William & Mary Business Law Review

Volume 7 (2016)
Issue 1

Article 6

February 2016

Presupposing Corruption: Access, Influence, and the Future of the Pay-to-Play Legal Framework

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PRESUPPOSING CORRUPTION: ACCESS, INFLUENCE, AND THE FUTURE OF THE PAY-TO-PLAY LEGAL FRAMEWORK

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ABSTRACT

Political spending, in all of its various permutations, lies at the nexus between campaign finance law and pay-to-play law. Both of these legal doctrines seek to minimize the corrupting effects of money upon elected officials and candidates, and both impose various caps and restrictions on political contributions in order to do so. Over the past half-century, however, the Supreme Court has struggled to define what sort of activity constitutes "corruption" in the political sphere. In light of its decisions in 2010's Citizens United v. FEC *and 2014's* McCutcheon v. FEC*—two seminal cases that dramatically altered campaign finance regulation—the Court now appears to recognize that the act of gaining access to elected officials via political spending does not constitute quid pro quo corruption or the appearance thereof. This view has led to deregulation of the legal framework of campaign finance in recent years. Furthermore, at present, presupposing corruption on the part of elected officials or candidates is not always a lawful assumption upon which laws or regulations governing political spending can be based. It thus follows that the corruption-based rationale at the heart of certain federal, state, and local pay-to-play laws may also be subject to challenge. This Note examines the Court's shifting views on corruption, applies it to various pay-to-play laws*

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currently in effect, and ultimately concludes that the legal and constitutional framework for much of pay-to-play law, as it currently stands, rests on shaky ground.

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INTRODUCTION

The relationship between campaign finance law and pay-to-play law—two legal doctrines that came into existence in only the past half-century—is complicated, contested, and changing. Generally, each field is governed by a different set of statutes and regulations, but these two areas of jurisprudence are nevertheless intertwined. Both employ restrictions on political contributions in an attempt to minimize corruption between, respectively, donors and elected officials or candidates, or government contractors or bidders and government officials.

In addition, pay-to-play laws take many of their cues from campaign finance law by employing the latter's methods of regulation, including imposing individual and aggregate limits on contributions and mandating disclosure. Accordingly, precedent set forth by litigation related to campaign finance often has an impact on the legitimacy and constitutionality of pay-to-play laws.

Over the past several years, our nation's highest court drastically changed the way in which it defines political corruption or the appearance thereof. For decades, the Supreme Court adhered to the standard it set forth in *Buckley v. Valeo*, a seminal campaign finance case that, inter alia, distinguished between political contributions and expenditures in the regulatory context.[1] Because direct contributions to elected officials and candidates for office were thought to pose the danger of corruption via quid pro quo exchanges, the government had a very compelling interest in limiting them, and courts could apply intermediate—rather than strict—scrutiny to laws that limited contributions.[2] Meanwhile, the Court deemed that laws controlling expenditures by candidates or committees merited strict scrutiny and did not impose the risk of corruption, but the Court declined to rule on whether corporations could make them.[3] Nearly thirty-five years after *Buckley* (and following a long line of cases debating the lawfulness of corporate political expenditures[4]), the Court held in

[1] *See generally* 424 U.S. 1 (1976).
[2] *Id.* at 16.
[3] *Id.*
[4] *See, e.g.*, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978) (holding that a state statute banning expenditures by corporations on ballot measure elections

Citizens United v. FEC that unlimited independent expenditures in support of officials and candidates are a form of protected speech that "do not give rise to corruption or the appearance of corruption."[5] Two months later, the United States Court of Appeals for the D.C. Circuit held in *Speechnow.org v. FEC* that the government lacked a compelling anti-corruption interest in limiting contributions to independent expenditure groups.[6] Finally, four years after *Citizens United*, the Court ruled in favor of eliminating aggregate limits (those it had affirmed in *Buckley*) on political contributions in *McCutcheon v. FEC*, pronouncing that the government may *only* target quid pro quo corruption (the direct exchange of an official act or promise for remuneration) when regulating in the campaign finance space.[7] Additionally, in *McCutcheon*, the Court held that access to elected officials resulting from political contributions does not constitute quid pro quo corruption or the appearance thereof.[8]

These decisions, and their progression toward a narrower view of what constitutes political corruption, pose questions about whether a meaningful First Amendment distinction exists between aggregate limits on political contributions in general and limits on contributions set forth as a condition of eligibility for a government contract, which many pay-to-play laws impose.[9] Furthermore, if

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was unconstitutional); FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 239 (1986) (holding that corporations that exist for the purpose of disseminating information, rather than turning a profit, are exempt from the prohibition on corporate expenditures in candidate elections); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 654–55 (1990) (holding that corporations may not make independent expenditures in connection with state candidate elections).

[5] 558 U.S. 310, 314 (2010).

[6] 599 F.3d 686, 694–95 (2010).

[7] 134 S. Ct. 1434, 1441 (2014) ("Any regulation must instead target what we have called '*quid pro quo*' corruption or its appearance.").

[8] *Id.* at 1438 ("Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner 'influence over or access to' elected officials or political parties.").

[9] *See, e.g.*, Rebecca Moll Freed, *McCutcheon v. FEC: the Potential Impact on Aggregate Contribution Limits Under Local Pay-to-Play Ordinances*, CORP. POLITICAL ACTIVITY BLOG (Oct. 17, 2013), http://www.corporatepoliticalactivitylaw.com/new_jersey/mccutcheon-v-fec-potential-impact-aggregate-contribution-limits-local-pay-play-ordinances [http://perma.cc/M6MR-8ZNB] (speculating

increased access to public officials is no longer considered a form of corruption, the rationale for many pay-to-play laws may rest on shaky ground.

This Note addresses whether the shifting standards for political corruption embodied by the Supreme Court's holdings in *Citizens United, McCutcheon*, and other recent cases could lead to a challenge of pay-to-play laws that seek to prevent the appearance of impropriety via restrictions on political contributions, and argues that such a challenge may well be successful. Additionally, current jurisprudence raises red flags and sets clear limits for regulators seeking to promulgate pay-to-play restrictions, and many pay-to-play laws in effect today are not properly tailored to the cause of preventing quid pro quo corruption or the appearance thereof. This Note examines provisions included in the two most prominent federal pay-to-play laws—SEC Rule 206(4)-5 and MSRB Rule G-37[10]—as well as provisions in the nation's strictest state pay-to-play laws (in effect in Connecticut and New Jersey) and new laws proposed by other government regulatory bodies, such as the Financial Industry Regulatory Authority (FINRA). Although certain aspects of these laws are properly tailored to the goal of preventing corruption and thus may ultimately survive judicial review, not all provisions contained therein meet the standards set forth by current jurisprudence. Hence, at both the state and federal levels, these laws may be subject to successful challenges.

Part I addresses how the Supreme Court has progressed over the years in defining corruption in the context of campaign finance regulation. Part II reviews the genesis and evolution of pay-to-play laws at the state and federal level. Part III examines the First Amendment problems posed by pay-to-play laws. Part IV discusses additional problems posed by current pay-to-play laws. Finally, Part V focuses on the issues that these laws may pose for contributors and candidates in future elections.

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that the *McCutcheon* decision could be extended to state pay-to-play laws that impose aggregate contribution limits).

[10] *See, e.g.*, 17 C.F.R. § 275.206(4)-5 (2015); MUN. SEC. RULEMAKING BD., RULE G-37: POLITICAL CONTRIBUTIONS AND PROHIBITIONS ON MUNICIPAL SECURITIES BUSINESS, http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-37.aspx [http://perma.cc/3NK6-MUV9].

