Aggregate Corruption

Michael D. Gilbert
University of Virginia School of Law

Emily Reeder
University of Virginia School of Law

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Aggregate Corruption

Michael D. Gilbert & Emily Reeder

INTRODUCTION

More than a year before the 2016 election, presidential candidates, parties, and outside groups had amassed hundreds of millions of dollars for the campaign. For this, the Supreme Court deserves, depending on one’s perspective, credit or blame. In the last decade, the Court has methodically unwound campaign finance regulations at federal and state levels, opening the door for more money in politics. More money means more political speech and debate, which many people value and which the First Amendment protects. But it also means more corruption or at least a risk thereof. The Supreme Court “draws the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply to limit political speech.” The Roberts Court’s decisions have moved the line in a deregulatory direction.

The Court’s latest decision, McCutcheon v. FEC, remained true to this form. The case addressed federal aggregate contribution limits. While base limits cap the amount of money one can contribute to a candidate, aggregate limits cap the total amount one can give to all candidates. At the time of the case, one could, in a single election cycle, give no more than $5,200 to any individual candidate for federal office and no more than $48,600 to all candidates combined. The Court invalidated the aggregate limits, reasoning that they burdened First Amendment rights and, because they failed to prevent corruption, lacked justification. The key

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1 Michael D. Gilbert is the Sullivan & Cromwell Professor of Law at the University of Virginia School of Law. Emily Reeder is a J.D. candidate at the University of Virginia School of Law. This paper was prepared for a symposium at the University of Kentucky entitled “An Elective Perspective: Judicial Regulation of Politics in an Election Year.” For helpful comments we thank participants at that symposium and Debbie Hellman, Michael Kang, and Dan Ortiz.


5 See id. at 25–27.

6 McCutcheon v. FEC, 134 S. Ct. 1434, 1441 (2014) (plurality opinion).

7 Id. at 1442.

8 Id.

9 Id. at 1442–43.

10 Id. at 1462.
to the case—the Court's conclusion that aggregate limits do not stop corruption—rested on two pillars: (1) if one complies with the base limits, giving no more than $5,200 to any candidate, there is no "cognizable risk of corruption;" and (2) aggregate limits do not "prevent circumvention of the base limits . . . . in any meaningful way."¹¹

Our first objective is to challenge these pillars. Regarding the former, contributions always create a risk of corruption, regardless of size. A contribution of, say, $5,000, probably cannot purchase a vote on important legislation, but it can buy a call to a regulator, a line in a stump speech, a (minor) government contract, or something similar.¹² In short, it can buy favors worth $5,000. Later we will present evidence that this happens. Before McCutcheon, "small-dollar" corruption like this was capped at $48,600 per donor, but now it runs in the millions.¹³

Regarding the second pillar, the Court reasoned that federal laws, other than aggregate limits, prevent circumvention. One cannot, for example, give $5,000 to Candidate Smith and another $5,000 to a political action committee ("PAC") that exclusively supports Smith, thus giving him $10,000 and making an end run around base limits.¹⁴ With circumvention foreclosed, the Court reasoned, aggregate limits cease to serve a purpose.¹⁵ This logic focuses only on formal circumvention—the channeling of actual money in excess of $5,200 to one candidate. The Court failed to consider informal circumvention, or what we call spillover.

To demonstrate, suppose a donor gives $5,200 to a party leader and another $5,200 to a candidate in a tight race, the outcome of which determines which party controls the legislature. Suppose this candidate wins. The contribution not only helped the candidate, it spilled over to help the leader, whose status and power turned on the race. The contributor effectively circumvented the base limits by conveying value in excess of $5,200 to the leader. The loophole-plugging laws that the Court praised in McCutcheon do not address this in any way. Aggregate limits, on the other hand, do; they dampen the spillover effect. Before McCutcheon, a contributor could give $5,200 to the leader and only about nine members of her party.¹⁶ After McCutcheon, a contributor can give $5,200 to that leader and hundreds of members of her party. A contributor who supports many vulnerable

¹¹ See id. at 1452–53.
¹⁴ See McCutcheon, 134 S. Ct. at 1453 ("The primary example of circumvention . . . . envisons an individual donor who contributes the maximum amount under the base limits to a particular candidate . . . . say, Representative Smith. Then the donor also channels 'massive amounts of money' to Smith through a series of contributions to PACs that have stated their intentions to support Smith . . . . Various earmarking and antiproliferation rules disarm this example.").
¹⁵ See id.
¹⁶ See id. at 1448.
and important members of a leader's party—or more mundanely, allies of any particular legislator—conveys more than the face value of a check for $5,200.17

Our second objective is to take these observations and develop general relationships between base limits, aggregate limits, and corruption. The Supreme Court has focused attention on one form of corruption: the quid pro quo.18 Commentators often refer to quid pro quo corruption abstractly, which masks distinctions, two of which are obvious and important: size and frequency. Regarding size, the "quid" in a corrupt exchange may be large, as with a billion-dollar government contract, or small, as with an internship in a politician's office. Regarding frequency, quid pro quos can happen rarely or routinely. We hypothesize that base limits mostly affect size and that aggregate limits mostly affect frequency. Thus, a system with low base limits and no aggregate limits should generate many acts of small-dollar corruption. A system with high base limits and low aggregate limits should generate relatively few acts of corruption, each relatively large in size. The social cost of corruption, and therefore the appropriate weight to attach to the state's anti-corruption interest, depends on both size and frequency. The point, relevant to judges and legal designers alike, is that the optimal balance of speech and corruption almost certainly involves both individual and aggregate limits.

We conclude with a critique of the Supreme Court. McCutcheon and other cases in this line have a persistent feature: the Justices make strong and speculative claims about how the world works. They state that independent expenditures do not cause corruption,19 campaign finance disclosure informs voters,20 and such disclosure prevents corruption.21 Most recently, the Court has stated that aggregate limits do not deter corruption.22 None of this is certain, and a few scratches of the

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18 See, e.g., McCutcheon, 134 S. Ct. at 1441 ("Any regulation must instead target what we have called 'quid pro quo' corruption or its appearance . . . . Campaign finance restrictions that pursue other objectives, we have explained, impermissibly inject the Government 'into the debate over who should govern.'" (citations omitted)); Citizens United v. FEC, 558 U.S. 310, 359 (2010) (explaining the government interest in regulating political speech is limited to preventing quid pro quo corruption, and regulations may not target "generic favoritism or influence theory") (quoting McConnell v. FEC, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part)).

