

Where Else Is the Appearance of Corruption Protected by the Constitution? A Comparative Analysis of Campaign Finance Laws After *Citizens United* and *McCutcheon*

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Introduction

In September 1988, a jury convicted a West Virginia state legislator, Robert McCormick, of corruption—misusing political power to extort money.¹ McCormick had long been the voice for a group of foreign doctors in West Virginia by supporting legislation that would enable these doctors to practice medicine in the state. After realizing that his re-election campaign was becoming expensive, McCormick called the lobbyist who represented foreign doctors about how he was running low on campaign cash.² The lobbyist reasonably responded that he would contact the doctors to see what he could do. The lobbyist then summoned the doctors, collected a few thousand dollars in cash, and delivered it to McCormick. After receiving the money, McCormick sponsored state legislation in favor of the foreign doctors. Two weeks after the legislation was enacted, McCormick collected another cash payment from the doctors. Although the jury decided that McCormick abused his power,³ the Supreme Court disagreed and overturned McCormick's conviction. The Court also overturned the law that criminalized McCormick's conduct, holding that a campaign contribution is not a bribe without the so-called "quid pro quo"

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1. *United States v. McCormick*, 896 F.2d 61, 64 (4th Cir. 1990).
2. *McCormick v. United States*, 500 U.S. 257, 260–61 (1991).
3. *Id.* at 262.

requirement.⁴ The Court held that corruption occurs only when the prosecutor can prove that money was paid in exchange for an explicit promise to unduly influence the government.⁵ The Court's decision caused much outrage because it blessed campaign finance tactics that appeared corrupt.⁶

Twenty-five years later, there is even more outrage about campaign finance, and the decisions from *Citizens United*⁷ and *McCutcheon*⁸ were the most condemned for making the United States elections appear more corrupt. In both of these decisions, the Supreme Court used the First Amendment freedom of speech protection to shield large political contributions from government regulation. One writer for the *New York Times* compared the Court's holding to defending the right to market junk food to children.⁹ Another writer cautioned that the combination of the two decisions further blurred the line between campaign finance and quid pro quo bribery.¹⁰ Yet another columnist highlighted that the combination of the *Citizens United* and *McCutcheon* decisions "will further inundate a political system already flush with cash, marginalize average voters, and elevate those who can afford to buy political access."¹¹

But how do the United States corruption laws compare to those of other countries? Do our laws really support corruption and abuse, as critics suggest? This note aims to discover where the United States campaign finance laws post-*Citizens United* and *McCutcheon* stand in the international arena.

A. Corruption and Bribery Per Se

Bribery per se is not an issue here because traditional bribery is defined and penalized uniformly across the globe. The meaning of

4. *Id.* at 263.

5. *Id.*

6. In *Dirty Deals? An Encyclopedia of Lobbying, Political Influence and Corruption*, Amy Handlin characterizes the *McCormick* decision as one that paved the way for corruption in the United States. See generally AMY HANDLIN, *DIRTY DEALS? AN ENCYCLOPEDIA OF LOBBYING, POLITICAL INFLUENCE AND CORRUPTION* (2014).

7. *Citizens United v. FEC*, 510 U.S. 310 (2010).

8. *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

9. Mark Bittman, *Why Care About McCutcheon*, N.Y. TIMES (Apr. 14, 2014), http://www.nytimes.com/2014/04/23/opinion/bittman-why-care-about-mccutcheon.html?_r=0.

10. Brendan Fischer, *What Corruption? McCutcheon Reveals Absurdity of Citizens United*, THE CENTER FOR MEDIA AND DEMOCRACY'S PR WATCH (Apr. 3, 2014, 1:50 PM), <http://www.prwatch.org/news/2014/04/12438/mccutcheon>.

11. *Supreme Court's McCutcheon Decision Is a Blow Against Average Voters*, BRENNAN CENTER FOR JUSTICE (Apr. 2, 2014), <http://www.brennancenter.org/press-release/supremc-courts-mccutcheon-decision-blow-against-average-voters>.

traditional bribery is not subject to debate. The members of the United Nations Convention Against Corruption (“UNCAC”) define a “bribe” as the “undue advantage” that is intentionally offered to a government official “[to] act or refrain from acting in the exercise of his or her official duties.”¹² UNCAC is a binding international anticorruption instrument that has been adopted by 173 countries, including the United States and the European Union.¹³ The UNCAC has standardized the definition of a traditional bribe across the globe. Now the elements of traditional bribery are the same everywhere, and the conduct of buying political favors is punished worldwide. Defining per se bribery therefore is not an issue after UNCAC.

However, UNCAC fails to clearly define “lobbying” and “private campaign financing,” the most prevalent manifestations of legal corruption. Laws regulating lobbying and campaign finance are not uniform and deal with the intricate concept of “appearance of corruption,” where money is not given under the table but in plain sight under the scrutiny of the legal system. These laws are at the forefront of the debate on corruption after *Citizens United* and *McCutcheon*, making these decisions very controversial. Accordingly, this note will compare campaign finance laws across the globe to discover exactly how corrupt the United States *appears* to be after the two debatable decisions.

B. Appearance of Corruption

Appearance of corruption stems from the presence of big money in politics. It is not corruption per se because campaign contributions are legal. But political victories fueled by large donations of the rich minority do not *appear* fair because they make the votes of the poor majority seem worthless. Some developing countries offer extreme examples of why the presence of big money in politics feels corrupt.

For example, in Brazil, the candidate who gets corporate money wins the election. Dilma Rosouff won the Brazilian presidential election in 2010 after getting 98% of her campaign funds from large corporations.¹⁴ In fact, corporations donated 99.04% of all money spent in the country’s most

12. U.N. Secretary General, *United Nations Convention Against Corruption*, art. 15, sec. (a) & (b) (2004).

13. *Action Against Corruption & Economic Crime*, U.N. OFFICE ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/corruption/index.html> (last visited Apr. 7, 2016); *United Nations Convention against Corruption Signature & Ratification Status as of 1 December 2015*, U.N. OFFICE ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited Apr. 7, 2016).

14. Nick Thompson, *International Campaign Finance: How do Countries Compare?*, CNN (Mar. 5, 2012, 4:54 PM), <http://www.cnn.com/2012/01/24/world/global-campaign-finance/>.

populous state of São Paulo.¹⁵ That is appearance of corruption: big money gets big power and *appears* to rule the government. Laws protecting corporate donations allow that to happen.

In Nigeria, there are no limits on how much money a candidate can spend on campaigning.¹⁶ “[It is] an electoral system where you need to spend” in order to win.¹⁷ This is the appearance of corruption: big money is necessary to obtain power, and the voices of the poor *appear* to drown in the dollars of the rich. Laws allowing for unlimited donations and expenditures allow this to happen.

After the *Citizens United* and *McCutcheon* decisions, U.S. campaign finance laws were compared to those of Brazil and Nigeria,¹⁸ both of which are developing economies known for widespread corruption. While this comparison is alarming, it is not proper. The United States has one of the most developed legal systems in the world, and it should be compared to similarly situated legal systems, some of which are in the European Union.

Accordingly, it is reasonable to compare the laws regulating the appearance of corruption in the United States (after the decisions of *Citizens United* and *McCutcheon*) to that of France and the United Kingdom, as well as other European countries. While the Supreme Court’s decision to protect corporate contributions and legalize unlimited expenditures is not ideal, it is also not far from the reality of other countries in the developed world. The decisions of *Citizens United* and *McCutcheon* are therefore not as wild and unprecedented as the critics claim them to be.