I. THE FIRST AMENDMENT, CORRUPTION, AND REGULATION OF POLITICAL ACTIVITY

Since its origins in the 1970s, campaign finance law has framed political spending in terms of the First Amendment: such activity is considered core political speech that is essential to the proper functioning of democracy.[11] The Supreme Court has applied two different levels of scrutiny in most major campaign finance cases: strict and intermediate. If the Court chooses to review a law or regulation centered on independent political expenditures, it must apply the higher standard of strict scrutiny, which requires that the law be narrowly tailored—in the least restrictive manner possible—to advance a compelling government interest, with the goal of safeguarding protected speech.[12] If the issue before the Court involves certain types of contribution limits, however, the Court must apply the lower standard of intermediate scrutiny, which only requires a finding that the law furthers a sufficiently important government interest by employing means closely drawn to avoid unnecessary abridgement of associational freedoms.[13]

It is not always clear which level of scrutiny a court should apply in campaign finance cases. As political campaign infrastructures grow more complex, it becomes more difficult to classify political spending as either a completely independent expenditure or a simple contribution. As a result, in the years following the passage of the Federal Election Campaign Act ("FECA"), courts are obligated to clarify what level of scrutiny applies in a given case, as well as which forms of alleged corruption constitute a compelling state interest for the purpose of regulating money in politics.[14]

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[11] Buckley v. Valeo, 424 U.S. 1, 16 (1976) ("[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.").

[12] *See generally* Ward v. Rock Against Racism, 491 U.S. 781 (1989); *see also* United States v. O'Brien, 391 U.S. 367 (1968).

[13] *See, e.g.*, McCutcheon v. FEC, 134 S. Ct. 1434, 1444; *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 386 (2000).

[14] 52 U.S.C. § 30116 (2015).

A. The Beginning: Buckley v. Valeo *and* Austin v. Michigan Chamber of Commerce

As initially passed in 1971, the FECA capped both individual and aggregate political contributions, as well as the expenditures that could be made by candidates and candidate committees.[15] Shortly after its passage, however, the Court struck down the FECA's expenditure limits in *Buckley v. Valeo*, holding that the government's compelling interest in preventing "corruption or its appearance" was limited to political contributions. Contributions were targeted because of the perceived danger of quid pro quo exchanges between contributors and candidates or elected officials—a risk that did not exist in the context of expenditures.[16] Ultimately, the Court in *Buckley* provided that corruption or the appearance thereof could be targeted for regulation.[17] Moreover, the Court held that governmental limitation of contributions both at the individual and the aggregate level was a narrowly tailored approach toward preventing such corruption.[18]

A decade and a half later, the Supreme Court appeared to expand on the definition of corruption set forth in *Buckley* in *Austin v. Michigan Chamber of Commerce*. In *Austin*, Justice Thurgood Marshall wrote for the majority, holding that Michigan's ban on independent expenditures in state elections by corporations was narrowly tailored to the goal of preventing the appearance of quid pro quo corruption, even though such expenditures could not be coordinated with a candidate or a candidate committee.[19] Thus, at the time, although independent expenditures—unlike contributions—could ostensibly be made without the knowledge or consent of a candidate, the mere fact that they could support or oppose that candidate was enough of a connection to pose a risk of quid pro quo corruption.[20]

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[15] *Id.*

[16] *Buckley*, 424 U.S. at 45, 80.

[17] *Id.* at 131–32.

[18] *Id.* at 26 ("It is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1,000 contribution limitation.").

[19] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990).

[20] *See id.* at 668–69.

B. The Modern Era: Citizens United v. FEC *and* McCutcheon v. FEC

From the beginning, the Roberts Court's approach to previous corruption jurisprudence was much more skeptical than that of Courts past. As a result, the Court drew attention to problems with the definition of corruption as it stood after *Austin*. As Chief Justice Roberts himself noted in *Wisconsin Right to Life, Inc. v. FEC*, a regulatory regime directed at ever-expanding views of what constituted corruption led to the application of "prophylax-is-upon-prophylaxis" in a never-ending campaign against circumvention.[21] Such a regime was bound to face stiff challenges.

The first major salvo against the more inclusive *Buckley* and *Austin* standard for corruption arrived with the Supreme Court's ruling in *Citizens United*, which struck down the federal prohibition on independent political expenditures, the same prohibition that the Court previously found constitutional in *Austin*.[22] *Citizens United* did not address direct contributions to candidates, but the case did address whether independent political expenditures (which, incidentally, could be made by corporations with contract business before the government) could lead to corruption or the appearance thereof. During oral arguments, the FEC stipulated that the very premise of the independent expenditure prohibition was to prevent individuals or corporations from spending "massive amounts of money" on campaign advertisements that could possibly have an electoral effect and lead, in turn, to favor-seeking between such entities and the candidates they support.[23] In the opinion, however, Justice Anthony Kennedy applied strict scrutiny and held that increased access resulting from independent expenditures was not indicative of corruption, and although "speakers may have influence over or access to elected officials[, that] does not mean that those officials are corrupt."[24]

Kennedy's opinion in *Citizens United*, which took key cues from his prior dissent in *McConnell v. FEC*,[25] signaled a break

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[21] 551 U.S. 449, 479 (2007).

[22] Citizens United v. FEC, 558 U.S. 310, 312 (2010).

[23] Transcript of Oral Argument at 47, Citizens United v. FEC, 558 U.S. 310 (2009) (No. 08-205).

[24] *Citizens United*, 558 U.S. at 314.

[25] "[Congress may] regulat[e] federal candidates' and officeholders' receipt of *quids* [but it may not] regulat[e] ... any conduct that wins goodwill from or

with the Court's prior views about what actions and events constitute corruption. By indicating that increasing one's access or influence to public officials is not a corrupt act, the Court dealt a heavy blow to the concept that the government has a compelling interest in regulating what it perceives as "corruption" absent actual evidence of wrongdoing. Furthermore, in dicta, Justice Kennedy cast doubt on whether gaining access through independent expenditures even bore the aura of corruption, stating that "the appearance of influence or access will not cause the electorate to lose faith in this democracy."[26]

Kennedy's opinion set the stage for *McCutcheon*, in which the Court removed certain restrictions on direct contributions, rather than independent expenditures.[27] Although the ruling in *McCutcheon* dealt narrowly with aggregate contribution limits and did not directly address pay-to-play restrictions, the reasoning that the Court employed in reaching its holding has the potential to threaten the constitutional basis for many pay-to-play laws.

In *McCutcheon*, the Court examined whether aggregate limits on political contributions, which were set at $123,200 overall for the 2013–2014 election cycle,[28] could withstand intermediate scrutiny, and held that they could not.[29] In a plurality opinion, Chief Justice John Roberts wrote that laws that are not properly drawn to prevent quid pro quo corruption or the appearance thereof can and should be trumped by the First Amendment, and laws that attempt to prevent ingratiation and access between candidates and their donors, rather than de facto corruption, do not fall under this rubric.[30] The Court reasoned that the potential for

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influences a Member of Congress." McConnell v. FEC, 540 U.S. 93, 294 (2003) (Kennedy, J., dissenting).

[26] *Id.*

[27] *See generally* McCutcheon v. FEC, 134 S. Ct. 1434 (2014).

[28] COVINGTON & BURLING, LLP, THE FEC INCREASES INDIVIDUAL CONTRIBUTION LIMITS FOR 2013–2014 (Feb. 11, 2013), http://www.cov.com/files/Publication/0fc16100-f79c-4222-8686-00e70bc91845/Presentation/PublicationAttachment/7309c948-e64d-4268-82ed-104ad7e1fe45/The_FEC_Increases_Individual_Contribution_Limits_for_2013-2014.pdf [http://perma.cc/V4VU-TVB5] (explaining the increased limits on individual contributions for the 2013–2014 election cycle).

[29] *See generally McCutcheon*, 134 S. Ct. at 1434.

[30] *Id.* at 1441 ("We have said that government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford.").

corruption does not increase when a donor can give the same contribution, subject to the individual limits, to more candidates or committees than was permitted under the aggregate limit.[31] Therefore, after applying intermediate scrutiny, the Court held that the aggregate limits were not sufficiently drawn toward preventing quid pro quo corruption or the appearance thereof.[32] In essence, First Amendment rights are paramount, and "more speech, not less" is the governing rule for campaign finance regulation, unless the government can show that a contribution is quid pro quo.