19 Citizens United, 558 U.S. at 357 ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.").

20 See id. at 369 (sustaining disclosure requirements on the basis of the "informational interest").

21 McCutcheon, 134 S. Ct. at 1459 ("[D]isclosure of contributions minimizes the potential for abuse of the campaign finance system . . . . [and] may also 'deter actual corruption and avoid the appearance of corruption.'") (citations omitted).

22 See id. at 1462.
surface deepen our doubt. 23 We understand that courts must make decisions in the face of uncertainty, but we would distinguish some uncertainty in typical cases from deep uncertainty in potentially monumental cases. A careful court would not remake campaign finance law on the basis of five Justices' convictions about speech rights and hunches about corruption.

I. BACKGROUND: CONTRIBUTION LIMITS AND MCCUTCHEON

The Federal Election Campaign Act ("FECA") distinguished two forms of political spending: expenditures and contributions.24 When a person spends money independently—on a radio or newspaper ad, for example—he makes an expenditure.25 When a person gives money directly to a candidate or to a political committee that channels money to candidates, she makes a contribution.26 FECA limited contributions in various ways. The "base" limit capped the amount one could contribute to a given candidate, which, at the time the statute was enacted, equaled $1,000.27 The "aggregate" limit capped the total amount one could contribute to candidates and political committees, like PACs and national party committees, at $25,000.28

In Buckley v. Valeo, the Supreme Court considered the constitutionality of FECA's contribution limits.29 The Court concluded that contributions serve as a symbolic expression of political preferences and a means of political association.30


25 Id. at 39–40. Coordinated expenditures, such as expenditures on a television ad made in consultation with the candidate it supports, count as contributions. See, e.g., id. at 78 (explaining that contributions "include not only contributions made directly or indirectly . . . but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate"). For a discussion of coordination, see Gilbert & Barnes, supra note 23.

26 Buckley, 424 U.S. at 23–24. Technically, the money goes to a candidate's campaign, not a candidate. See id. at 21–22.

27 Id. at 13.

28 Id.

29 Id. at 23–24. The Court also considered the constitutionality of expenditure limits, which it struck down, and disclosure requirements, which it upheld. Id. at 14–23, 64–69, 84.

30 Id. at 18–22.
Thus, limits on contributions burden First Amendment rights.\textsuperscript{31} The Court upheld the base limits, however, on the ground that the state has an interest in combating quid pro quo corruption—for example, dollars for votes—and that contribution limits serve that purpose.\textsuperscript{32} The Court also upheld the aggregate limits, though it dedicated only a few sentences to this issue, stating in pertinent part:

The overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate . . . . But this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party.\textsuperscript{33}

This is the anticircumvention rationale.\textsuperscript{34} If a contributor circumvents the base limit, directing more than $1,000 to an individual candidate, the aggregate limit provides a backstop. It places an upper limit on the flow of money from one contributor to one candidate.

By the time of the 2014 election, Congress had raised contribution limits. The base limit stood at $2,600 per election, meaning one could contribute a maximum of $5,200 to a candidate who ran in primary and general elections.\textsuperscript{35} The aggregate limit equaled $48,600 for contributions to candidates and $74,600 for contributions to other political committees.\textsuperscript{36} "All told, an individual [could] contribute up to $123,200 to candidate and noncandidate committees during each two-year election cycle."\textsuperscript{37}

The Supreme Court decided \textit{McCutcheon} against this backdrop. In the 2011–2012 election cycle, Shaun McCutcheon made sixteen contributions to candidates totaling $33,088, and he wanted to make twelve additional contributions of $1,776 each.\textsuperscript{38} In addition, McCutcheon contributed $27,328 to noncandidate political committees and wanted to contribute additional money to others.\textsuperscript{39} However, the aggregate limits forbade those additional contributions.\textsuperscript{40} Looking ahead, McCutcheon claimed that the aggregate limits would prevent him from

\textsuperscript{31} Id. at 21–22 (explaining that although the First Amendment is implicated, the individual limits impose "little direct restraint" on political speech).
\textsuperscript{32} See id. at 27–29.
\textsuperscript{33} Id. at 38.
\textsuperscript{34} McCutcheon v. FEC, 134 S. Ct. 1434, 1447 (2014) (plurality opinion) ("The aggregate limit, on the other hand, was upheld as an anticircumvention measure . . . .").
\textsuperscript{35} Id. at 1442.
\textsuperscript{36} Id. (explaining that although there was a $74,600 aggregate limit, a maximum of $48,600 could go to state and local party committees and PACs).
\textsuperscript{37} Id. at 1443.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
contributing as much as he wished during the next election cycle.\footnote{Id. (explaining that McCutcheon wanted to contribute at least $60,000 to various candidates and $75,000 to non-candidate political committees in the 2013–2014 election cycle).} McCutcheon did not challenge the base limits, claiming only that the aggregate limits violated the First Amendment.\footnote{See id. (explaining that McCutcheon wanted to contribute at least $60,000 to various candidates and $75,000 to non-candidate political committees in the 2013–2014 election cycle).}