I. Campaign Finance Laws in the United States After *Citizens United* and *McCutcheon*

Citizens United and *McCutcheon* focused on the appearance of corruption resulting from political campaign contributions. The Court extended First Amendment political speech protection to campaign contributions, overlooking the appearance of corruption. The only corruption the Court wanted to prevent was “quid pro quo corruption,” defined as requiring the proof of traditional bribery to penalize any form of corruption. As a result of these cases, a plaintiff claiming that big money in politics appears corrupt will most likely lose the suit because the Court heightened the standard on campaign finance. But these two decisions did

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

not create this law out of thin air. The forty-year-old precedent of *Buckley v. Valeo* shaped the discussion in both *Citizens United* and *McCutcheon*.¹⁹

A. The *Buckley* Precedent

In *Buckley*, the Court looked at laws limiting direct contributions to political candidates and independent political expenditures. The limit on direct contributions prohibited individuals from *giving* more than \$1,000 to a single candidate or more than \$25,000 to all candidates in one election year.²⁰ The limit on independent expenditures, on the other hand, prohibited *spending* more than \$1,000 a year “relative to a clearly identified candidate.”²¹ The Court upheld the direct-contribution limit but struck down the spending limit.

The *Buckley* Court relied on the First Amendment to protect the use of money in politics.²² The Court provided campaign financing with the same constitutional protection as political speech because funneling money to candidates apparently facilitated “discussion of government affairs . . . including discussion among candidates.”²³ Supporting a candidate of one’s choice was also considered an association with the candidate or party, which is a separate source of the First Amendment protection.²⁴ Thus, the perception of corruption within campaign finance is reviewed under a high freedom of speech bar in the United States.²⁵ *Buckley* made it very hard to scrutinize questionable campaign finance practices, like the one presented in the McCormick’s case.

While viewing the limit on direct contributions as a limit on the freedom of association,²⁶ the *Buckley* Court still upheld the restriction out

19. *Buckley v. Valeo*, 424 U.S. 1 (1976); *see, e.g., McCutcheon v. FEC*, 134 S. Ct. 1434, 1451 (2014) (“The definition of corruption we apply today . . . has firm roots in *Buckley* itself.”).

20. *Buckley*, 424 U.S. at 13.

21. *Id.* (quoting the statute).

22. *Id.* at 14 (holding that “contribution and expenditure limitations operate in the area of the *most fundamental* First Amendment activities” (emphasis added)).

23. *Id.* (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

24. *Id.* at 15 (holding that the First Amendment “encompasses the right to associate with a political party of one’s choice”).

25. *See id.* at 19 (“A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires expenditure of money.”). Governmental “action which may have the effect of curtailing the freedom to associate is *subject to closest scrutiny*.” *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460–61 (1958) (emphasis added).

26. *Buckley*, 424 U.S. at 24.

of fear of the appearance of corruption.²⁷ Against the First Amendment backdrop, the Court reviewed the limit on direct contributions under strict scrutiny. Appellants argued that direct contributions did not *appear* corrupt because there was no “proven or suspected quid pro quo arrangement,” which is an element of corruption *per se*.²⁸ The Court, however, refuted the appellants’ position, and acknowledged that proving a quid pro quo arrangement is too high of a bar to show merely the appearance of corruption.²⁹

The Court thus identified actual corruption and the appearance of corruption as two separate categories, holding that preventing both types of corruption served a significant governmental interest.³⁰ The public perceived large contributions as a means to “secure a political quid pro quo,” which undermines the integrity of a democratic political system, analogous to traditional bribery.³¹ At the time of *Buckley*, polls revealed that 69.9% of Americans thought that the U.S. government was primarily advancing the interests of a rich minority.³² The Court then addressed this public concern by upholding the limit on per-candidate direct contributions as a measure to prevent appearance of corruption.³³

The *Buckley* Court, however, struck down the limitation on political expenditures in favor of a candidate. The ceiling on political expenditures, characterized as a “loophole-closing provision,”³⁴ prevented contributors from indirectly paying a candidate’s bills by advocating in an individual capacity on the candidate’s behalf. In other words, the provision limited how much a person can sponsor the candidate without directly giving cash to the candidate. The Court held that limiting how much a person can spend on a candidate, such as paying for election-related advertisements, unnecessarily burdened the freedom of speech.³⁵ While ignoring the

27. *Id.* at 29.

28. *Id.* at 27.

29. *Id.* at 27–28 (“[L]aws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action.”).

30. *Id.* at 27.

31. *Id.* at 26.

32. *See Buckley v. Valco*, 519 F.2d 821, 839 n.34 (D.D.C. 1975). Additional research revealed the milk industry contributing \$2 million to Nixon campaign—despite the \$2,500 committee contribution limit per candidate—and the President reciprocating by directing the Department of Agriculture to install price supports favorable to the milk industry. *Id.* at 839 n.36.

33. The Court also upheld the aggregate contribution limit of \$25,000 per election cycle. *Buckley*, 424 U.S. at 38. While holding that the aggregate limit does not significantly restrict the freedom of association, the Court found the aggregate limit useful to prevent contributors from circumventing per candidate contribution limits. *Id.*

34. *See Buckley*, 519 F.2d at 853.

35. *Buckley*, 424 U.S. at 48.

practical perception of corruption, the Court focused on the theory that spending less money on candidates “necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of audience reached.”³⁶

To prove its point, the Court contradicted itself and relied on the quid pro quo principle that it rejected when reviewing appearance of corruption of direct contributions. The Court decided that “independent expenditures may well provide little assistance to the candidate’s campaign” without prearrangement and coordination.³⁷ After discussing how evidence of quid pro quo is too high of a standard with regard to direct contributions, the Court inexplicably required proof of a prearranged agreement in the case of indirect contributions.³⁸ Hence, “independent advocacy [in favor of a candidate] does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.”³⁹

The Court also did not address the fact that the appearance of corruption stems from candidates who represent the interests of a rich minority simply by receiving more funds. The Court did not aim to prevent appearance of corruption that comes from inequality. On the contrary, the *Buckley* Court held that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”⁴⁰

In essence, *Buckley* limited how much election money a candidate can choose to spend himself, without limiting how much money a candidate can receive. So, the Court created the rule, but chose not to foreclose the loopholes that swallow the rule itself. By treating the act of paying candidates’ bills as speech, the Court extended constitutional protection to what otherwise smelled like potential bribery. After *Buckley*, it became much harder to fight against appearance of corruption in politics because of this First Amendment backdrop. But the saga continued in *Citizens United*.

36. *Id.* at 19.

37. *Id.* at 47.

38. *See id.* (“The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”).

39. *Id.* at 46.

40. *Id.* at 48–49 (emphasis added).

B. *Citizens United* and Rights of Corporations in Politics

In *Citizens United*, the Court returned to *Buckley* and the appearance of corruption with respect to election contributions by corporations. Specifically, the Court dealt with a statute that prohibited corporations from spending money on behalf of candidates within sixty days of a general election.⁴¹ This was the same issue the *Buckley* Court addressed, except the focus in *Citizens United* was on corporate, rather than personal, money in politics. Here, the Court again relied on the First Amendment in its inquiry supported largely by the precedent in *Buckley*.⁴² But this time, the Court stated that, as a self-evident truth, the “First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.”⁴³ Again, those fighting against the appearance of corruption had to face steep First Amendment scrutiny. The Court held that a corporation had the same rights as a natural person when it came to spending money on candidates.⁴⁴

The issue in *Citizens United* concerned only the limit on corporate expenditures because the *Buckley* limit on direct contributions had already applied to corporations.⁴⁵ For purposes of its First Amendment analysis, the Court did not perceive corporations’ involvement in politics as a means to generate and secure their own wealth. Instead, the Court continued basing its reasoning on the abstract theory that corporate money is a form of political speech where “the speaker is an association that has taken on the corporate form.”⁴⁶ This allowed the Court to ignore the inherent appearance of corruption that comes from profit-seeking entities with a lot of cash and an aversion to regulation engaging in politics.⁴⁷

The Court was deferential to *Buckley* in divorcing the appearance of corruption from corporate campaign expenditures.⁴⁸ The concept of quid pro quo corruption again governed the discussion. The Court explained, “Limits on independent expenditures . . . have a chilling effect extending beyond the Government’s interest in preventing *quid pro quo* corruption.

