises than individual candidacies, with a deeper contributor base within which any individual contributor is more likely to be subsumed. It is harder to corrupt even an important subparty group than an individual candidate, both in actuality and appearance.

Party-based quid pro quo corruption also presents greater problems of proof. Inference of a causal relationship between campaign finance contributions and legislative activity by an individual candidate is always difficult. It is even more difficult to infer corruption for a group of allied candidates. The relationship between the aggregation of money across many candidates and party committees and the legislative behavior of a large group of officeholders is difficult to sort out when the quid pro quo exchanges, at least in theory, occur on an unindividuated basis with many players.

Nonetheless, these complications with group-level corruption raise matters for regulatory calibration rather than rendering regulation categorically unconstitutional. Although group-level corruption is as plausible in theory as individual-level corruption, it is harder to achieve across multiple candidates in practice and justifies this lighter regulatory touch as a result. For this reason, the aggregate limit must be set at a very high dollar ceiling to affect only those contributors whose donations would be large enough to motivate their recipients into overcoming the collective action challenges of group-level corruption. In other words, group-level corruption is admittedly less likely in practice than individual-level corruption dollar-for-dollar and demands a much higher threshold before regulation. But this adjustment speaks to regulatory calibration, not the theoretical justifiability of any regulation at all. And it deserves mention

⁵⁷ See generally Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049 (1996) (challenging the empirical and normative premises of campaign finance reform); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663 (1997) (outlining inconsistencies in the conception of quid pro quo corruption).

that group-level corruption presents potentially far higher payoffs for the contributor when it is achieved. A group of candidates and officeholders can offer more attractive quids than they can individually, and thus the regulatory calibration should offset any improbability by the greater potential value of group-level corruption.

Of course, it goes way too far to argue that parties are little more than structures for such coordination between officeholders and their contributors, and that is not at all my claim. As I have argued previously, parties are immensely valuable institutions that organize and advance the ideological policy commitments of their various constituents, from officeholders at the top to average voters at the bottom.⁵⁸ However, the aggregate limit plausibly suppresses the ability of party-based groups to engage in actual and apparent quid pro quo exchanges with the few contributors who have the means and potential interest in these transactions. Not many individuals wish to donate almost \$4 million for a federal election cycle, but the aggregate limit restricts the ability of contributors to wield that sort of leverage through the major parties.

CONCLUSION

Defenders of the aggregate limit style it, consistent with what they view as the demands of First Amendment law, as a check against circumvention of base contribution limits. Along these lines, at oral argument in *McCutcheon*, Chief Justice Roberts sought a solution that served the same anti-circumvention goal without also preventing a contributor from contributing to as many candidates as desired.⁵⁹ He seemed to contemplate the possibility of striking down the aggregate sublimit on candidate contributions while upholding the aggregate sublimits on party committees and other PACs. If party committees and other PACs are the most likely conduits for circumvention, then a contributor might struggle to circumvent the base limits but still remain free to support all the candidates the contributor wants to support.

A problem with this tailored judicial response is that it might not realistically address the risk of party-based, group-level corruption. Anti-circumvention is only one plausible goal of the aggregate limit and too narrowly frames the only relevant relationship in campaign finance as between the contributor and a single candidate. It fails to account for the fact that, at least at the federal level, nearly every candidate and high-level contributor operates within a highly partisan campaign finance ecosystem within which the major parties matter a great deal. A high-level contributor—who contributes heavily to one party and its candidates at the

⁵⁸ See Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131 (2005).

⁵⁹ See *McCutcheon Oral Argument*, *supra* note 5, at 14–15, 29–30, 47–48.

aggregate limit, and beyond it in its absence—effectively may transact not only with individual candidates, but with their party and party-based allies. Both the aggregate limit and base contribution limits plausibly address the risk of corruption by limiting the maximum amount involved in the campaign finance relationship for the relevant dyad.⁶⁰

⁶⁰ This Essay argues that the aggregate limit is best understood practically as a party-based contribution limit, but a useful legislative amendment would be to make the aggregate limit more explicitly a party-based one by capping not simply the total amount contributed, but the total amount contributed to a single party's candidates and committees. Such a party-based aggregate limit would allow further contributions to other parties' candidates and committees, and as a result, allow a greater degree of individual spending and discretion while serving the same purpose. Thanks to Nathan Brenner for this suggestion.