As in \textit{Buckley}, the Court agreed that aggregate limits burden contributors' rights of political speech and association.\footnote{Id. at 1448 ("As relevant here, the First Amendment safeguards an individual's right to participate in the public debate through political expression and political association."); id. at 1462–64 (Thomas, J., concurring) (arguing campaign contributions "generate essential political speech" and any attempt to regulate this speech, including aggregate limits, should be subject to strict scrutiny review) (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 412 (2000) (Thomas, J., dissenting)).} Turning to the state's defense, the Court accepted that the government has an interest in preventing quid pro quo corruption and the appearance thereof.\footnote{Id. at 1450 (plurality opinion). \textit{But see} id. at 1466–68 (Breyer, J., dissenting) (arguing that the Government's anticorruption rationale is "rooted in the First Amendment itself").} However, a plurality of the Court perceived a "substantial mismatch" between this objective and "the means selected to achieve it."\footnote{Id. at 1446 (plurality opinion).} In other words, the plurality doubted that the aggregate limits prevented much corruption. This doubt rested on two arguments. First, the plurality reasoned that "Congress's selection of a $5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption."\footnote{Id. at 1452.} As long as one complies with the base limits, channeling no more than $5,200 to any one candidate, corruption is not a worry. Second, the plurality argued that "targeted anticircumvention measures" adopted since \textit{Buckley} ensure compliance with the base limits.\footnote{Id. at 1446. For example, "an antiproliferation rule prohibiting donors from creating or controlling multiple affiliated political committees" was enacted in 1976. \textit{Id.} at 1438. This "forecloses what would otherwise be a particularly easy and effective means of circumventing the limits on contributions to any particular political committee." \textit{Id.} at 1447 (quoting Brief for Appellee at 46, \textit{McCutcheon}, 134 S. Ct. 1434 (No. 12–538), 2013 U.S. S. Ct. Briefs LEXIS 2945).} In short, contributors do not and cannot channel more than $5,200 to a candidate. Thus, aggregate limits represent a "prophylaxis-upon-prophylaxis approach" that burdens speech without preventing corruption, and the Court struck them down.\footnote{Id. at 1458.}

We think the plurality is wrong on both counts. Before explaining why, a pair of clarifications merit attention. First, the plurality and dissent battled over the effectiveness of those targeted anticircumvention measures. The plurality concluded that they work, the dissent claimed otherwise, and their disagreement implicated FEC enforcement practices, earmarking rules, joint fundraising committees, and
other details. Our points hold regardless of which side has the better argument, so we do not delve into that complicated debate. Second, several writers have challenged the Court's contention that states have an interest in preventing only one form of corruption, quid pro quos, and the appearance thereof. They claim that different and easier-to-prove forms of corruption do and should justify limits on money in politics. Our points hold whatever the definition of corruption, so we simply accept the Court's view—which is, of course, the controlling one.

II. SMALL-DOLLAR CORRUPTION

Suppose a buyer and seller negotiate over a used car. Their price will depend on the value each party places on the car. If the buyer values it highly, perhaps because he covets this make and model, the seller can demand a high price. Likewise, if the seller values it highly—she inherited the car from a favorite uncle—she will demand a high price. To generalize, the price of a good or service depends on the parties' go-it-alone values, that is, their respective benefits from not transacting. If the seller loves the car, so the benefit of keeping it instead of transacting with the buyer is high, then she will demand a lot, and vice versa.

These ideas are not limited to the market for used cars. They apply to exchanges involving toothpaste, tractors, and, importantly, political favors. Politicians spend a lot of time on legislation: drafting, debating, amending, and voting. Like a seller who loves her car, politicians sometimes love legislating, and when they do, corruption costs a lot. A congressman of deep conviction who opposes the Affordable Care Act, for example, will relish voting against it. Buying his vote on that Act would cost an enormous sum. Likewise, a congresswoman who made an election promise to support the Act would demand a high price to change her mind.

In addition to legislating, politicians oversee the federal bureaucracy, make speeches, meet with business and community leaders, give tours to constituents, attend charity events, hire staff, and engage in other activities. In all settings, these ideas apply. A politician who served in the armed forces may speak at Arlington National Cemetery every Memorial Day, no matter the other demands on her time, and getting her to change course would cost a fortune.

49 Compare id. at 1447 (pointing to several FEC regulations that limit political committee contributions and prevent a donor who has maxed-out a candidate from contributing to a committee that only supports that candidate), with id. at 1475–78 (Breyer, J., dissenting) (arguing these regulations do not prevent circumvention of the individual limits because of difficulties in enforcement, relative ease of creating PACs, and potential for circumvention via multi-candidate committees). See id. at 1475–77 (Breyer, J., dissenting) (identifying numerous legal issues implicated by the Justices' disagreement on targeted anticircumvention measures).

50 See sources cited supra note 23.

51 This is a basic tenet of bargaining theory. See, e.g., ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 74–76 (6th ed. 2011).
What if politicians do not place a high value on staying the course? What if the benefit of not transacting—acting non-corruptly—is low? An incumbent in a close race may not care about the search for a new staffer. She may tune in to a hearing involving the Environmental Protection Agency but ignore happenings at the Defense Logistics Agency. A congressman from Alaska may care a little, but no more, about public works in the Gulf of Mexico because her constituents are indifferent. In cases like these, prices fall. Corruption is cheap.

Now relate these ideas to contribution limits. At the time of McCutcheon, base limits stood at $5,200 per election cycle.\(^2\) Buying a vote on the Affordable Care Act would cost a lot more than $5,200, so lawful contributions would be insufficient for that corrupt deal. One might need a briefcase full of cash. But what about buying an internship in the embattled congresswoman’s office? Or buying a call from her chief of staff to the Defense Logistics Agency? How about getting Alaska’s representative to speak against the public works plan in the Gulf? The owner of a valueless car will sell it for a song, and politicians with power over issues they do not care about will sell influence at a discount. Such influence can be bought for $5,200 or less. Simply put, lawful contributions can buy corruption.\(^3\)

Evidence of this relationship abounds. In a recent paper, Professor Usha Rodrigues convincingly argues that lawful contributions bought favors involving securities laws.\(^4\) One congressman was scrutinized after procuring $6 million in government contracts for a firm whose executives had lawfully contributed $17,500

\(^2\) McCutcheon, 134 S. Ct. at 1442.