41. *Citizens United v. FEC*, 558 U.S. 310, 337 (2010).

42. *See id.* at 339, 349 (holding that the “prohibition on corporate independent expenditures is thus a ban on speech” and asserting that “[i]f the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens for simply engaging in political speech”).

43. *Id.* at 339 (internal citations and quotation marks omitted).

44. *Id.* at 365.

45. *Id.* at 345.

46. *Id.* at 348–49.

47. *See id.* at 351 (“It is irrelevant for purposes of the First Amendment that corporate funds may have little or no correlation to the public’s support for the corporation’s political ideas.”).

48. *Id.* at 356.

The anticorruption interest is not sufficient to displace the [corporate] speech in question here.”⁴⁹

The Court also defined the appearance of corruption more narrowly by focusing on the appearance of quid pro quo corruption—bribes being exchanged for political favors—ignoring the fact that politicians may favor the interests of those who sponsor their political campaign without a formal quid pro quo arrangement.⁵⁰ “The fact that [corporations] may have influence over or access to elected officials does not mean that these officials are corrupt: *Favoritism and influence are not avoidable in representative politics.*”⁵¹ In other words, the Court was willing to accept the appearance of corruption as long as it was not traditional bribery, for “[i]ngratiation and access, in any event, is not corruption.”⁵² Spending money on political campaigns, even by corporations, thus “does not lead to or create appearance of *quid pro quo* corruption” in the United States.⁵³

The Court refused to accept the idea that “ingratiation” by corporations alone creates appearance of corruption without the showing of a quid pro quo arrangement. The Court missed the point by focusing on generalities, like that “[m]any people can trace their funds to corporations . . . in the form of dividends, interest, or salary”⁵⁴ and that most U.S. corporations are not so rich: “more than 75% of corporations . . . have less than \$1 million in receipts per year.”⁵⁵ But the appearance of corruption is associated with the rich minority of corporations, and politicians should be accountable to the general public, even if corporations sponsor politicians’ campaigns. The Court’s comparison of politicians to salaried employees of corporations shows the Court’s disregard for the

49. *Id.* at 357.

50. *Id.* at 359 (“When *Buckley* identified a sufficiently important governmental interest in preventing corruption or appearance of corruption, that interest was limited to *quid pro quo* corruption.”).

51. *Id.* (emphasis added); see also *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part) (“It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness. *Quid pro quo* corruption has been, until now, the only agreed upon conduct that represents the bad form of responsiveness and presents a justiciable standard with a relatively clear limiting principle: Bad responsiveness may be demonstrated by pointing to a relationship between an official and a *quid*.”).

52. *Citizens United*, 558 U.S. at 360.

53. *Id.*

54. *Id.* at 351.

55. *Id.* at 354.

appearance of corruption in the United States. But the Court did not associate corporate campaign finance with appearance of corruption. Instead, the Court washed its hands by stating that “[p]olitical speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws.”⁵⁶

The Court thus disposed of the limit on corporate political spending by ignoring the vast wealth of the donors, and instead, made the election laws apply equally to both individuals and corporations. The high quid pro quo bar on appearance of corruption was reinforced while the corporate identity was ignored. And the corporate wealth became irrelevant because “wealthy individuals and unincorporated associations can spend unlimited amounts of money on independent expenditures.”⁵⁷ The concern with individual wealth skewing politics was later addressed in *McCutcheon*.

C. *McCutcheon* and Aggregate Contributions Limits

In *McCutcheon*, the Court struck down limits on total contributions during an election cycle. *McCutcheon*, the appellant in the case wanted to contribute money to more members of his political party and more political action committees (“PACs”) than the law allowed.⁵⁸ The law limited the aggregate contribution limit to \$123,000 per election,⁵⁹ which was too little for *McCutcheon*. If the law were to be struck down, *McCutcheon* figured, a wealthy citizen could potentially contribute up to \$3.5 million to his favorite *group* of candidates.⁶⁰ So *McCutcheon* challenged the law to enable the wealthy elite, like himself, to contribute more money to *groups* of political candidates they supported. The Court once again relied on the First Amendment to strike down the contribution limit that protected against the perception of corruption.

56. *Id.* at 364.

57. *Id.* at 356.

58. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1442–43 (2014).

59. Prior to the ruling, a single donor could give a maximum of up to \$2,600 directly to eighteen candidates, as well as up to \$74,600 to political parties and PACs. The \$123,200 maximum aggregate limit pre-*McCutcheon* is thus the sum of \$48,600 contributed to candidates directly plus \$74,600 contributed to political parties and PACs. *McCutcheon v. FEC—2014 Electoral Impacts*, CONGRESS.ORG (Apr. 3, 2014), <http://congress.org/2014/04/03/mccutcheon-v-fec-2014-eclectoral-impacts/>.

60. Andy Kroll, *The Supreme Court Just Guttled Another Campaign Fin. Law. Here's What Happened*, MOTHER JONES (Apr. 2, 2014), <http://www.motherjones.com/politics/2014/03/supreme-court-mccutcheon-citizens-united> (last visited Oct. 23, 2015). Note that \$3.5 million is the maximum aggregate amount of contributions that divided between individual candidates, political action committees, and political parties. The \$3.5 million cap still exists because of individual contribution limits upheld in *Buckley*.

The Court reiterated its holding in *Buckley*, holding that the First Amendment is not concerned with inequality in political expression.⁶¹ The Constitution should not limit the contributions of some to empower the voice of others.⁶² In other words, while the U.S. Constitution protects against certain kinds of inequality, like racial⁶³ or gender⁶⁴ inequality, the Constitution is not concerned with overcoming *financial* inequality and its political repercussions.⁶⁵ In addressing the obvious perception of corruption that comes from further empowering the politically motivated elite, the Court further held that the First Amendment “surely protects campaign speech despite popular opposition.”⁶⁶ Accordingly, the standard in judging perception of corruption once again centers around requiring the proof of a quid pro quo arrangement.⁶⁷

The Court held that spending excessive sums of money on elections is not quid pro quo corruption: excessive spending only provides better access to certain candidates.⁶⁸ But the United States “[g]overnment may not seek to limit the appearance of mere influence or access.”⁶⁹ The only clear appearance of corruption that may be regulated comes from “financial contributions to *particular* candidates,” not contributions to *groups* of candidates, according to the Supreme Court.⁷⁰

The Court did not discuss the core concern of the aggregate limit law—that the politically motivated elite may not only want to put a like-

61. *McCutcheon*, 134 S. Ct. at 1450 (“No matter how desirable it may seem, it is not an acceptable governmental objective to ‘level the playing field,’ or to ‘level electoral opportunities,’ or to ‘equalize the financial resources of candidates.’”).

62. *Id.* at 1436 (holding that the First Amendment “may not, however, regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others”).

63. *See Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding that “the Equal Protection Clause demands that racial classifications . . . be subjected to the most rigid scrutiny” (internal quotation marks omitted)).

64. *See Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that “statutory classifications that distinguish between males and females are subject to scrutiny under the Equal Protection Clause” (internal quotation marks omitted)).