The reasoning that the Supreme Court employed in *McCutcheon* can also be found in *Dallman v. Ritter*, a 2010 case in which the Colorado Supreme Court struck down Amendment 54 to the Colorado Constitution.[33] The amendment prohibited sole source government contractors and members of their immediate families from making contributions to political parties or to state and local candidates during the duration of a government contract and for two years after its conclusion.[34] The language of the amendment referred to "a presumption of impropriety between contributions to any campaign and sole source government contracts."[35] In other words, Amendment 54 presupposed corruption or the appearance thereof. The court held that although preventing the actuality and appearance of corruption was a justifiable government interest, the appearance of corruption *alone* is "not sufficient to justify any and all restrictions on First Amendment freedoms," and the far-reaching and vague language in Amendment 54 was not properly drawn to the goal of preventing such corruption.[36] As the Supreme Court opined later in *McCutcheon*,

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[31] *Id.* at 1463:

> Equally unpersuasive is *Buckley's* suggestion that contribution limits warrant less stringent review because '[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution,' and '[a]t most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate.'

[32] *Id.* at 1449 ("To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process.").

[33] 225 P.3d 610, 640 (Colo. 2010).

[34] COLO. CONST. art. XXVIII, § 15 (West, Westlaw through Nov. 2014 amendments).

[35] *Dallman*, 225 P.3d at 615.

[36] *Id.* at 623.

the Colorado court also found that there was little evidence showing that the prohibition on contributions reduced actual corruption, and correspondingly, such prohibitions overburdened the First Amendment rights of those targeted by Amendment 54.[37]

C. The Appearance of Impropriety and the Coming Debate

The most recent case embodying the idea that the appearance of corruption itself is a compelling government interest arrived in 2014–15, when the D.C. Circuit Court of Appeals adjudicated *Wagner v. FEC*. In *Wagner*, the plaintiffs sought to challenge the constitutionality of the FECA's prohibition against federal government contractor contributions in connection with federal elections.[38] This prohibition is somewhat narrowly drawn; it only limits natural persons who are federal government contractors from making political contributions and does not include family members.[39] The plaintiffs in *Wagner* argued that this law was overbroad because it banned contributions by a class of individual citizens who are at low risk for corruption—those who do not win government contracts through a bidding process—and thus, the FEC failed to establish that the law is appropriately tailored to the specific goal of preventing corruption.[40] *Wagner*, like other campaign finance cases, involved a traditional analysis that weighs speech via contributions against the risk of quid pro quo corruption or the appearance thereof.[41] In the lead-up to the D.C.

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[37] *Id.* at 633 ("These attributes make the potential of pay-to-play corruption in a collective bargaining agreement exceedingly remote, so the government lacks a sufficiently important interest to justify this sort of heavy-handed regulation.").

[38] *See generally* Wagner v. FEC, 854 F. Supp. 2d 83 (D.D.C. 2013), *vacated*, 717 F.3d 1007 (D.C. Cir. 2013), *appeal after remand*, 793 F.3d 1 (D.C. Cir. 2015) (en banc).

[39] 52 U.S.C. § 30119 (2015).

[40] Complaint at 17, Wagner v. FEC, 717 F.3d 1007 (D.C. Cir. 2013) (No. 11-cv-1841(JEB)):

> Because section 441c completely prohibits individuals with government contracts from making any contributions to candidates, political committees, and political parties in connection with elections for federal offices, it is unconstitutional under the First Amendment unless there is a compelling governmental interest in the ban and the ban is narrowly tailored to support that interest.

[41] Telephone Interview with Kenneth Gross, Partner, & Patricia Zweibel, Counsel, Skadden, Arps, Slate, Meagher & Flom LLP (Jan. 29, 2015).

Circuit's decision, various campaign finance experts speculated that the court would choose to take its cues from *Dallman* by striking down the prohibition on contractor contributions as an overzealous restriction of protected First Amendment speech, enforced only against a limited class: government contractors.[42]

In a unanimous opinion issued in July of 2015, however, the D.C. Circuit upheld the ban, reasoning that the potential for corruption that originally spurred the law remained a pressing concern.[43] The opinion engaged in an extensive historical review of the problems posed by political pressure vis-à-vis political contributions and concluded that past incidents illustrated that a ban on contractor contributions was necessary.[44] Although the court noted that the plaintiffs limited their claim to individual contractors and conceded that most of its analysis involved corporate—not individual—misdeeds, it extended the potential for corruption and coercion to these individuals.[45] This rationale ostensibly rests upon the idea that the government interest in preventing the appearance of impropriety in such situations is based upon the same underlying principles as the 1939 Hatch Act, which prevents certain government employees from engaging in political campaign activity.[46] Upon closer examination, however, the *Wagner* holding also seemed to take many of its cues from the assertion that the government may act aggressively to prevent the mere public perception of the appearance of corruption.[47] This line of reasoning seems somewhat unsupported with respect to Supreme Court precedent, especially *McCutcheon*.[48]

Notably, the *Wagner* court held that total bans on political contributions should be held to the same level of scrutiny—intermediate—as mere limits on such contributions.[49] This holding

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[42] Telephone Interview with Stefan Passantino, Partner, McKenna Long & Aldridge LLP (Jan. 15, 2015). Passantino characterizes the restriction as creating a "status crime," in which members of a certain class (government contractors) are prohibited from engaging in otherwise protected speech.

[43] *Wagner*, 793 F.3d at 17–18 (D.C. Cir. 2015).

[44] *Id.* at 17 n.21.

[45] *Id.* at 28.

[46] 5 U.S.C. § 7323 (2015).

[47] *Wagner*, 793 F.3d at 15–16.

[48] *See supra* notes 32–33 and accompanying text.

[49] *Id.* at 22.

relied heavily upon the rationale set forth in *FEC v. Beaumont*, a 2003 Supreme Court case that upheld an outright ban on corporate political contributions by applying intermediate—rather than strict—scrutiny.[50] Since 2003, however, *Beaumont*'s rationale has not survived unscathed. Both *Citizens United* and *Speechnow* disavowed a hefty portion of *Beaumont*'s reasoning with respect to corporate political spending, and *McCutcheon* further tightened the gap between the compelling public interest a campaign finance law is intended to uphold and the restrictions it imposes on protected speech.[51] The *Wagner* court relied heavily upon case law that is questionably relevant in the current era of campaign finance, and although the U.S. Supreme Court denied the plaintiffs' petition for a writ of certiorari in January of 2016, its holding in *McCutcheon* remains at odds with the D.C. Circuit's rationale for upholding the law. [52]

Ultimately, *Citizens United, McCutcheon,* and their brethren have moved toward a new doctrine: the government only has a compelling interest in preventing quid pro quo corruption or the appearance thereof—rather than the presupposition of corruption—via restrictions on contributions, and "access" resulting from contributions or expenditures does not constitute corruption.[53] In the wake of high-profile corruption cases involving former Virginia Governor Robert McDonnell and former Illinois Governor Rod Blagojevich, the Supreme Court may further develop this position, at least with regard to federal honest services laws.[54] In the McDonnell and Blagojevich cases, the Fourth and Seventh Circuits affirmed the respective trial courts' findings

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[50] FEC v. Beaumont, 539 U.S. 146, 161–63 (2003).

[51] *See supra* discussion in Part I.B.

[52] Wagner v. FEC, 793 F.3d 1 (D.C. Cir. 2015) (en banc), *cert. denied sub nom.* Miller v. FEC (U.S. Jan. 19, 2016) (No. 15-428).

[53] Lloyd Hitoshi Mayer, *Nonprofits, Politics, and Privacy*, 62 CASE W. RES. L. REV. 801, 823–24 (2012).

[54] Kenneth P. Doyle, *McDonnell Case Could Shape Corruption Law*, BLOOMBERG BNA (Nov. 25, 2015), http://www.bloomberglaw.com/exp/eyJpZCI6IkEwSDVYOFA3VzU/anM9MCZzdWJzY3JpcHRpb250eXBlPWJuYWRlciZpc3N1ZT0yMDE1MTEzMCZjYW1wYWlnbj1ibmFlbWFpbGxpbmsmc2l0ZW5hbWU9Ym5hIiwiY3R4dCI6IkJCTkEiLCJ1dWlkIjoiOXBicCtCWXlTNmpDR2p4TndTSm15dz09UHVzZmgyU1M0SzRCTWhNUUZCUkFyQT09IiwidGltZSI6IjE0NDg2NzQ4NTQ5NzkiLCJzaWciOiJnZ2RVT09nWk5BS1dRY2VlaDZOODlESXhmTkU9IiwidiI6IjEifQ== [http://perma.cc/U3PN-MX9C].

that McDonnell and Blagojevich traded "official acts" for remuneration.[55] Both governors subsequently filed separate petitions for certiorari arguing that the actions they had taken were not "official acts," but pedestrian political activities such as arranging meetings and attending events.[56] Although McDonnell's case involved federal honest services laws rather than campaign finance law (and the Fourth Circuit made this distinction in its holding[57]), both cases merit the attention of pay-to-play and campaign finance lawyers, given their focus on an integral aspect of quid pro quo: what exactly constitutes an "official act."