\(^3\) In her valuable article, Professor Usha R. Rodrigues makes a similar point:

If a politician is campaigning on gun rights and has considerable NRA support, a mere $5200 donation is not going to tempt her to deviate from that position. But on laws regarding issues to which most politicians, their constituents and the general public are relatively indifferent—like securities regulation, particularly in a time where no scandal has rendered the issue salient—the price of legislator mind-changing is likely to be much lower. And if legislators have no clear prior preference on the question . . . then $5200 could go a long way indeed.

Rodrigues, supra note 12, at 88. We develop and generalize Rodrigues’s point by resting it on bargaining theory, which provides a firmer foundation. We need not borrow from the psychology literature on reciprocity, which we find complicated and not entirely consistent, to show why contributions can buy favors. See id. at 76–78 (using studies on reciprocity to argue that even small contributions can lead to favors). Likewise, we need not tie the argument to transparency and disclosure. See id. at 95 (suggesting that contributions can only buy favors when the public is not paying attention). This matters because the relationship between disclosure and corruption is uncertain. See generally Gilbert & Aiken, supra note 23 (explaining how disclosure can exacerbate corruption). Regardless of psychology and disclosure, the price of corruption will fall when politicians’ threat values—that is, the payoffs they earn by not transacting—fall.

\(^4\) See Rodrigues, supra note 12, at 56–63.
to his campaign.\textsuperscript{55} Another congressman switched positions on a "billboard owners compensation" law after receiving lawful contributions of around $12,000 from the billboard industry.\textsuperscript{56} Former Congressman Michael Barnes recounts conversations with lobbyists who would remind him that the "next round of checks" was coming before asking if he had been "following" an upcoming bill.\textsuperscript{57}

Moving to state government, Arkansas County Judge James Hesterly pled guilty to awarding a nearly $70,000 government contract in exchange for a $4,000 campaign contribution.\textsuperscript{58} North Carolina Governor Pat McCrory intervened on behalf of a donor, Graeme Keith, to secure renewal of a prison maintenance contract.\textsuperscript{59} At a meeting with McCrory and prison officials, Keith asserted he had "given a lot of money to candidates running for public office and it was now time for him to get something in return."\textsuperscript{60} The examples continue.\textsuperscript{61}


\textsuperscript{57} Id. at 100.


\textsuperscript{60} Id. (reporting on a memorandum written by the North Carolina Department of Public Safety that details the meeting); see also Memorandum from N.C. Dept. of Pub. Safety, Summary of Meeting with Keith Corporation (Oct. 28, 2014), http://media2.newsobserver.com/static/content/multimedia/interactive/prison/prison-summary.pdf.

\textsuperscript{61} For instance, former Arkansas Circuit Judge Mike Maggio reduced the judgment against a nursing home from $5.2 million to $1 million after receiving campaign contributions from stockholders and industry lobbyists. Benjamin Hardy & Max Brantley, Mike Maggio Pleads Guilty to Federal Bribery Charge, ARK. TIMES: ARK. BLOG (Jan. 9, 2015, 1:34 PM), http://www.arktimes.com/ArkansasBlog/archives/2015/01/09/mike-maggio-pleads-guilty-to-federal-bribery-charge. Maggio pled guilty to federal bribery charges. Id. Utah's former attorney general allegedly told attendees at a fundraiser that he would help them if their businesses were scrutinized by the Utah Consumer Protection Bureau. Information at ¶ 50–52, State v. Shurtleff, No. 141907720 (Utah D. Ct. July 15, 2014) (DAO No. 14012686), http://www.scribd.com/doc/233985136/Charges-against-former-Utah-AG-Mark-Shurtleff. An attendee was also told that he would be notified ahead of time if any complaints were registered about his business. Id. A special commission in Massachusetts discovered a close correlation between legal campaign contributors and government contract recipients.

Jerold J. Duquette, \textit{Campaign Finance Reform in the Bay State: Is Cleanliness Really Next to Godliness?}, in \textit{MONEY, POLITICS, AND CAMPAIGN FINANCE REFORM LAW IN THE STATES} 155, 160 (David Schulz ed., 2002). Testimony showed that contractors who contributed to the administration were identified on bidding lists "with a dot or series of dots" and the contractors selected in accordance with these codes. Id. New York Senator Alfonse D'Amato, Chairman of the Senate Subcommittee on Securities, considered legal provisions damaging to an investment company's business. See STERN, supra note 56, at 152. Shortly after the Senator dropped the provisions from his bill, thirty-six executives from that company each donated $500 to his campaign. Id.
The upshot of our analysis is clear: the *McCutcheon* plurality erred in concluding that contributions within base limits do not raise a "cognizable risk of corruption."62 Of course they do. Occasionally it will be big-dollar corruption, meaning the cost to society is high, but often it will be small-dollar corruption. When a congresswoman sells a job in her office or ignores a misstep by a minor agency, society does not suffer terribly, it suffers a tad. But these tads can add up, especially without aggregate limits in place. Before *McCutcheon*, every donor of means could spend $48,600 on small-dollar corruption per election cycle. Now those donors can spend millions.

A final point remains. Technically, the *McCutcheon* plurality did not argue that lawful contributions do not cause corruption. Instead, it argued that Congress does not believe that lawful contributions cause corruption.63 So the problem of small-dollar corruption, one might argue, does not fall on the Justices' feet but rather on Congress. Under this theory, the Court has not erred; it has respected congressional intent.

Suppose the Justices are right that Congress does not believe that contributions of $5,200 create a cognizable risk of corruption.64 That does not end the analysis. Congress might hold that belief because aggregate limits are in place. Put differently, Congress might tolerate the corruption that lawful contributions engender if and only if aggregate limits place a cap on it. Without aggregate limits, Congress might believe that hundreds of contributions of $5,200 from a single donor do, in fact, create a risk of corruption. The opinion does not address this possibility.

III. SPILLOVER

Most contributions involve money, such as checks at fundraisers, and the Supreme Court equates the two. In *McCutcheon*, the plurality wrote that "base limits . . . restrict how much money a donor may contribute to any particular candidate."65 Thirty years earlier, the Court wrote: "Elected officials are influenced to act contrary to their obligations of office by . . . infusions of money into their campaigns."66 In fact, contributions can take non-monetary forms. "[A]nything of value" given to a candidate to influence a federal election counts as a contribution.67 Thus, one can make a contribution by donating office furniture, offering

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63 Id. ("Congress's selection of a $5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption.").