65. *McCutcheon*, 134 S. Ct. at 1450 (“No matter how desirable it may seem, it is not an acceptable governmental objective to ‘level the playing field,’ or to ‘level electoral opportunities,’ or to ‘equalize the financial resources of candidates.’ The First Amendment prohibits such legislative attempts to ‘fine-tune’ the electoral process, no matter how well intentioned.” (internal citations omitted)).

66. *Id.* at 1441.

67. *Id.* at 1450 (“Congress may target only a specific type of corruption—‘quid pro quo’ corruption.”).

68. *Id.*

69. *Id.* at 1451.

70. *Id.* at 1450 (emphasis added) (internal quotation marks omitted).

mind individual in power, but also seek to occupy the majority of Congress with favored politicians. The aggregate limit was designed to prevent big money from capturing the majority of candidates in a Congressional election, not just guaranteeing the loyalty of an individual candidate.⁷¹ Having “influence [on] or access” to many representatives is much more effective in passing favorable legislation than having close ties to a single representative. But the Court did not perceive appearance of corruption here, and instead focused on how ineffective aggregate contribution limits are at circumventing individual contribution limits.⁷²

After *McCutcheon*, the Supreme Court became uninterested in preventing the appearance of corruption. The high constitutional speech protection that the Court repeatedly granted to various types of political spending prevents future plaintiffs from challenging appearance of corruption in American politics. Further, even if a campaign-finance limitation does not impermissibly impinge the freedom of speech, it is still nearly impossible to prove the quid pro quo bribery component when claiming the appearance of corruption. Appearance of corruption means that individuals with unequal wealth have unequal access to politicians. But, after *Citizens United* and *McCutcheon*, this inequality is deemed constitutionally permissible in the United States.

D. Results

With aggregate direct and expenditure limits struck down, and standards to corruption solidified at quid pro quo, Americans are concerned. During the 2012 congressional election, two years after the *Citizens United* decision, most of the winners raised the lion’s share of their campaign cash from super-PACs,⁷³ which are largely funded by corporations and other large donors. In 2012, nearly 60% of all super-PAC

71. R. SAM GARRETT, CONG. RESEARCH SERV., R43334, CAMPAIGN CONTRIBUTION LIMITS: SELECTED QUESTIONS ABOUT MCCUTCHEON AND POLICY ISSUES FOR CONGRESS 4 (2014) (“Essentially, Congress established the existing individual limits at a threshold at which it believed struck a balance between permitting donors to support their favored candidates while also limiting potential corruption. Support for the aggregate limits generally rests with a concept known as the “anti-circumvention rationale,” which holds that an overall limit is necessary to protect the individual limits. Supporters generally argue that if a contributor were permitted to make an unlimited number of contributions, it would make little difference that each individual contribution were capped. Such donors might still enjoy outsized influence in elections and policymaking, therefore potentially corrupting both.”).

72. See *id.* at 1446–47 (giving examples of how one cannot use aggregate limits to circumvent individual limits).

73. Adam Lionz & Blair Bowic, *Billion-Dollar Democracy: The Unprecedented Role of Money in 2012 Elections*, DEMOS (Jan. 17, 2013), <http://www.demos.org/publication/billion-dollar-democracy-unprecedented-role-money-2012-elections>.

funding came from just 159 contributors.⁷⁴ Over 93% of cash spent on the election by super-PACs came from 0.0011% of the American population.⁷⁵ During the 2012 presidential election, the top thirty-two super-PAC donors gave as much money as the next 3.7 million smaller donors.⁷⁶ Sheldon Adelson, the CEO of the Las Vegas Sands, the biggest casino company in the United States, reportedly contributed \$150 million in the 2012 election.⁷⁷ That is not exactly the “lone pamphleteer or street corner orator in the Tom Paine mold” that the First Amendment aimed to protect.⁷⁸ Yet, under the strict constitutional scrutiny employed by the Supreme Court, excessive lobbying is hardly perceived as corruption in the United States.

The Court decided *McCutcheon* right in the middle of the 2014 congressional election. Between April and July 2014, when the Supreme Court published the decision, donors contributed over \$50.2 million in extra cash that would have been impermissible before the decision.⁷⁹ Of that amount, \$11.6 million was contributed just by 310 rich donors.⁸⁰ Also, fueled by the *Citizens United* decision, spending by outside groups on candidates nearly doubled in only four years after the decision.⁸¹ Outside groups provided 47% of the total cash spent on candidates—while candidates’ own efforts, limited by the caps on direct contributions, produced 41% of the total cash they spent. Further, by September 2014, just two billionaires—Charles and David Koch—have sponsored over 44,000 television advertisements (or 10% of total election advertisements aired in the first half of 2014) aimed at giving the Republicans control of the Senate.⁸² This is the direct effect of these two decisions: elections became even costlier.

74. Kroll, *supra* note 60.

75. Lionz & Bowie, *supra* note 73.

76. *Id.*

77. Peter H. Stone, *Sheldon Adelson Spent Far More on Campaign Than Previously Known*, HUFFINGTON POST (Dec. 2, 2012, 12:00 AM), http://www.huffingtonpost.com/2012/12/03/sheldon-adelson-2012-election_n_2223589.html.

78. *McCutcheon*, 134 S. Ct. at 1448 (internal citation and quotation marks omitted).

79. Matea Gold, *Wealthy Political Donors Seize on New Latitude to Give to Unlimited Candidates*, WASH. POST (Sept. 2, 2014), https://www.washingtonpost.com/politics/wealthy-political-donors-seize-on-new-latitude-to-give-to-unlimited-candidates/2014/09/01/d94aeefa-2f8c-11e4-bb9b-997ae96fad33_story.html?hpid=z1.

80. *Id.*

81. Gabrielle Levy, *How Citizens United Has Changed Politics in 5 Years*, U.S. NEWS & WORLD REPORT (Jan. 21, 2015, 12:26 PM), <http://www.usnews.com/news/articles/2015/01/21/5-years-later-citizens-united-has-remade-us-politics>.

82. Michael Hiltzik, *The November Election Is Already Drowning in Big, Secret Donations*, L.A. TIMES (Sept. 5, 2014, 2:41 PM), <http://www.latimes.com/business/hiltzik/la-fi-mh-big-secret-money-20140905-column.html>.

The 2016 presidential election is expected to cost \$5 billion.⁸³ As of October 2015, more than a year before the election day, candidates have already raised \$290.4 million through direct contributions and another \$277.8 million in donations—through super-PACs and independent expenditures, which are not subject to limitations after *McCutcheon*. This outside spending by large donors provides a significant financial advantage to candidates that are not actually supported by the majority. By October 15, 2015, Hillary Clinton, who received approval from over 50% of Democratic voters,⁸⁴ has raised \$77.5 million in direct contributions due to her popularity, but only \$20.3 million from PACs and super-PACs.⁸⁵ Jeb Bush, on the other hand, a far less popular candidate supported by barely 8% of Republican voters,⁸⁶ has raised a mere \$24.8 million in direct contributions, but an astounding \$108.5 million from PACs and super-PACs who represent business interests supporting Bush.⁸⁷ This is how wealth can impact elections in the United States after the *Citizens United* and *McCutcheon* decisions.

II. Political Contributions and Expenditures in Europe

Now that the points of comparison are established—individual and aggregate direct contributions, and individual and corporate independent expenditures—the new U.S. laws can be compared to European campaign-contribution laws. This comparison will help determine whether “*Citizens United* and *McCutcheon* were not just bad law but bad history.”⁸⁸

A. Perception of Corruption in the European Union

The European Commission views corruption as “one of the biggest challenges facing Europe.”⁸⁹ Europeans are just as prone as Americans to think their country is corrupt: 76% of Europeans consider corruption

83. Amic Parnes & Kevin Cirilli, *The \$5 Billion Presidential Campaign?*, THE HILL (Jan. 21, 2015, 4:54 PM), <http://thehill.com/blogs/ballot-box/presidential-races/230318-the-5-billion-campaign>.