The Court, however, has not foreclosed the idea that the government still has an interest in preventing acts that carry the mere whiff of corruption.[58] Therefore, the government may seek to regulate political money in other ways, such as compelled disclosure regimes. The reasoning behind the imposition of such regimes, set forth in *Buckley*, still holds: disclosure serves to deter corruption and facilitates the enforcement of other election laws, and the negative consequences of disclosure are outweighed by its benefits.[59]

II. THE DEVELOPMENT OF PAY-TO-PLAY LAWS

Pay-to-play laws, like campaign finance laws, originated in the 1970s,[60] but only became common at the state and federal

[55] United States v. McDonnell, 792 F.3d 478, 507–511 (4th Cir. 2015), *cert. granted*, 84 U.S.L.W. 3217 (U.S. Jan. 15, 2016) (No. 15-474); United States v. Blagojevich, 794 F.3d 729, 733–34 (7th Cir. 2015), *petition for cert. filed*, 84 U.S.L.W. 3304 (U.S. Nov. 19, 2015) (No. 15-664).

[56] Petition for Writ of Certiorari at 1–2, *McDonnell*, 792 F.3d 478 (No. 15-474); Petition for Writ of Certiorari at 9–10, *Blagojevich*, 794 F.3d 729 (No. 15-664).

[57] *McDonnell*, 792 F.3d at 504–05.

[58] Mayer, *supra* note 53.

[59] Buckley v. Valeo, 424 U.S. 1, 68, 81–82 (1976). Additionally, in November of 2015, the United States Supreme Court declined to review California's § 501(c)(3) disclosure requirements, which had been upheld by the Ninth Circuit. Ctr. for Competitive Politics v. Harris, No. 2:14-cv-00636-MCE-DAD, 2014 WL 2002244 (E.D. Cal. May 14, 2014), *aff'd*, 784 F.3d 1307 (9th Cir. 2015), *cert. denied*, No. 15-152, 2015 WL 4611242 (2015). Although *Harris* did not involve electoral activities, the Court's decision not to grant certiorari in that case could be viewed as a broader endorsement of mandatory disclosure.

[60] Craig Holman & Michael Lewis, *Pay-to-Play Laws in Public Contracting and the Scandals that Created Them*, PUB. CITIZEN, at 4 (June 26, 2012), http://www.citizen.org/documents/wagner-case-record.pdf [http://perma.cc/XTS2-4YZV].

levels over the past two decades.[61] Many of these laws cover all individuals and entities engaged in business with the government; others deal solely with certain sectors, such as municipal securities dealers or investment advisers.[62] Although various jurisdictions initially proposed and passed these laws in response to concerns about the link between political contributions and the procurement process for lucrative government contracts, pay-to-play laws do not exist for the purpose of preventing quid pro quo political corruption, which is already prohibited under state and federal bribery statutes.[63] Instead, because quid pro quo corruption in its plainest form is so difficult to prove, pay-to-play laws are designed to quash the appearance of corruption or impropriety that may result when individuals and entities engaged in the procurement process make political contributions to officials involved in determining the recipients of government contracts.[64]

A. Federal Laws

The seeds of modern federal pay-to-play laws first germinated in the early 1970s, after the press revealed that sitting Vice President Spiro Agnew received over $100,000 in campaign gifts in exchange for promises to influence the awarding of state and county engineering contracts.[65] Additional scandals followed in the mid-1970s and 1980s, when reports of pay-to-play activity surfaced in various states across the nation.[66] Ultimately, in September of 1993, representatives of the Municipal Securities Rulemaking Board (MSRB) testified before Congress regarding the need for regulation of the municipal securities market. In this testimony, the MSRB's representatives expressed the need for a "specific

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[61] Jason Abel, *The Next Rule: Pay-to-Play, Municipal Advisors, and McCutcheon*, STEPTOE & JOHNSON LLP (May 14, 2014), http://www.steptoe.com/publications-9593.html [http://perma.cc/TNF4-4MKM].

[62] *Id.*

[63] 18 U.S.C. § 201 (2014).

[64] Stefan Passantino, *Did the US Supreme Court's Ruling in McCutcheon v. FEC Put the Constitutionality of Some Pay-to-Play Laws in Doubt?*, PAY TO PLAY L. BLOG (Apr. 4, 2014), http://www.paytoplaylawblog.com/did-the-us-supreme-courts-ruling-in-mccutcheon-v-fec-put-the-constitutionality-of-some-pay-to-play-laws-in-doubt [http://perma.cc/GW69-9BK5].

[65] Holman & Lewis, *supra* note 60.

[66] *Id.*

regulatory response" to concerns over the "appearance of impropriety that can occur when underwriters make political contributions to … officials with whom they do business."[67] As a result, in 1994, the MSRB adopted Rule G-37, which prohibits covered entities, such as brokers, dealers, municipal securities dealers, and their political action committees ("PACs"), from engaging in municipal securities business with government issuers within two years after they contribute more than a de minimis amount to an official employed by the issuer.[68]

In the years since Rule G-37 took effect, regulators have modeled subsequent restrictions upon the MSRB's initial rule. In 2011, the Securities and Exchange Commission (SEC) promulgated the Advisers Act Rule 206(4)-5, which restricts the ability of investment advisers and their corporate PACs to make political contributions to certain covered officials.[69] The law aims to prevent the selection of investment advisers to public pension funds and similar entities by officials who receive contributions from certain employees of the adviser, as well as adviser-controlled PACs.[70] Moreover, it provides for a two-year ban on advisers receiving compensation for services if the adviser or one of its covered associates makes a non-exempt contribution to a public official or candidate with the ability to influence advisory business.[71] This compensation ban includes both investment management fees and carried interest, meaning that an investment adviser who violates the Rule could surrender millions of dollars for even a single non-exempt political contribution.[72] Rule 206(4)-5

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[67] Joe Mysak, *State Treasurers Dredge Up Pay-to-Play Nightmare*, BLOOMBERG (Nov. 26, 2003), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aFhQ6l4Jj_CE&refer=columnist_mysak [http://perma.cc/XD5P-AL9C].

[68] MUN. SEC. RULEMAKING BD., RULE G-37: POLITICAL CONTRIBUTIONS AND PROHIBITIONS ON MUNICIPAL SECURITIES BUSINESS, http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-37.aspx [http://perma.cc/3NK6-MUV9].

[69] 17 C.F.R. § 275.206(4)-5(a)(1) (2014).

[70] Melanie Waddell, *Fair Play: The Fight Over Rule 206(4)-5*, INV. ADVISOR (May 1, 2011), http://www.thinkadvisor.com/2011/05/01/fair-play-the-fight-over-rule-20645?page=3 [http://perma.cc/A6TE-YB4H].

[71] 17 C.F.R. § 275.206(4)-5(a)(1).

[72] Political Contributions by Certain Investment Advisors, 75 Fed. Reg. 41018, 41048 (July 14, 2010) (to be codified at 17 C.F.R. pt. 275) ("the adviser could instead comply with the Rule by waiving or rebating the portion of its

imposes strict liability, and does not make exceptions for good-faith efforts to comply; even a single contribution in violation of the Rule could lead to a ban.[73] Rule 206(4)-5's expanded scope, as well as its harsher penalties, has led practitioners of political law to characterize it as representing a drastic expansion of the pay-to-play universe, with implications above and beyond those of previously promulgated laws.[74]

In November of 2014, FINRA proposed another pay-to-play law that would restrict the ability of investment advisers who do or seek business with government entities to make political contributions.[75] The proposed rule builds upon Rule 206(4)-5 by not only prohibiting the receipt of compensation for advisory services by violators, but also by mandating disgorgement of any profits received under a relationship deemed to be a violation of the Rule.[76]

B. State Laws

Many states and localities have enacted their own pay-to-play laws in response to scandals involving government contractors and influential state officials.[77] As with federal pay-to-play laws, the ultimate goal of state pay-to-play laws is to maintain the integrity of government contract proceedings by preventing the appearance of a system that obligates political contributions from contract bidders that want to secure business from the government.[78] However, these laws vary dramatically in terms

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fees or any performance allocation or carried interest"); *see also* Waddell*, supra* note 70.