64 We ignore the old but important observation that Congress is an institutional "they," not a sentient "it," and therefore cannot "believe" anything. Cf. Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

65 *McCutcheon*, 134 S. Ct. at 1443 (emphasis added).


67 11 C.F.R. § 100.52(a) (2016).
discounted advertising, paying a campaign’s bill, hosting an extravagant fundraiser,68 or renting a bus at below-market rates.69 In short, the law limits the conveyance of value, of which money is merely one form.

Shifting focus to value reveals a shortcoming of McCutcheon. The plurality claimed that anticircumvention measures prevent any one contributor from conveying a “massive amount of money” to a campaign.70 The dissent disagreed.71 Either way, the debate misses the fact that one can convey value without conveying money.

Consider our earlier example: a donor gives $5,200 to a party leader and the same amount to a candidate in a tight race, with control of the legislature on the line. The donor’s checks stay fixed, but the value the checks convey changes depending on the race. If the candidate wins, the leader’s power and prestige soar—thanks in part to the donor. If the candidate loses, the leader fizzles. This example involves unusually high stakes, but the same idea applies elsewhere. Suppose the donor supports the leader and a half-dozen members of the leader’s party, some in close races and others not. Regardless of the outcomes of the individual races, the donor has increased (at least probabilistically) the leader’s power. The leader’s debt to the donor exceeds the face value of the checks she received.

These ideas are not hypothetical. Contributions from one congressperson to another jumped in recent decades, driven by an “increased awareness among [m]embers of how much is at stake for them in contested elections outside their own districts.”72 Contributions to leadership PACs, which are frequently

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68 See Citizens’ Guide, FED. ELECTION COMM’N, http://www.fec.gov/pages/brochures/citizens.shtml (last updated Jan. 2015). All fundraiser costs, including invitations, food, and beverages, are not regulated as campaign contributions so long as event expenses remain under $1,000 per election or $2,000 on behalf of a political party per year (spouses may each spend up to the limit, so a husband and wife would have a household limit of $2,000 per candidate per election or $4,000 per year for a political party). See id. As soon as a donor crosses these limits, however, all expenses are considered a contribution to the candidate or party committee. See id.


70 McCutcheon, 134 S. Ct. at 1452–53 (quoting Buckley v. Valeo, 424 U.S. 1, 38 (1976)).

71 Id. at 1472 (Breyer, J., dissenting).

controlled by sitting members of Congress, often go to supporting those members’ allies.73

Consider other settings that do not turn on party power. John McCain and Joe Lieberman, who sat on opposing sides of the aisle in the Senate, were friends for years and fellow members of the “Gang of 14,” which negotiated a compromise on judicial nominations.74 Governor Bill Haslam of Tennessee offered financial support to incumbent Republicans facing primary challenges, saying “it does matter who serves and, even within your own party, or within our party, there are some folks who have worked with us a lot better than others.”75 “The Executive Branch, in settings from the governor’s mansion to the Oval Office, benefits when agreeable legislators, regardless of party, remain in office.

To generalize from these examples, lawmakers usually cannot act alone, and thus they benefit when surrounded by others with whom they can compromise and form consensus.76 This means a contributor can convey value to a lawmaker by supporting her—or her allies. Stated another way, contributions come with a

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76 Political scientists have produced a mountain of scholarship on interdependencies among political actors. See, e.g., Justin H. Gross & Justin H. Kirkland, Legislative Networks, in ENCyclopedia OF SOCIAL NETWORKS 484, 485–86 (George A. Barnett, ed., 2011) (“Studies of individual chambers of state legislatures ... found political party to be a strong predictor of relational ties but also identified cross-party friendships as a key component of the legislative process . . . . [S]cholars have focused on using these measures to demonstrate that the network of relationships between legislators has important implications for nearly all of legislative politics.”); Emily Ursula Schilling, Reassessing Legislative Relationships: Capturing Interdependence in Legislative Position Taking and Votes 2–3 (Aug. 2015) (Ph.D. dissertation, Univ. of Iowa), http://ir.uiowa.edu/etd/1899/ (describing research on legislator’s decision-making, which implies “all individual decisions depend on the decisions made by the rest of the legislators” and describes congressional behavior as “relational”). See generally JOHN H. ALDRICH, WHY PARTIES? A SECOND LOOK (2011); SEBASTIÁN M. SAIEGH, RULING BY STATUTE: HOW UNCERTAINTY AND VOTE BUYING SHAPE LAWMAKING (2011); STEVEN S. SMITH, PARTY INFLUENCE IN CONGRESS (2007); Bruce A. Desmarais et al., Measuring Legislative Collaboration: The Senate Press Events Network, 40 SOC. NETWORKS 43 (2015); Justin H. Kirkland, The Relational Determinants of Legislative Outcomes: Strong and Weak Ties Between Legislators, 73 J. POL. 887 (2011).
spillover effect. They directly benefit the recipient, and they indirectly benefit the recipient's allies.\footnote{In recent, valuable work, Professor Kang makes a related point. See Kang, Party-Based Corruption, supra note 17, at 252 (arguing that candidates "care not simply whether they individually receive any particular contribution, but whether a contribution, wherever it is formally received, benefits the coordinated party effort"). See also Kang, Brave New World, supra note 17, at 14 (criticizing the traditional "dyadic framework" that envisions corrupt "individual contributors and individual officeholders pairing off in isolation from the rest of their political world"). Our work complements and generalizes Kang's. He focuses on relationships among members of a party. See id. at 14-37. We generalize by showing that spillovers operate with any set of political allies, regardless of party affiliation. He imagines corrupting multiple actors at once, which raises coordination problems. See id. at 28-29 (describing a "group of officeholders engaging in corruption "as a club" and noting that as their numbers grow "the challenges of coordination go up"). We generalize by showing that spillovers can lead to individual quid pro quo corruption, which increases the corruptive risk because coordination is unnecessary. He expects group corruption to be greatest among party leadership. See id. at 23-24 (stating that contributors can "transact with their party collective" and leadership is "invested with the party's collective welfare"). We generalize by showing that spillovers can corrupt any candidate, leader or not. He argues for a new, "party-based" theory of corruption that could justify aggregate limits. See id. at 32-33. By showing that spillovers can prompt individual quid pro quo corruption, we can justify aggregate limits with the Court's existing theory. A final distinction bears mention. Although Kang envisions contributions to one candidate spilling over to help others, his analysis does not include a multiplier effect. Ours does. As we explain in the text, a contribution of $2,600 converges, because of this multiplier, more than $2,600 in value. Thus, the problem of spillover is worse under our account than under Kang's.} How substantial is the spillover effect? The answer depends on context, but consider some possibilities. Suppose a donor gives a senator and her five tepid allies $2,600 apiece. Suppose the value of a contribution to the recipient equals its size, so the senator and the others each get $2,600 in value directly. Suppose the contribution to the senator provides an indirect benefit of $100 to each of those five allies. The donor spent $15,600 and conveyed $16,100 in value, so the spillover equals $500. But perhaps this math is incomplete. If the contribution to the senator helps her allies, one may assume the contributions to those allies help the senator. If each of the six contributions conveys $2,600 in value directly (to the recipient) and $500 indirectly (to the allies), then the donor spent $15,600 and conveyed $18,600 in value. The spillover equals $3,000.