84. *2016 Presidential Election Polls*, THE POLITICS AND ELECTIONS PORTAL, <http://2016.election-polls.org/> (last visited Oct. 23, 2015).

85. *Which Presidential Candidates Are Winning the Money Race*, N.Y. TIMES (Feb. 22, 2016), http://www.nytimes.com/interactive/2016/us/elections/election-2016-campaign-money-race.html?_r=1.

86. *2016 Presidential Election Polls*, *supra* note 84.

87. *Which Presidential Candidates Are Winning the Money Race*, *supra* note 85.

88. Zephyr Teachout, *Corruption in America*, HARVARD UNIVERSITY PRESS, <http://www.hup.harvard.edu/catalog.php?isbn=9780674659988> (last visited Apr. 7, 2016).

89. CORRUPTION REPORT, EUROPEAN COMMISSION 2 (2014).

widespread in Europe,⁹⁰ compared to 79% of Americans.⁹¹ But this perception varies greatly among European countries—from 99% of Greeks believing that corruption is commonplace in their country to just 54% of Swedes.⁹² Because the law varies within the European Union, it is helpful to compare country by country.

In 2012, Transparency International released a report, *Money, Politics, Power: Corruption Risks in Europe*,⁹³ highlighting the performance of different countries with regard to lobbying and appearance of corruption. The report illustrated how lobbying laws vary among different European countries, explaining the disparity in perception of corruption across Europe. Of the twenty-five European countries assessed, two countries—Sweden and Switzerland—“lack any binding rules to regulate political donations.”⁹⁴ Ironically, Transparency International ranked Sweden and Switzerland as the fourth and fifth cleanest countries in the world respectively in its 2014 Corruption Perception Index, while the United States lagged behind in seventeenth place.⁹⁵ The report explained the paradox by stating that “political party financing . . . is a particularly high-risk area, which even countries often described as ‘low corruption contexts’ have not managed to insulate themselves against.”⁹⁶

The report identified corporate and large individual campaign contributions as “types of donations considered to be more prone to corruption.”⁹⁷ By 2012, eight out of twenty-five European countries completely banned corporate donations to political candidates⁹⁸—the opposite of what the United States did in *Citizens United*. However, these countries provide “generous public funding” to their elections⁹⁹—

90. *Id.* at 6.

91. Jon Clifton, *Americans Less Satisfied with Freedom*, GALLUP (July 1, 2014), <http://www.gallup.com/poll/172019/americans-less-satisfied-freedom.aspx>. Seventy-nine percent of Americans replied “yes” when asked, “Is corruption widespread throughout the government in this country, or not?” *Id.*

92. CORRUPTION REPORT, *supra* note 89, at 6.

93. See generally TRANSPARENCY INT’L, MONEY, POLITICS, POWER: CORRUPTION RISKS IN EUROPE (2012) [hereinafter CORRUPTION RISKS IN EUROPE].

94. *Id.* at 22.

95. *Corruption Perception Index 2014: Results*, TRANSPARENCY INT’L, <https://www.transparency.org/cpi2014/results> (last visited Oct. 23, 2015). Note that this ranking is out of 175 countries and territories in the world.

96. CORRUPTION RISKS IN EUROPE, *supra* note 93, at 22.

97. *Id.*; see also *id.* at 23 (explaining that “limiting corporate and individual donations [is necessary] to ensure democracy is ‘not for sale’”).

98. *Id.* at 24. These countries are Belgium, Estonia, France, Hungary, Latvia, Lithuania, Poland, and Portugal. *Id.*

99. *Id.* (emphasis added).

something that U.S. candidates largely do not utilize.¹⁰⁰ About half of the European countries do not have ceilings on individual contributions,¹⁰¹ which makes the United States Supreme Court's decision in *Buckley*—to limit direct contributions out of fear of corruption—praiseworthy. “In the UK, the absence of any limit on the amount individuals or corporations can donate contributes to the on-going erosion of public confidence in the political process.”¹⁰² Similar to the Supreme Court's decision in *Buckley*, the Transparency International report did not find a correlation between independent expenditures and perception of corruption.¹⁰³

To compare U.S. campaign finance law with that of the European Union's, France and the United Kingdom were selected as illustrations because both countries have sophisticated legal systems but approach campaign financing differently from each other and from the United States. The comparison is limited to the substance of the *Citizens United* and *McCutcheon* decisions: direct contribution limits by individuals and corporations, aggregate contribution limits, and independent expenditure limits.

B. Campaign Financing Laws in France

Transparency International's Corruption Perception Index ranked France as the twenty-sixth cleanest country in the European Union and Western Europe, with a score of sixty-nine out of one hundred.¹⁰⁴ However, with respect to the transparency and integrity of campaign finance, France received a much lower score of twenty-seven out of one

100. See *Public Financing of Elections (U.S.)*, OPEN CONGRESS, https://www.opencongress.org/wiki/Public_financing_of_elections_%28U.S.%29 (last visited Oct. 23, 2015) (“Candidates have increasingly moved away from accepting public funds, as they can raise more money throughout the primary, nomination, and general election processes through strictly private contributions.”). Note that, in the United States, public funding is available only to presidential candidates—but not in Congressional elections. See *Quick Answers to Public Funding Questions*, FEDERAL ELECTION COMMISSION, http://www.fec.gov/ans/answers_public_funding.shtml (last visited Oct. 23, 2015).

101. CORRUPTION RISKS IN EUROPE, *supra* note 93, at 24, 54 (Czech Republic, Denmark, Estonia, Germany, Hungary, Italy, Netherlands, Norway, Slovakia, Sweden, Switzerland, and United Kingdom).

102. *Id.* at 24.

103. See *id.* at 54–57 (limiting areas of corruption analysis to banbans on undisclosed contributions and corporate donations, ceilings on individual contributions, lobbying disclosures, and whistleblower laws).

104. *Corruption Perception Index 2014: Results*, TRANSPARENCY INT'L, <https://www.transparency.org/cpi2014/results> (last visited Oct. 23, 2015).

hundred.¹⁰⁵ The score is low largely due to the lack of transparency in campaign finance in France. But the score is not low because of the loose campaign finance laws: French “law strictly regulates private funding of political activities.”¹⁰⁶

In France, aggregate direct contributions per election are limited to €4,600,¹⁰⁷ or approximately \$5,070¹⁰⁸—compared to \$3.5 million in the United States after *McCutcheon*. Corporations are also distinguished from natural persons under the French campaign finance laws¹⁰⁹—while corporations in the United States are treated as individuals after *Citizens United*. “No legal entity [i.e., a corporation] is allowed to participate in financing a political candidate unless the legal entity is a political party or a political group.”¹¹⁰ Contributions by foreign corporations are also prohibited in France,¹¹¹ while the Court in *Citizens United* refused to ban foreign corporate contributions in the United States.¹¹² The limit on political party financing is €7,500,¹¹³ or approximately \$8,265,¹¹⁴ though political parties themselves are not limited in how much they can contribute to a candidate.¹¹⁵

Further, France limits expenditures, unlike the United States after *Buckley* and *Citizens United*. The limitations vary, depending on the type of expenditure and election. The French Constitutional Council approved the expenditure limit as a means to counteract the appearance of corruption in politics—freedom of speech was not an issue.¹¹⁶ Because the Constitutional Council is the highest authority on constitutional matters, no

105. TRANSPARENCY INT’L FRANCE, TRANSPARENCY AND INTEGRITY OF LOBBYING: A CHALLENGE FOR DEMOCRACY, CITIZEN ASSESSMENT ON LOBBYING IN FRANCE 7 (2014) [hereinafter TRANSPARENCY INT’L FRANCE].