[73] Jason Abel, *A New Era for Pay-to-Play*, ELECTION L. BLOG (June 23, 2014, 3:55 PM), http://electionlawblog.org/?p=62666 [http://perma.cc/MXW6-CYMZ].

[74] Telephone Interview with Kenneth Gross & Patricia Zweibel, *supra* note 41.

[75] FIN. INDUS. REGULATORY AUTH., REG. NOTICE 14-50, POLITICAL CONTRIBUTIONS: FINRA REQUESTS COMMENT ON A PROPOSAL TO ESTABLISH A "PAY-TO-PLAY" RULE (Nov. 2014), https://www.finra.org/sites/default/files/notice_doc_file_ref/14-50.pdf [http://perma.cc/C5R9-BVL7].

[76] *Id.* at 7.

[77] Notable incidents involved, separately, former Illinois Governor Rod Blagojevich, former Connecticut Governor John Rowland, and former California Public Employees Retirement System (CalPERS) board member Al Villalobos. *See* Holman & Lewis, *supra* note 60, at 12–13 (referring to Connecticut, Illinois, and New York pay-to-play scandals).

[78] *See, e.g.*, Karl J. Sandstrom & Michael T. Liburdi, *Overview of State Pay-to-Play Statutes*, PERKINS COIE LLP (May 5, 2010), http://www.perkinscoie.com

of whom they cover and how those individuals or businesses are restricted. Some pay-to-play laws provide for contribution restrictions on contractor PACs,[79] as well as the spouses, partners, and dependent children of covered individuals.[80] Some apply to state party committees, as well as individual candidate committees.[81] Some apply only to sole source or no-bid contracts, while others apply to competitive-bid contracts as well.[82]

As detailed in Part IV, Section B, Connecticut has one of the nation's strictest state pay-to-play laws, which was enacted in the wake of a public corruption scandal that ultimately led to the conviction of former Governor John Rowland for conspiracy to commit honest services fraud.[83] Under this law, state contractors, prospective state contractors, and their principals seeking state contracts of $50,000 or more are prohibited from contributing to or soliciting contributions on behalf of state and local officials, their exploratory committees, or state party committees.[84] "Principals" are broadly defined, and include members of the contractor's board; individuals owning 5 percent or more of the company's stock; individuals living in Connecticut who hold

/images/content/2/1/v2/21769/wp-10-05-pay-to-play.pdf [http://perma.cc/L89L-ULLH] ("[M]any jurisdictions have enacted laws … with the goal of not only maintaining the integrity of the contracting process, but also preventing a *de facto* regime whereby bidders come to believe that it is necessary to make political contributions in order to obtain government contracts.").

[79] *See, e.g.*, CAL. GOV'T CODE § 84308 (West 2014); CONN. GEN. STAT. ANN. § 9-612(f)(1)(F) (West 2014); N.J. STAT. ANN. § 19:44A–20.13 et seq. (West 2014) (covering contractor PACs).

[80] *Compare* § 9-612(f)(1)(F) (covering spouses and dependent children) *with* 30 ILL. COMP. STAT. ANN. § 500/50-37(a) (West 2014) (covering spouses alone).

[81] *Compare* CONN. GEN. STAT. ANN. § 9-612; W. VA. CODE § 3-8-12 (West 2014) (covering state and local candidates and parties) *with* IND. CODE ANN. § 4-30-3-19.5 (West 2014) (covering candidates for state office, party committees, and caucuses).

[82] *Compare* CAL. GOV'T CODE § 84308 (no-bid only) *with* § 9-612 (both no-bid and competitive contracts).

[83] In September of 2014, former Governor Rowland was convicted of seven counts of election-related honest services fraud. *See, e.g.*, Alison Leigh Cowan, *Rowland, Ex-Connecticut Governor, Is Convicted in Campaign Finance Case,* N.Y. TIMES (Sept. 19, 2014), http://www.nytimes.com/2014/09/20/nyregion/rowland-ex-connecticut-governor-found-guilty-of-corruption.html [http://perma.cc/5NC7-V9JK].

[84] CONN. GEN. STAT. ANN. § 9-612(f)(2)(A)–(B) (West 2014).

the title of president, treasurer, or executive vice president; spouses, partners, and dependent children of the aforementioned; and political committees established by the contractor or any of the aforementioned.[85]

New Jersey's pay-to-play law, like Connecticut's, was also passed in response to a bribery scandal. The scandal in question involved a $392 million non-competitive private contract that was awarded to a company that gave $507,950 to state candidates and committees in the four years prior.[86] The law, which was codified in 2004, prohibits all but de minimis contributions to gubernatorial candidates and state and county party committees by contractors; their PACs and subsidiaries; their officers; the spouses, partners, and dependent children of officers; and any person or entity that controls more than 10 percent of the contractor.[87] Additionally, New Jersey allows county and municipal governments to impose additional pay-to-play laws as they see fit.[88] This has resulted in a dense patchwork of regulations and disclosure requirements at both the state and local levels, which has prompted observers to characterize New Jersey's collective pay-to-play laws as the toughest in the nation.[89]

III. FIRST AMENDMENT CONSIDERATIONS

The key difference between the average individual who seeks to make a political contribution and a government contractor who seeks to do so involves the matter of choice in doing business. The Supreme Court affirmed in *McCutcheon* that political contributions are a form of speech that can currently only be abridged by individual candidate and committee contribution limits.[90] Hence, an individual cannot be prevented from giving

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[85] *Id.* at (e)(1).

[86] Francis E. Schiller & W. Cary Edwards, *N.J. Enhanced Motor Vehicle Inspection Contract* 62, STATE OF N.J. COMM'N OF INVESTIGATION (Mar. 2002), http://www.state.nj.us/sci/pdf/mvinspect.pdf [http://perma.cc/YW5C-A854].

[87] N.J. STAT. ANN. 19:44A-20.3–20.7 (West 2014).

[88] *Id.* at 20.26.

[89] Colleen O'Dea, *New Jersey: Best score in the country,* CTR. FOR PUB. INTEGRITY (Mar. 19, 2012, 12:01 AM), http://www.stateintegrity.org/newjersey_story_subpage [http://perma.cc/252W-6EGR].

[90] *See generally* McCutcheon v. FEC, 134 S. Ct. 1434 (2014).

up to the individual limit to any number of candidates and committees.[91] A government contractor, however, presently has a choice between engaging in business with the government, which subjects it to additional restrictions intended to ensure the integrity of the contracting process, and participating fully in the electoral process via political contributions.[92]

A. The Conditioning of Protected Speech

According to the government agencies and state legislatures that promulgate pay-to-play laws, lucrative government contracts do not come without strings attached, and contractors are free to choose their business in order to avoid such conditions.[93] The fact that contractors are engaged in, or are seeking to engage in, a business relationship with the government adds an additional dimension to the relationship between donor and donee, and potentially increases the likelihood that a contribution may influence the entity that is awarding the contract.

At the federal level, the two most extensive pay-to-play laws, MSRB Rule G-37 and SEC Rule 206(4)-5, are similarly structured: both rules contain a two-year restriction on covered advisers providing certain types of services to a government entity following a political contribution to certain government officials within that entity.[94] However, Rule G-37 prohibits municipal securities dealers from providing such services *at all*, regardless of whether remuneration is involved,[95] while Rule 206(4)-5 prohibits SEC-registered advisers from providing such services *for compensation*.[96] The reason for this distinction appears to lie in the fact that the municipal bond underwriting business (covered by the MSRB's rule) is transaction-oriented, whereas the investment advising business (covered by the FEC's rule) relies

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[91] *Id.*

[92] *See, e.g.*, Waddell, *supra* note 70.