Now suppose the senator is not so lonesome. Like Daniel Inouye or Robert Byrd, she has served in Congress for decades, occupied powerful leadership roles, and been an effective ally to members of both chambers. She owes favors to many colleagues that will become undeliverable if she loses. Now a contribution conveys $2,600 to the senator and spillover of $1,000 to her 25 closest allies, $500 to another 25 compatriots, and $100 to each of 250 members of the rank-and-file. The contributor spent $2,600 and conveyed $65,100 in value.

The donor in that example made one contribution, albeit to a powerful politician. Suppose the donor makes 200 contributions. Each directly conveys its face value of $2,600 to the recipient, and each indirectly conveys, say, $200 to twenty of each recipient's allies. In total, the donor spent $520,000 and conveyed
$1,320,000 in value. In these examples, the donor only gave to candidates. If the donor also contributes to PACs and party committees, and if those monies in turn convey value, the spillover effect will grow.

Spillover can engender small-dollar corruption. The donor in the last example indirectly gave $200 to several politicians, and they may reciprocate with a lot of small favors. But it can engender large-dollar, or at least larger-dollar, corruption as well. Each candidate in the last example received $2,600 directly and $4,000 indirectly. Now 200 candidates owe the donor $6,600 apiece. That sum, $6,600, may not buy a lot of votes, but it might buy more than internships—government contracts, for example. If a candidate gets $6,600 every two years for a couple of decades, he may reciprocate with very lucrative contracts.

We have shown how spillovers multiply the value of contributions. Value alone does not prompt corruption, however; we also need information. Quid pro quo corruption requires mutual favors, or at least the expectation of them. The politician must do something in exchange for a benefit. If a corrupt politician knows that a person conveyed a benefit to her, perhaps by contributing directly to her campaign, she will do a favor in return. Conversely, if the politician does not know that a person helped, then she will not do a favor—even if the person in fact helped. Politicians, one might argue, cannot track spillovers, so spillovers can not corrupt as we claim.

We disagree. At least three mechanisms help politicians track spillovers: parties, joint fundraising committees, and disclosure requirements. Regarding the first, parties coordinate fundraising and disbursements, with party leaders keeping an eye on who gave to whom and when. In exchange for support to the party, those leaders demand favors from members, even if those members did not benefit directly. As Professor Michael Kang writes:

The major parties centralize campaign finance for their wealthiest supporters and their candidates and officeholders. The parties carefully cultivate relationships, maintain a legal and administrative infrastructure for campaign finance, and distribute financial support efficiently across a wide slate of candidates. Parties serve as a centralizing institution—a form of one-stop political shopping—through which their supporters know that they will have access to party officeholders and their financial contributions will be directed toward the

78 But see STERN, supra note 56, at 148-49 (describing how a senator switched positions on a billboard owners compensation law after receiving lawful contributions of only about $12,000).

79 See Former County Judge Pleads Guilty to Bribery Charge, supra note 58 and accompanying text (recounting how an elected official was convicted for trading a $4,000 contribution for a $70,000 contract).

80 Federal law prohibits corrupt exchanges and also attempts at corrupt exchanges, meaning the mere expectation or offer of a favor may violate the statute. 18 U.S.C. § 201(b)-(c) (2012).

81 This idea underlies an important book. See generally BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002) (arguing that masking contributions, so candidates do not know who has and has not contributed to them, would reduce corruption).
party cause with the greatest expertise and effectiveness. For wealthy supporters willing to donate six-figure amounts in election cycle after election cycle, the parties are essential brokers...82

Joint fundraising committees ("JFCs") offer another mechanism for tracking spillovers. JFCs consolidate fundraising for multiple candidates and committees.83 Donors can write a single check to a JFC, sometimes for over a million dollars,84 that gets distributed in lawful increments to different candidates and party committees. JFCs make spillovers transparent. To demonstrate, the Boehner for Speaker Committee disbursed funds to then-Speaker of the House John Boehner, the Republican Party of Ohio, and the National Republican Congressional Committee.85 Surely Boehner noticed when Paul Singer contributed over a hundred thousand dollars to the JFC, even though Boehner himself received only $5,400 of that sum.86 In 2014, the Boehner for Speaker Committee received $35,382,857 in contributions.87

82 Kang, Brave New World, supra note 17, at 22 (footnote omitted). "Party candidates and officeholders, particularly the party leadership invested with the party's collective welfare, ... track high-level contributors' financial support and try to reciprocate ...." Id. at 24. See also Richard Briffault, Soft Money Reform and the Constitution, 1 ELECTION L.J. 343, 356 (2002) (noting the corruption danger is "not so much that the parties will act as conduits . . . , but rather that the process of party fundraising will give large donors special relationships with the party's fundraisers—who are also the leaders of the party—in government").