106. *Id.* at 18.

107. *Id.*; see also *Campaign Finance: France*, LIBRARY OF CONGRESS, <http://www.loc.gov/law/help/campaign-finance/france.php#funding> (last visited Oct. 23, 2015) (explaining that while €4,600 is the aggregate limit, direct contributions per candidate are further limited by total expenditure per candidate).

108. Date of currency conversion: Oct. 23, 2015.

109. *Campaign Finance: France*, *supra* note 107 (distinguishing between physical persons and legal entities).

110. *Id.*

111. *Id.*

112. See *Citizens United v. FEC*, 558 U.S. 310, 337 (2010) (striking down the statute that applied to foreign corporations).

113. TRANSPARENCY INT’L FRANCE, *supra* note 105, at 18.

114. Date of currency conversion: Oct. 23, 2015.

115. *Campaign Finance: France*, *supra* note 107 (Note: The ceilings on campaign expenditures per candidate, however, apply to political parties too).

116. *Id.*

French lower court could challenge the expenditure limit.¹¹⁷ The French Constitution does not protect political donations and expenditures, which is in stark contrast to the United States, where the Supreme Court characterized campaign financing as political speech protected by the First Amendment in *Buckley*, *Citizens United*, and *McCutcheon*. Because French courts do not provide constitutional protection to campaign financing, French law has the power to significantly limit campaign expenditures to prevent the appearance of corruption.

In French presidential elections, independent expenditures by third parties supporting the candidates are completely prohibited,¹¹⁸ compared to unlimited independent expenditures in the United States post *Buckley*. Direct expenditures—payments by the candidates themselves using funds contributed by donors—are also limited in France, unlike in the United States.¹¹⁹ The expenditure ceiling limits direct spending by a presidential candidate to €16.2 million (\$17.85 million¹²⁰) in the first ballot and €21.6 million (\$23.8 million¹²¹) in the second ballot,¹²² significantly reducing how much money is necessary to win a French presidential election. Nicolas Sarkozy managed to win the 2007 French presidential election with €21,038,893, or approximately \$23.1 million,¹²³ in candidate expenditures and zero in independent expenditures.¹²⁴ To compare, it took President Barack Obama about \$730 million in direct expenditures¹²⁵ and nearly

117. *Id.*

118. *Id.* (“[A]ll forms of paid commercial advertisement through the press or by any audiovisual means during the three months preceding an election are prohibited. The state provides free access to public radio and television for political advertisement for a certain amount of time during the official election campaigns.”).

119. *Cf. Buckley v. Valco*, 424 U.S. 2–4 (1976) (holding that it is proper for the Government to regulate only allocation of *public* funding to an election candidate—not the candidate’s own funding); see also *Presidential Spending Limits for 2008*, FEDERAL ELECTION COMMISSION, http://www.fcc.gov/pages/brochures/pubfund_limits_2008.shtml (last visited Apr. 7, 2015) (General Election Limit was \$84.1 million per candidate in 2008 if the candidate uses public funds for campaigning). But no major candidate in the previous election opted in for public *funding*—unlike in France, where there is an expenditure limit on *spending* regardless of where the money came from. See *Campaign Finance: France*, *supra* note 107 (emphasis added).

120. Date of Currency Conversion: Oct. 23, 2015.

121. Date of Currency Conversion: Oct. 23, 2015.

122. *Campaign Finance: France*, *supra* note 107 (Note: These numbers are for the 2007 presidential election and are rounded up to the nearest hundred thousand).

123. Date of Currency Conversion: Oct. 23, 2015.

124. Date of Currency Conversion: Oct. 23, 2015.

125. *2008 Presidential Election*, OPEN SECRETS, <https://www.opensecrets.org/prcs08/> (last visited Oct. 23, 2015).

\$150 million in independent expenditures¹²⁶ to win the 2008 presidential election in the United States. Thus, the presence of big money and unlimited expenditures affects the election process in the United States much more than in France.¹²⁷

In French parliamentary elections, expenditures are also limited. Like in French presidential elections, independent expenditures on parliamentary candidates are forbidden and direct expenditures by candidates are limited. The limit on direct expenditures in a parliamentary election is calculated by using a formula that depends on the district size. It starts with a fixed base of €38,000 per candidate, plus €0.15 per each resident of a district, increased by a multiplier of 1.18.¹²⁸ So, for a district the size of California's Seventh Congressional District, which includes suburbs of Sacramento with total population of around 721,042,¹²⁹ the candidate expenditure ceiling in France would be €165,624, or approximately \$182,109,¹³⁰ per candidate plus no independent expenditures. By contrast, during the 2014 House election, Congressman Amerish Bera won the California's Seventh District election after spending nearly \$4.36 million in direct contributions¹³¹ with another \$6.32 million provided in independent expenditures.¹³² While in France, every candidate is on equal grounds when it comes to campaign finance, in the United States, the sky is the limit—and it becomes apparent when looking at the cost of election victories.

Thus, while the United States Supreme Court deemed it impermissible to “level the playing field” by “equaliz[ing] financial resources of candidates,”¹³³ the French did exactly the opposite. In France, both

126. *2008 Independent Expenditure Summaries*, FEDERAL ELECTION COMMISSION, <http://www.fec.gov/press/press2008/2008indexp/2008presindepexpend.html> (last visited Oct. 23, 2015).

127. *See id.* Obama, as the winning candidate, spent more than twice as much as the runner up on the election: \$730 million, compared to \$333 million by John McCain. *Id.* The third place candidate, Ralph Nader, spent only \$4 million of his election funds. *Id.* While correlation is not causation, winning in the United States is surely correlated with higher spending than in France.

128. *Campaign Finance: France*, *supra* note 107.

129. *Fast Facts for Congress*, UNITED STATES CENSUS BUREAU, <http://www.census.gov/fastfacts/> (select “California” in the drop-down menu 1; then select “Congressional District 7” in the drop-down menu 2) (last visited Oct. 23, 2015).

130. Date of Currency Conversion: Oct. 23, 2015.

131. *House and Senate Elections*, FEDERAL ELECTION COMMISSION, http://www.fec.gov/portal/house_senate.shtml (click on “House and Senate Map” hyperlink; then type in “Bera” in the “Search by Candidate Name” text box; then click “Go”) (last visited Oct. 23, 2015).

132. THE CAMPAIGN FINANCE INSTITUTE, TABLE 1: 2014 HOUSE GENERAL ELECTION RACES BY TOTAL AMOUNT OF INDEPENDENT SPENDING (2015).

133. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014).

contributions and expenditures are effectively capped. While, in the United States, the more a candidate raises—both in direct contributions and independent expenditures—the more a candidate can spend on winning the campaign. Also, corporate contributions and unlimited expenditures, which are wholly permissible in the United States after *Citizens United* and *Buckley*, are altogether banned in France. This has the effect of reducing the appearance of corruption in France and making the U.S. political system seem entangled with big money. This is where the legal standard for appearance of corruption plays a practical role: while winning a campaign still costs money in France, it costs much less than in the United States.