[93] *See, e.g.*, Freed, *supra* note 9.

[94] MUN. SEC. RULEMAKING BD., RULE G-37: POLITICAL CONTRIBUTIONS AND PROHIBITIONS ON MUNICIPAL SECURITIES BUSINESS, http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-37.aspx [http://perma.cc/3NK6-MUV9]; 17 C.F.R. § 275.206(4)-5 (2014).

[95] MUN. SEC. RULEMAKING BD., RULE G-37, *supra* note 94.

[96] 17 C.F.R. § 275.206(4)-5(a)(1).

on long-term business relationships between advisers and their clients.[97] Thus, because investment advisers covered under Rule 206(4)-5 usually have an ongoing fiduciary duty to their clients, if an adviser were to make a contribution in violation of the Rule, it could not simply "dump" the client. It could, however, be required to provide its services for free during the period of the two-year ban.[98]

1. MSRB Rule G-37

Although the D.C. Circuit upheld Rule G-37 as constitutional in *Blount v. SEC* in 1995,[99] this holding—and the stipulation that entities and individuals covered under Rule G-37 are forced to choose between exercising their First Amendment rights and engaging in customary business activities—may no longer apply in the wake of more recent jurisprudence.

In *Blount*, the court applied strict scrutiny and held that the MSRB's rule was narrowly tailored toward addressing the appearance of quid pro quo corruption.[100] In reaching this conclusion, the court found that the regulation's goal was to prevent contributions "as a cover for what is much like a bribe ... intended to induce [an official] to exercise his discretion in the donor's favor."[101]

However, in *Davis v. FEC*, a later case in which the Supreme Court struck down the "Millionaire's Amendment"[102] to the public financing portion of the Bipartisan Campaign Reform Act ("BCRA"), the petitioner successfully characterized the government as wrongfully "requir[ing] a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations."[103] Similarly, Rule G-37 forces covered associates in the municipal bond market to choose between engaging in political speech and subjecting themselves to extremely burdensome regulations in the normal course of business.

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[97] Waddell, *supra* note 70.
[98] *Id.*
[99] *See generally* 61 F.3d 938, 942 (D.C. Cir. 1995).
[100] *Id.* at 944.
[101] *Id.* at 942.
[102] Bipartisan Campaign Reform Act of 2002, H.R. 2356, 107th Cong. § 319(b) (2002).
[103] 128 S. Ct. 2759, 2771 (2008).

2. SEC Rule 206(4)-5

The government's penalties for investment advisers covered under Rule 206(4)-5 are hardly a better solution than the outright ban imposed by Rule G-37. These penalties—which essentially force investment advisers accused of making otherwise legal political contributions to fulfill their fiduciary duty to a client by providing labor for free—can be analogized to an unlawful regulatory taking. Government takings limit the use of private property to the point that they deprive the lawful owner of utility or value,[104] whereas Rule 206(4)-5 limits the way in which a private entity can engage in lawful business that creates such value.[105] Such limits—especially taking into account the amount of income lost via foregone fees and carried interest—have the potential to reduce the ultimate value or utility of the business itself. Furthermore, if an investment adviser were to be harmed to the point that the business is irreversibly damaged, the regulation itself might constitute not only a government taking,[106] but also an unduly negative market force, as far as public policy is concerned.

B. The Lawfulness of Influence

In light of the Court's holding in *Citizens United* (even though "speakers may have influence over or access to elected officials[, that] does not mean that those officials are corrupt"[107]), Rules G-37 and 206(4)-5 may be open to a strong First Amendment challenge. If such a challenge were to be raised, the Court would need to determine whether the "inducement" that was held unlawful in *Blount* is sufficiently similar to the "influence" held lawful in *Citizens United*. If "inducement" and "influence" *are* indeed the same type and degree of pressure, then the line of reasoning leading to the *Blount* holding may prove null and void.

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[104] John Martinez, Government Takings 1 § 1 (2014), *available at* Westlaw Next Real Property Texts & Treatises.

[105] 17 C.F.R. § 275.206(4)-5 (2014).

[106] *See, e.g.*, Penn. Coal Co. v. Mahon, 43 S. Ct. 158, 161 (1922) ("[O]ne fact for consideration in determining whether the limits of the police power have been exceeded is the extent of the resulting diminution in value.").

[107] Citizens United v. FEC, 558 U.S. 310, 314 (2010).

At the MSRB's quarterly meeting in May 2014, only a month after the Supreme Court ruled in *McCutcheon*, that regulatory body's chair appeared to recognize the changed standard for corruption set forth by the Court, stating that extending Rule G-37 to municipal advisers would "help prevent *quid pro quo* political corruption, or the appearance of such corruption, in public contracting."[108] Subsequently, in September of 2014, the MSRB released draft amendments to Rule G-37 that would extend the Rule in this manner.[109] Thus, it appears that regulators are beginning to respond to courts by defending existing rules against a newer, stricter definition of actual or implied corruption. That said, it seems unclear whether merely stating that such rules are aimed at preventing quid pro quo corruption is enough: if influence is all that such contributions buy, and influence does not lead to quid pro quo corruption or the appearance thereof, such statements may mean little in the course of a challenge.

IV. ADDITIONAL CONSIDERATIONS FOR FUTURE PAY-TO-PLAY CHALLENGES AND RULEMAKINGS

Along with the First Amendment concerns described *supra* in Part III, state and federal pay-to-play laws may face challenges on several other fronts. First, individuals or entities seeking to dispute these laws may raise concerns that certain provisions are the product of arbitrary and capricious rulemaking. Additionally, certain laws—notably those that extend to the children and relatives of covered associates, or all employees of investment advisers with certain government contracts—could be struck down on the basis that they are overbroad or duplicative of other laws. Also, due to the high stakes for those who violate pay-to-play laws, rulemaking bodies (most notably the SEC, which extended

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[108] Press Release, Mun. Sec. Rulemaking Bd., MSRB Holds Quarterly Meeting (May 6, 2014), http://www.msrb.org/News-and-Events/Press-Releases/2014/MSRB-Holds-Quarterly-Meeting-April-2014.aspx [http://perma.cc/N9ZJ-BX7B].

[109] MUN. SEC. RULEMAKING BD., REQUEST FOR COMMENT ON DRAFT AMENDMENTS TO MSRB RULE G-37 TO EXTEND ITS PROVISIONS TO MUNICIPAL ADVISORS (Aug. 18, 2014), http://www.msrb.org/~/media/Files/Regulatory-Notices/RFCs/2014-15.ashx?n=1 [http://perma.cc/R32W-SSAT] [hereinafter G-37 Amendments Request for Comment].

compliance deadlines and issued technical amendments after enacting Rule 206(4)-5 due to widespread confusion among those covered by the law[110]) will need to ensure that the language of these rules is clear and precise in order to avoid challenges on the basis of vagueness. Finally, the strict liability provisions in many pay-to-play laws may beg questions about whether intent should be a factor in both the enactment and enforcement of these laws. In other words, if there is *quid*, but no possibility of *pro quo*, is there corruption?

A. Arbitrariness and Capriciousness

Under generally accepted principles of administrative law, a government agency's rulemaking conducted under the Administrative Procedure Act is reviewed under the "arbitrary and capricious" standard.[111] Under this standard, courts are compelled to review an agency's actions in order to determine whether the agency undertook a reasonable effort to examine all pertinent information related to the rulemaking and subsequently made a rational decision based on the facts it found.[112] Agency decisions are arbitrary and capricious if the agency fails to use reasonable diligence in its fact-finding efforts, if it fails to consider relevant evidence, or if it bases its actions on conclusions that a reasonable person would not reach.[113]

The SEC has conceded that Rule 206(4)-5 may, in the course of its attempts to prohibit unlawful quid pro quo corruption, also serve to suppress activity that is otherwise lawful.[114] In a recent challenge to Rule 206(4)-5 filed against the SEC by the New York and Tennessee state Republican parties, the plaintiffs noted that

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[110] Political Contributions by Certain Investment Advisers: Ban on Third-Party Solicitation; Extension of Compliance Date, 77 Fed. Reg. 35263-01 (June 13, 2012) (to be codified at 17 C.F.R. pt. 275).