84 Following the McCutcheon decision, the top tier for the Republican National Committee soared to $1.34 million per couple, and $1.6 million per couple on the Democratic side. Materia Gold & Tom Hamburger, Political Parties Go After Million-Dollar Donors in Wake of Looser Rules, WASH. POST (Sept. 19, 2015), https://www.washingtonpost.com/politics/political-parties-go-after-million-dollar-donors-in-wake-of-looser-rules/2015/09/19/728b43fe-5ede-11e5-8e9e-dcec82a2a679_story.html?postshare=7231442698842350. The news is replete with examples of six-figure checks to joint fundraising committees, and over an election cycle, the sum from a single donor may be over a million dollars. See, e.g., Paul Blumenthal, The Warnings About The Supreme Court's Dangerous Campaign Finance Ruling Are Now Coming True, HUFFINGTON POST (Sept. 21, 2015, 7:05 PM), http://www.huffingtonpost.com/entry/joint-fundraising-committee-hillary-clinton_us_56060606e48b0310e8f19c2. The dissenters in McCutcheon warned of large checks as a consequence of the plurality’s decision. McCutcheon v. FEC, 134 S. Ct. 1434, 1473 (2014) (Breyer, J., dissenting) ("[W]ithout any aggregate limit, the law will allow Rich Donor to write a single check to, say, the Smith Victory Committee, for up to $3.6 million.").


86 See FED. ELECTION COMM'N, IMAGE # 201507159000182825 SCHEDULE A (FEC FORM 3X) ITEMIZED RECEIPTS (Apr. 15, 2015), http://docquery.fec.gov/cgi-bin/fecimg/?201507159000182825; FED. ELECTION COMM'N, IMAGE # 201507159000222213 SCHEDULE A (FEC FORM 3X) ITEMIZED RECEIPTS (Apr. 15, 2015), http://docquery.fec.gov/cgi-bin/fecimg/?201507159000222213;
Finally, disclosure requirements help politicians keep tabs on spillovers. At the federal level and in many states, law requires disclosure of contributions: who gave what to whom. The government makes this information public, and actors like the Center for Responsive Politics organize and publicize it. If a donor asks for a favor, and if a politician wonders if the donor deserves it, that politician can simply consult disclosure records. In minutes, she will know how many allies that donor has supported and to what degree. Foreseeing doubt by the politician, the donor might start his pitch by pointing to disclosure records, which provide credible information on the many favors, direct and indirect, that he has done.

If politicians can track spillovers as we claim, then spillovers can cause corruption, and this gets us back to McCutcheon. The plurality concluded that law prevents circumvention of the base limits. Even if correct, that analysis focused only on formal circumvention. Informal circumvention, or spillover, persists despite the many loophole-plugging measures the Justices addressed. Thus, the plurality erred in concluding that circumvention cannot occur. Likewise, it erred in concluding that aggregate limits represent a redundant, “prophylaxis-upon-prophylaxis approach.” The aggregate limits put a significant brake on circumvention. To demonstrate concretely, suppose spillover equals twenty percent of a contribution’s face value, so a contribution of $2,000 conveys $2,400 in total value to the recipient and allies. Before McCutcheon, one could contribute $123,200 in an election cycle, conveying $147,840 in total value. After McCutcheon, one can contribute $3.6 million in an election cycle, conveying $4.3 million in total value.

IV. OPTIMAL CONTRIBUTION LIMITS

The legal debate about corruption, in McCutcheon and elsewhere, operates at two levels. The first, more abstract level involves conceptions of corruption: quid pro quos, as opposed to so-called access or influence corruption, “dependence

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88 See Gilbert, Campaign Finance Disclosure, supra note 23, at 1854–58 (giving background on disclosure laws).
89 See, e.g., CTR FOR RESPONSIVE POL., opensecrets.org (last visited Aug. 3, 2016).
90 These arguments demonstrate a general claim that one of us has developed in separate work. See generally Gilbert & Aiken, supra note 23 (explaining how disclosure can facilitate corruption).
91 See McCutcheon v. FEC, 134 S. Ct. 1434, 1462 (2014) (plurality opinion).
92 See id.
93 Id. at 1458.
94 Id. at 1443.
95 Id. at 1473 (Breyer, J., dissenting).
corruption, and so on.\textsuperscript{96} The second level, down in the weeds, involves detailed corruption scenarios, real or imagined: Congressman X had cash in the freezer, Senator Y delivered a vote, Party Z channeled money through illegal means, and so forth. In our view, the debate needs a third, intermediate level, something that can help guide legal and policy choices.

To illustrate the gap that we perceive, imagine benevolent lawmakers designing contribution limits from scratch. They aim to balance speech rights and anti-corruption concerns, where, just to simplify, those concerns are limited to quid pro quo corruption. How should they approach this problem? Like real legislators and judges, they do not know when and to what degree contributions of different sizes corrupt, and they do not know the cost to society of that corruption. They must rely on intuitions. As far as we can tell, they have but a pair to guide them: corruption is bad, and higher contribution limits mean more corruption.

We share those intuitions, but we want to refine them—at least a little. Consider magnitudes, a topic that we touched on above. A corrupt act can cause either great or only minor harm to society. Imagine legislators trading contributions for votes on a $20 billion defense contract. If the contract is for unnecessary equipment, the corruption causes great harm. If the contract is for valuable equipment, but the legislators accepted it rather than an alternative contract for $19.99 billion, the corruption causes relatively little harm. If a politician hires a staffer who is well qualified but whose resume would not have surfaced from the pile but for a contribution from dad, little harm results. If a politician hassles an agency into dropping an enforcement action, that may cause great harm.