Further, because French courts leveled the political playing field, the appearance of corruption is far less prevalent in France. French laws are tough on the appearance of even slight corruption, not just full quid pro quo bribery—hence the ban on corporate contributions. Political contributions in France are also not entangled with deep-rooted constitutional protections, unlike the U.S. campaign finance laws. Elections and campaign financing are viewed more as an administrative procedure than as speech. As a result, elections are brief, and safeguards are strong.¹³⁴ Further, appearance of impartiality takes priority over protecting the power of money. This is why the state plays such a big role in administering and conducting elections,¹³⁵ a characteristic common to some other European countries as well. This is a different avenue of viewing money in politics. Under this view, it is possible to extend stronger protection to the vote of the poor and unpopular—unlike in the United States, where the right to spend money on politics is protected under the Constitution.

C. Campaign Financing in the United Kingdom

The United Kingdom ranks as the fourteenth cleanest country in Europe, and also holds the fourteenth least corrupt place in the world, according to the Corruption Perception Index, which is slightly above the United States in seventeenth place.¹³⁶ Nevertheless, 59% of U.K. citizens believed that the British government is run by a few big entities acting in their own best interests, 67% considered British political parties to be corrupt, and 55% felt that the British Parliament was either corrupt or

134. *Campaign Finance: France*, *supra* note 107.

135. *Id.* (“Campaign accounts are audited by special commission. Candidates whose campaign accounts are certified may be reimbursed up to 50% of their expenses by the state.”).

136. *Corruption Perception Index 2014: Results*, TRANSPARENCY INT’L, <https://www.transparency.org/cpi2014/results> (last visited Oct. 23, 2015).

extremely corrupt.¹³⁷ The campaign finance laws in the United Kingdom are also much less favorable to serving private interests than the laws in France. As a result, political party financing has been at the heart of many corruption scandals in the United Kingdom over the past decade.¹³⁸

In the United Kingdom there are *no* limits on individual donations—either to individual candidates or to political parties.¹³⁹ By comparison, the *Buckley* Court upheld a \$1,000 individual contribution limit in the United States, which has grown to \$2,700 per candidate or \$33,400 per political party in 2015.¹⁴⁰ British law, however, justifies the absence of a contribution limit by setting an expenditure limit in Parliamentary elections. The spending limits apply to both how much a political party can spend on their candidates and how much an individual candidate can spend on his or her own campaign.

The direct expenditures limit for political parties nominating candidates to the British Parliament is the greater of £990,000 (\$1.5 million¹⁴¹) or £30,000 (\$46,016¹⁴²) times the number of contested seats (up to 632 seats in the British Parliament).¹⁴³ The average direct expenditure limit for individual parliamentary candidates is £16,050 (\$24,619¹⁴⁴) for a “short campaign” and £26,450 (\$40,571¹⁴⁵) for a “long campaign.”¹⁴⁶ The British Electoral Commission set these limits to ensure that the general electorate can afford to participate and to prevent appearance of corruption.¹⁴⁷ While prevention of appearance of corruption was only the rhetoric in the *Buckley* and *Citizens United* decisions, the United Kingdom

137. TRANSPARENCY INT’L UK, LIFTING THE LID ON LOBBYING: THE HIDDEN EXERCISE OF POWER AND INFLUENCE IN THE UK 12 (2015) [hereinafter LOBBYING IN THE UK] (reporting the Global Corruption Barometer findings).

138. *Id.* at 17.

139. *Id.*; see also *Campaign Finance: United Kingdom*, LIBRARY OF CONGRESS, <http://www.loc.gov/law/help/campaign-finance/uk.php> (last visited Oct. 23, 2015).

140. *Contribution Limits for 2015–2016 Federal Elections*, FEDERAL ELECTION COMMISSION, http://www.fec.gov/pages/brochures/contrib.shtml#Contribution_Limits (last visited Oct. 23, 2015).

141. Date of Conversion: Oct. 23, 2015.

142. Date of Conversion: Oct. 23, 2015.

143. THE ELECTORAL COMM’N, UK PARLIAMENTARY GENERAL ELECTION 2015 6–7 (2015). Note that there is a separate election for Northern Ireland with similar limits, but for simplicity concerns it is not discussed in this note.

144. Date of Conversion: Oct. 23, 2015.

145. Date of Conversion: Oct. 23, 2015.

146. THE ELECTORAL COMM’N, CANDIDATE SPENDING LIMIT REVIEW 3, 6 (2014). Note that these are *average* spending limits. In the United Kingdom, the spending limit varies by a number of electors. But this complication is unnecessary for the general analysis of this note that tries to compare apples to apples.

147. *Id.* at 4.

actually implemented laws to “level the playing field,” which the United States Supreme Court explicitly refused to do in *Buckley*. Yet, the apparent intent of leveling the playing field did not translate into reality in the United Kingdom.

Despite the expenditure limit, the lack of contribution limit is problematic from the standpoint of preventing the appearance of corruption. Chandu Krishnan, the executive director of Transparency International United Kingdom, reiterated the concern of the *Buckley* Court with regard to large contributions: “When donors are making contributions exceeding £20,000 (\$31,000)—and some are making donations well over £250,000 (\$390,000)—it’s perfectly understandable you don’t give away that kind of money without expecting something in return.”¹⁴⁸ This concern is warranted: between 2001 and 2010, nearly 60% of the £432 million (\$662 million) donated to political parties came from individual donations of more than £100,000 (\$153,387).¹⁴⁹ To compare, the appearance of corruption that stems from large individual contributions was limited in the United States by the *Buckley* decision; now, individual contributions to a political party is limited to \$32,400 per party, per year.¹⁵⁰ After *McCutcheon*, however, a donor in the United States can circumvent this limit by donating to as many individual candidates in a party as he or she wishes¹⁵¹—but this is also an issue in the United Kingdom.

Because there are no individual contribution limits in the United Kingdom, there is also no aggregate contribution limit,¹⁵² leaving British law in sync with the U.S. law after the *McCutcheon* decision. While the United States Supreme Court in *McCutcheon* explained that aggregate limits existed only to stop circumvention of individual contribution limits,¹⁵³ this line of reasoning is irrelevant in the United Kingdom because there are no individual contribution limits to circumvent. British law also does not address the greater concern of the dissenters in *McCutcheon*—that without aggregate limits, the wealthy elite can elect their political party to

148. Thompson, *supra* note 14. Note that the dollar amounts in the quote are based on 2012 conversion rates.

149. LOBBYING IN THE UK, *supra* note 137, at 17. Note also that loans, unlike donations, are not subject to regulation. *Id.* In the first three months of 2014, political parties in the United Kingdom received about £14 million in outright donations, and another £15 million in loans. *Id.* Note that the conversion rate to U.S. dollars was based on the October 23, 2015 rate.

150. GARRETT, *supra* note 71, at 3.

151. See *id.* (showing that the *McCutcheon* decision struck down the aggregate contribution limit).

152. See generally *Contribution Limits for 2015–2016 Federal Elections*, *supra* note 140. This is a corollary that is undisputed in the law.

153. See *McCutcheon v. FEC*, 134 S. Ct. 1439 (2014).

occupy the whole legislature. And it shows: Liberal Democrats, the third largest party in the House of Commons, received 40% of their cash contributions over the past three years from just three wealthy businessmen.¹⁵⁴ The United States, therefore, appears less corrupt when compared to the United Kingdom, even after the two infamous decisions.