[111] 5 U.S.C. § 706 (2014).

[112] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).

[113] *Id.* at 43.

[114] Political Contributions by Certain Investment Advisors, 75 Fed. Reg. 41018, 41022 (July 14, 2010) (to be codified at 17 C.F.R. pt. 275) ("[Rule 206(4)-5] thus permits the Commission to adopt prophylactic rules that may prohibit acts that are not themselves fraudulent.").

this concession blatantly exceeds the scope of that agency's authority, stating in their complaint that "[t]he SEC is prohibited from using its authority to, 'by rules and regulations define ... acts, practices, and courses of business as are fraudulent, deceptive, or manipulative' to enact rules that prohibit conduct beyond that which is fraudulent, deceptive, or manipulative."[115] Thus, in promulgating Rule 206(4)-5, the SEC appeared to presuppose that all campaign contributions from covered associates of investment advisors are inherently favor-seeking, and therefore suspect.

This faulty line of reasoning can be analogized to the scenario in *FEC v. Wisconsin Right to Life, Inc.*, a case in which the Supreme Court applied strict scrutiny to provisions of the BCRA that prevented § 501(c)(4) organizations from airing issue advocacy ads within thirty days of an election.[116] The BCRA, like the SEC's pay-to-play rule, sought to set a bright-line standard for permissible political activity for § 501(c)(4) nonprofit groups, but the Court explicitly rejected this standard as overreaching, ruling that "the desire for a bright-line rule ... hardly constitutes the compelling state interest necessary to justify any infringement on First Amendment freedom."[117] Furthermore, as the Court stated, "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor."[118] In its attempts to suppress unlawful speech, the government may not also inhibit lawful speech.[119] As was initially the case with the FEC and the BCRA, the SEC freely admitted that its regulations encompass lawful speech that is protected under the First Amendment. This admission is arguably relevant information that the agency failed to take into account during its rulemaking process.

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[115] Complaint at 16, N.Y. Republican State Comm. v. SEC, 70 F. Supp. 3d 362 (D.D.C. 2014) (No. 14-01345) (quoting Schreiber v. Burlington N., Inc., 472 U.S. 1, 12 (1985)); *see infra* note 123.

[116] 551 U.S. 449, 464 (2007).

[117] *Id.* at 479 (quoting FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986)).

[118] *Id.* at 474.

[119] "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002).

Additionally, the de minimis contribution limits set by both Rule G-37[120] and Rule 206(4)-5,[121] as well as many other state pay-to-play laws, do not seem to be based on evidence illustrating why these amounts, rather than the base contribution limits imposed on all other individuals and PACs by the FECA,[122] are sufficient to prevent pay-to-play activity. Neither the MSRB nor the SEC has provided guidance on whether or why these lower amounts are set correctly. As U.S. District Court Judge Beryl Howell said during an adjudication hearing in *N.Y. Republican State Comm. v. SEC*: "[t]he $350 [de minimis limit in Rule 206(4)-5] seems like it came out of thin air."[123] Thus, according to the appropriate standard of review, which fails if the rulemaking agency does not meet just one of the criteria, the SEC's rulemaking could be considered arbitrary and capricious.

In late August of 2015, the D.C. Circuit upheld the 60-day statutory review provision of the Investment Advisers Act—and, by extension, the SEC's pay-to-play rule—in *New York Republican State Committee v. SEC*, holding that this deadline was not subject to equitable tolling.[124] However, the court acknowledged that upon presentation of an as-applied challenge (as opposed to the facial challenge in the case at bar), a district court could have

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120 MUN. SEC. RULEMAKING BD., RULE G-37: POLITICAL CONTRIBUTIONS AND PROHIBITIONS ON MUNICIPAL SECURITIES BUSINESS, http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-37.aspx [http://perma.cc/3NK6-MUV9] (setting a de minimis limit of $250 per candidate per election if the individual contributing is entitled to vote for that official).

121 17 C.F.R. § 275.206(4)-5(b)(1) (2014) (setting a de minimis limit of $350 per election to officials or candidates for whom an individual is entitled to vote, and $150 per election to officials or candidate for whom an individual is not entitled to vote).

122 FEDERAL ELECTION COMMISSION, CONTRIBUTION LIMITS CHART 2013–2014, http://www.fec.gov/pages/brochures/contriblimits.shtml [http://perma.cc/XQF2-NPUL] (Individuals and PACs may give $2,600 to each candidate or candidate committee per election, $32,400 to each national party committee per calendar year, and a combined $10,000 to state, district, and local party committees per calendar year.).

123 Josh Gerstein, *Judge Mulls SEC Limits on Political Donations,* POLITICO (Sept. 12, 2014, 6:29 PM), http://www.politico.com/blogs/under-the-radar/2014/09/judge-mulls-sec-limits-on-political-donations-195402.html [http://perma.cc/AWG5-B3SS].

124 799 F.3d 1126, 1134–35 (D.C. Cir. 2015).

jurisdiction to review the rule under the Constitution and/or the Administrative Procedure Act.[125]

Therefore, the constitutional concerns posed by the plaintiffs, as well as the question of whether a particular pay-to-play rule-making is arbitrary and capricious, remain live issues for future courts to consider in the context of concrete claims. In addition, it is possible that the plaintiffs in this case will petition the United States Supreme Court for a writ of certiorari in the coming months.

B. Overbroadness and Inadequate Evidence

With regard to pay-to-play restrictions in certain jurisdictions, evidence exists that corruption occurred in the past. Notably, in *Green Party of Connecticut v. Garfield*, the Second Circuit upheld Connecticut's pay-to-play ban barring state contractors from contributing to the campaigns of state candidates, stating:

> [B]ecause the recent corruption scandals in Connecticut created the appearance of corruption with respect to *all* exchanges of money between state contractors and candidates for state office ... [the] outright ban on contractor contributions was justified (i.e., closely drawn to meet the state's anticorruption interest) because even a severe limit on contractor contributions would allow a small flow of contributions between contractors and candidates and would, as a result, likely give rise to an appearance of corruption.[126]

SEC Rule 206(4)-5 also arose out of the ashes of scandal: in the early 2000s, New York State comptroller Alan Hevesi was convicted of accepting bribes in exchange for investments in his state's pension fund.[127] In *Blount v. SEC*, the MSRB and SEC successfully defended Rule G-37 against a First Amendment challenge by providing extensive documentation of pay-to-play practices among investment, securities, and municipal finance entities.[128]

Previous successful challenges to laws banning contributions by a specific class seized on the government's inability to show

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[125] *Id.* at 1136.

[126] 616 F.3d 189, 206 (2d Cir. 2010).

[127] Marc Lifsher, *New York State Pension Fund Trustee Pleads Guilty to Taking Bribes*, L.A. TIMES (Oct. 7, 2010), http://articles.latimes.com/2010/oct/07/business/la-fi-hevesi-20101007 [http://perma.cc/Z6ZB-9WHN].

[128] *See generally* 61 F.3d 938, 939 (1995).

that certain provisions of those laws prevented corruption, thus proving that the law was overbroad. For example, in *McConnell v. FEC*, the Supreme Court overturned the BCRA's ban on political contributions from minors, holding that the government failed to assert ample evidence of corruption via conduit; that is, parents donating in their children's names in order to circumvent contribution limits.[129] This holding could lend support to a challenge of Connecticut's or New Jersey's pay-to-play laws (absent a track record in those states of parents contributing in their children's names), both of which prohibit dependent children of covered associates from making political contributions.[130]

C. Duplicative Laws

Many pay-to-play laws prohibit contributions not only from individuals who are directly involved in the contracting process, but also from their family members and work colleagues.[131] Family member contribution restrictions exist in order to prevent contractors from funneling money to government officials in the name of their spouse or children, but laws that prohibit this possibility are already on the books: federal election law currently enjoins any person from making a political contribution in the name of another person, or from knowingly permitting their name to be used to affect a contribution by another person.[132]

In *Citizens United*, the Supreme Court noted the duplicative nature of laws that prohibit certain contributions,[133] and it is quite possible that the presence of anti-bribery and anti-fraud laws may lead courts to conclude that further restrictions are unnecessary. Notably, in *McConnell*, the Court held that the government's failure to produce adequate evidence of parents contributing in

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[129] 540 U.S. 93, 232 (2003) ("[T]he Government offers scant evidence of this form of evasion.").