Contribution size and corruption magnitude do not correlate perfectly. Recall that the price a politician charges in a corrupt transaction depends in part on the value of not transacting.\textsuperscript{97} The congressman who does not care about the Defense Logistics Agency may sell an action regarding that agency for a low price—even if the action causes a lot of social harm. But that does not complete the analysis. The politician's price also depends on the transacting party’s benefit. If a car buyer likes a particular car a lot, the seller can raise the price. Likewise, as the corrupt contractor's profit margin grows, the price of corruption rises. As illicit profit grows, corruption probably causes more harm. Thus, as contributions get bigger, the magnitude of any corruption they engender should tend to increase.

Now consider frequency. Quid pro quos can happen constantly, as when border patrol demands a bribe for every crossing or legislators demand contributions for


\textsuperscript{97} See supra Part II.
every vote. Or they can happen rarely. Only one person in recent decades, former Illinois Governor Rod Blagojevich, has been caught trying to extract favors for an appointment to the U.S. Senate.98

Together the magnitude and frequency of corruption determine its social cost. If corrupt acts individually cause great harm but happen rarely, the total costs of corruption may be small. If each corrupt act causes little harm but such acts happen routinely, total costs may be great. No lawmaker, however benevolent and determined, can eliminate corruption. The only feasible goal is to minimize the harm that flows from it. Finding that low point requires attention to both magnitude and frequency.

Now relate these ideas to contribution limits. In theory, base limits should affect the magnitude of corruption: the more one can give, the more harmful the resulting corruption. Aggregate limits should affect frequency: the more politicians one can support, the more corrupt acts one can buy.99 We can see these same ideas by switching focus from the contributor to the politician. The higher the base limit, the more a politician can “shake down” a potential contributor—write me a large check or else. The higher the aggregate limit, the more contributors a politician can shake down.

In one context, the combination of relatively low base limits and no aggregate limits may minimize the costs of corruption. In a different context, the optimal combination may be a high base and a low aggregate. The point is that base and aggregate limits necessarily interact. The Justices in McCutcheon failed to perceive these ideas, casting a shadow on the opinion. More generally, we hope that these ideas begin a conversation at a helpful level of abstraction about the optimal design of campaign finance law.

CONCLUSION: CONSEQUENCES IN ELECTION LAW

We have argued that the McCutcheon plurality erred in concluding that contributions of $5,200 do not corrupt (the problem of small-dollar corruption), erred in concluding that actors cannot circumvent base limits (the problem of spillover), and erred in concluding that aggregate limits do not interact with base limits. At this point, readers might assume that we oppose the Court’s holding in McCutcheon and think the aggregate limits should have been upheld. In fact, we take no position on the outcome of the case.

The constitutionality of aggregate limits depends not only on corruption but also on activities like political speech, expression, and association. If one believes that contributions constitute such activity and that the First Amendment strongly

98 See Monica Davey, Blagojevich Draws 14-Year Sentence for Corruption Conviction, N.Y. TIMES, Dec. 8, 2011, at A22.
99 Aggregate limits also affect magnitude because of spillover. The more allied politicians one can support, the more value one can convey to every member of the alliance.
provides, then the Court made the right legal choice, even if corruption spikes. Regardless, one might argue that the Court made the right policy choice because the benefits of more expressive activity outweigh the costs of additional corruption. To generalize, the right decision in *McCutcheon* depends on law, values, and consequences. We do not address all of that in this short paper, so we do not take a position on the resolution of the case.

We do, however, take a position on something else: the method by which the plurality made its decision. For decades, the Court has made clear that the state's interest in preventing quid pro quo corruption can justify limits on contributions. Thus, the constitutionality of contribution limits depends in part on their relationship to corruption. No one has gathered, or probably ever can gather, precise data on the degree to which aggregate limits or any other campaign finance regulation prevent corruption. Intuitions must do the work, and here we believe the plurality fell short. The Justices rushed to extol the First Amendment values at stake, but they gave the consequential part of the analysis short shrift. As we have shown, the link between aggregate limits and corruption is complicated, not simple. The Justices dismissed consequences without understanding them.

The Court has made a habit of this in election law. The most famous example comes from *Citizens United*, where the Court invalidated prohibitions on corporate political spending based on the conclusion that "independent expenditures . . . do not give rise to corruption." Many have criticized that confident proclamation—developed without data, in just a few paragraphs of reasoning—about how the world works. In other cases, the Court has concluded that campaign finance disclosure does not meaningfully chill speech but does inform voters. The Court has also claimed that disclosure prevents corruption. In a separate area of election law, the Court has asserted that voter identification

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103 See, e.g., *McCutcheon* v. FEC, 134 S. Ct. 1434, 1460 (2014) (plurality opinion) (arguing disclosure requirements "represent[] a less restrictive alternative" on speech while providing important information to the electorate); *Citizens United*, 558 U.S. at 366–67 (explaining that while disclosure requirements "may burden the ability to speak, . . . they impose no ceiling on campaign-related activities and do not prevent anyone from speaking," thus furthering the government's interest in providing "the electorate with information") (citation omitted).
104 *McCutcheon*, 134 S. Ct. at 1459 ("[D]isclosure of contributions minimizes the potential for abuse of the campaign finance system. . . . [and] may also 'deter actual corruption . . . .' ").
laws protect elections from fraud. All of these claims, presented as facts, are actually just guesses. The claims are not only weakly supported, but they are also, in certain circumstances, exactly backwards.

We recognize that the Court does not have the luxury of time. The Justices must make some decisions under pressure, regardless of the state of their knowledge. Perhaps they cannot reason through every potential consequence of aggregate limits, and even if they could, they still would not know which consequence is most likely, and therefore which holding most sound. In a typical case, some uncertainty about relevant consequences is inevitable and acceptable. But election law cases are not typical. The stakes are high and the potential consequences grave. The Justices purport to take consequences seriously, so they should work hard to get the analysis right. In McCutcheon, the plurality wrote that fears of circumvention are "far too speculative" and "we 'have never accepted mere conjecture as adequate to carry a First Amendment burden.'" Those same Justices are remaking American democracy on the basis of conjecture.

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106 See sources cited supra note 23 and accompanying text.