Corporations are also permitted to contribute to elections in the United Kingdom,¹⁵⁵ just like in the United States post *Citizens United*. In fact, British campaign finance law, like American law following *Citizens United*, does not distinguish between natural persons and corporations when it comes to political contributions.¹⁵⁶ However, foreign corporations and foreign individuals are banned from contributing to the election,¹⁵⁷ unlike in the United States. Because British law permits unlimited corporate donations, corporations have been the top donors in British elections between 2001 and 2014.¹⁵⁸

Finally, independent expenditures by third parties are limited in the United Kingdom, unlike in the United States after *Buckley* and *Citizens United*. While paid political advertising in broadcast media, supported largely by independent spending in the United States, is prohibited in the United Kingdom, political parties receive a certain amount of airtime free of charge.¹⁵⁹ The independent expenditures in the United Kingdom are restricted to £500 (\$767¹⁶⁰) per person, for the limited purpose of “presenting to the electors the candidate or his views, or the extent or nature of his backing or disparaging of another candidate.”¹⁶¹ Previously, the United Kingdom had a much smaller independent expenditure limit—just £5 (\$8) per person, per election—before the European Court of Human Rights struck it down in *Bowman v. United Kingdom*.¹⁶² In *Bowman*, the European Court treated the limit on independent expenditure limit as a

154. LOBBYING IN THE UK, *supra* note 137, at 17.

155. Political Parties, Elections and Referendum Act, c. 41, § 54 (2000) (U.K.).

156. *Id.* (identifying individuals, companies, trade unions, building societies, partnerships, and associations as permissible donors, as long as they are registered in the United Kingdom).

157. *Id.*

158. *Donations and Loans Reported Every Quarter by Political Parties*, THE ELECTORAL COMM’N, <http://www.electoralcommission.org.uk/find-information-by-subject/political-parties-campaigning-and-donations/donations-and-loans-to-political-parties/quarterly-donations-and-loans> (last visited Apr. 10, 2015) (illustrating that between 2001 and 2004, individuals donated more than £258 million, while companies, unincorporated associations, partnerships, and trade unions have collectively donated close to £277 million).

159. Communications Act, c. 21, § 333 (2003).

160. Currency Conversion Date: Oct. 23, 2015.

161. *Campaign Finance: United Kingdom*, *supra* note 139.

162. *See generally* *Bowman v. United Kingdom*, 26 Eur. Ct. H.R. 1 (1998).

“restriction on freedom of expression.”¹⁶³ Similarly, in *Buckley* and *Citizens United*, the United States Supreme Court treated such limit as a restriction on freedom of speech. The European Court also explained that it was not necessary to set an expenditure limit in order to secure “equality between candidates,”¹⁶⁴ whereas the *Buckley* Court held that establishing equality between candidates was not a government objective at all when it came to preventing the appearance of corruption.¹⁶⁵

The U.K. government responded to *Bowman* by increasing the limits on independent expenditures that differentiate between “unrecognized” and “recognized” third parties. “Unrecognized” third parties—meaning, individuals that want to financially assist political candidates without revealing their identities—may only spend up to £500 (\$767) on a candidate per election.¹⁶⁶ “Recognized third parties”—meaning those who reveal their identities to the British government—may spend up to £988,100 (\$1,515,620) in the year leading to a parliamentary election in favor of or against a particular candidate.¹⁶⁷ While these numbers are large, independent expenditures are unlimited in the United States after *Buckley* and *Citizens United*.

These independent expenditure limits apply to both individuals and corporations.¹⁶⁸ These limits are necessary to promote “fairness between competing candidates for election by preventing wealthy third parties from campaigning for or against a particular candidate or issuing material which necessitated the devotion of part of a candidate’s election budget, which was limited by law,” as asserted by the British government in *Bowman*.¹⁶⁹ The fact that the British government reinstated the limits on independent expenditure after the European Court struck them down illustrates that the United Kingdom found expenditure limits necessary to prevent appearance of corruption, unlike the United States Supreme Court.

163. *Id.* at ¶ 33.

164. *Id.* at ¶ 37 (“Furthermore, the restriction on expenditure could not properly be said to ensure equality between candidates, because they were already subject to inequalities depending on whether or not they received the support of one of the major political parties, which were free to spend unlimited amounts on campaigning at national level as long as they did not attempt to promote or prejudice any particular candidate.”).

165. *Buckley v. Valco*, 424 U.S. 1, 48–49 (1976).

166. *Campaign Finance: United Kingdom*, *supra* note 139 (citing PPERA §§ 88, 95 & sched. 11).

167. *Id.*

168. *Id.* (noting that the United Kingdom does not distinguish between natural persons and legal entities for the purpose of its election law).

169. *Bowman v. United Kingdom*, 26 Eur. Ct. H.R. 4, ¶ 36 (1998).

Thus, the British campaign finance law appears to be almost a polar opposite of the U.S. campaign finance law in addressing the appearance of corruption. Unlike the U.S. law after *Buckley*, *Citizens United*, and *McCutcheon*, the U.K. law limits campaign expenditures but does not restrict contributions to political candidates. The British also aim to combat the appearance of corruption by leveling the playing field—something that the United States Supreme Court explicitly refused to do in both *Citizens United* and *McCutcheon*, citing the freedom of political speech. This shows that the British agree to limit the appearance of corruption at the expense of limiting the freedom of political expression—while the American judicial system values the freedom to utilize one’s wealth in elections. Thus, elections in the United Kingdom do not cost nearly as much as elections in the United States, even when taking into account the comparable size of the two economies.¹⁷⁰

Conclusion

In the United States, elections are expensive and the freedom to participate in elections is vast. As illustrated in this note, campaign finance law in the United States, following *Citizens United* and *McCutcheon*, differs from European campaign finance law—but not by much.

It starts with the high degree of scrutiny that the United States Supreme Court gives when reviewing money in politics. The Court views campaign finance as speech, not just manner of speech, which is very different from how European courts treat money in politics. As a result, the Court has struck down nearly every limit to money in politics, except for the most obvious direct contributions limit.

The Court also created a high bar for the perception of corruption: it only recognizes the interest in preventing quid pro quo corruption and has no interest in preventing the perception of corruption that stems from income inequality. This differs from Europe, where the governments in France and the United Kingdom are keen to put limits on any appearance of

170. Compare David Cowling, *What Price Democracy? Counting the Cost of UK Elections*, BBC NEWS (Nov. 8, 2013), <http://www.bbc.com/news/uk-politics-24842147> (estimating that the 2010 U.K. Parliamentary election cost £113 million, or approximately \$173 million) with *The Money Behind Elections*, OPENSECRETS.ORG, <https://www.opensecrets.org/bigpicture/> (last visited Oct. 23, 2015) (estimating that the 2010 Congressional election cost \$3.6 billion). While the Gross Domestic Product of the United States exceeded that of the United Kingdom by a factor of six-and-a-half in 2010, the cost of the U.S. Congressional election in that same year exceeded the cost of the British parliamentary election by a factor of twenty-one. See WORLD DEV. INDICATORS DATABASE, GROSS DOMESTIC PRODUCT 2010 1 (World Bank 2011) (stating that the GDP of the United Kingdom was \$2,246,079,000 in 2010, while the GDP of the United States was \$14,582,400,000).

corruption. Unlike Europe—where even corporate contributions are often limited—and due to the strict First Amendment scrutiny, perception of corruption is just not perceived as importantly in the United States.

Compared to many European countries, the United States still has many restrictions on campaign financing. However, most of these countries with unrestricted money in politics are small countries. Large economies, like France and the United Kingdom have more safeguards in their respective campaign financing laws. These nations do not protect giving cash to politicians as sacred speech, but rather treat elections as administrative matters, where prevention of corruption serves as the ultimate goal.

France and the United Kingdom also recognize the danger of inequality in politics, which leads to the appearance of corruption, while the United States does not limit inequality in politics. The election law after *Buckley*, *Citizens United*, and *McCutcheon* protects the right of some to spend much more than others on elections. As a result, American elections cost disproportionately more than elections in the largest European economies. Thus, while “[t]here is no right more basic in our democracy than the right to participate in electing our political leaders,”¹⁷¹ to exercise this basic right apparently costs money.

171. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440–41 (2014).