[130] CONN. GEN. STAT. ANN. § 9-612(e)(1) (West 2014); N.J. STAT. ANN. 19:44A-20.6 (West 2014).

[131] *See* KY. REV. STAT. ANN. § 121.330(3)–(4) (West 2014) (relating to prohibitions on political contributions from immediate family members); VT. STAT. ANN. tit. 32, § 109(a) (West 2014) (relating to prohibitions on contributions from employees with responsibility to provide investment services of any kind).

[132] 52 U.S.C. § 30122 (2015).

[133] Citizens United v. FEC, 558 U.S. 310, 356 (2010) ("The practices Buckley noted would be covered by bribery laws.").

the names of their children likely stemmed from the fact that the FECA already prohibited individuals from making political contributions in the name of another, rendering the restrictions on minors' contributions redundant.[134]

Additionally, some pay-to-play laws' contribution bans include all officers of a company with business before the government, regardless of whether those individuals play a role in the procurement process. For example, under New Jersey's pay-to-play law, it is possible that an officer working halfway across the country in an unrelated division of a company that engages in government procurement could be prohibited from making certain political contributions.[135] Such restrictions appear to be on shaky ground in light of holdings, such as that in *Dallman v. Ritter*, which view blanket prohibitions on contributions skeptically absent direct evidence of corruption or the likelihood thereof, rather than pure presupposition.[136] Furthermore, the Supreme Court's stipulation that courts should respect the doctrine of "more speech, not less,"[137] especially in cases where an individual has virtually no control over the contracting process, could lead to increased scrutiny regarding whether these restrictions are closely drawn to serve an anti-corruption purpose. Because it is already illegal under federal law to make a political contribution in the name of another, courts may look skeptically upon laws that simply duplicate what is already on the books.[138]

Commenters on FINRA's proposed pay-to-play rule (described *supra* in Part II, Section A) have also expressed concern about the rule's disgorgement provision.[139] Presently, neither Rule 206(4)-5

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[134] *McConnell*, 540 U.S. at 232, 245 ("Perhaps the Government's slim evidence results from sufficient deterrence of such activities by § 320 of FECA.").

[135] N.J. STAT. ANN. § 19:44A-20.6 ("When a business entity is other than a natural person, a contribution by any person or other business entity having an interest therein shall be deemed to be a contribution by the business entity.").

[136] *See, e.g.*, 225 P.3d 610, 623 (Colo. 2010).

[137] *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 259 (2002) (Thomas, J., concurring) ("The Government may not suppress lawful speech as the means to suppress unlawful speech.").

[138] *See supra* text accompanying notes 131–32.

[139] SIFMA, RE: FINRA REGULATORY NOTICE 14-50 11 (Dec. 22, 2014), http://www.sifma.org/comment-letters/2014/sifma-submits-comments-to-finra-on-regulatory-notice-14-50-relating-to-pay-to-play-practices/ [http://perma.cc/J2ZT-DYXV].

nor Rule G-37 mandates disgorgement, and investment advisers who discover potential pay-to-play violations typically disgorge any payments received under the problematic arrangement in question on a voluntary basis.[140] By mandating disgorgement, some practitioners have speculated that FINRA's rule could pose an undue penalty for investment advisers who have already internally discovered and rectified pay-to-play problems in good faith.[141] This could effectively deter such firms from voluntary disgorgement.[142] Other practitioners, however, have expressed doubt that the disgorgement provision would affect investment advisers' willingness to self-rectify potential violations, as regulating entities tends to refrain from further enforcement action against potential violators once they disgorge all fees in question.[143] However, these same practitioners acknowledge that disgorgement has the potential to be a heavy and disproportionate penalty, especially in situations where an investment adviser does not knowingly violate a pay-to-play law.[144]

D. Void for Vagueness Problems

Another potential issue for future litigation involves defining who falls under the aegis of pay-to-play laws without over-covering or leaving room for loopholes. SEC Rule 206(4)-5 has drawn criticism for what many perceive as an inadequate definition of what constitutes a "covered associate" under that law.[145] A "covered associate" of an investment adviser is defined as any general partner, managing member or executive officer, or other individual

[140] INV. CO. INST., RE: FINRA NOTICE 14-50 RELATING TO PROPOSED "PAY-TO-PLAY" RULES 5 (Dec. 15, 2014), https://www.finra.org/sites/default/files/notice_comment_file_ref/p602179_0.pdf [http://perma.cc/VUU8-J2DJ].

[141] SIFMA, *supra* note 139, at 11.

[142] INV. CO. INST., *supra* note 140, at 5.

[143] Telephone Interview with Kenneth Gross & Patricia Zweibel, *supra* note 41.

[144] *Id.*

[145] Waddell, *supra* note 70 ("The SEC received nearly 800 comment letters stating that the Rule was 'too broad' in defining who is a municipal advisor").

with a similar status or function; any employee who solicits a government entity for the investment adviser and any person who supervises, directly or indirectly, such employee; and any political action committee controlled by the investment adviser or by any of its covered associates.[146] Practitioners of political law have expressed confusion over whether this only covers those who solicit municipalities to *invest* with the adviser, or if it also covers those who solicit municipalities to *become clients* of the adviser.[147] Although both involve a business relationship, the potential rewards from investment management fees and carried interest are far greater than monthly retainer fees.

Initially, the SEC stated that it would not adopt a proposed amendment to the definition of "covered associate," which replaced the word "individual" with the word "person" so that a legal entity, not just an actual person employed by the adviser, would be considered a "covered associate."[148] However, the final rule mistakenly reflected the proposed change: the word "individual" was replaced incorrectly by the word "person," and the SEC was forced to make a technical amendment to the Rule for clarity's sake.[149]

Proposed amendments to Rule G-37 also have led to concerns over definitional vagueness. Although the amendments attempt to clarify which government entities are encompassed by the regulation by replacing the term "official of an issuer" with "official of a municipal entity,"[150] they also cover incumbents and candidates "for elective office ... directly or indirectly responsible for, or [who] can influence" the hiring of a covered municipal securities broker or dealer.[151] The Rule does not address what constitutes "indirect influence" or responsibility, nor does it provide titles or articulated standards (beyond this vague definition)

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[146] 17 C.F.R. § 275.206(4)-5(f)(2) (2014).

[147] Waddell, *supra* note 70.

[148] Technical Amendment to Rule 206(4)-5: Political Contributions By Certain Investment Advisers, 77 Fed. Reg. 28,476 (May 15, 2012) (to be codified at 17 C.F.R. pt. 275).

[149] *SEC Makes Technical Amendment to Definition of "Covered Associates" Under "Pay to Play" Rule of the Advisers Act*, BRACEWELL & GUILIANI (June 7, 2012), http://www.bracewellgiuliani.com/news-publications/updates/sec-makes-technical-amendment-definition-covered-associates-under-pay-play [http://perma.cc/H83R-UKWE].

[150] *See* G-37 Amendments Request for Comment, *supra* note 109.

[151] *Id.*

concerning specific covered officials.[152] If investment advisers are not reasonably able to determine what practices the Rule requires and forbids, the proposed amendments could potentially be held void for vagueness on the theory that they violate the Due Process Clause.[153] For the Rule to withstand a challenge on this basis, the MSRB and other regulators will need to ensure that such definitions are clearly stated from the outset.

E. Strict Liability Issues

Finally, it is possible that SEC Rule 206(4)-5's strict liability provision may come under attack in future litigation. Indeed, if the aim of such laws is to prevent corruption, how should courts approach situations in which an investment adviser makes a contribution that cannot possibly unduly influence the contracting process? Political law practitioners have noted that these strict liability provisions could severely penalize covered individuals who do not make the conscious decision to violate pay-to-play laws, but rather inadvertently violate them by giving a political contribution to, for example, a former college roommate or friend who is running for office.[154]

In at least one case, the SEC has interpreted its own pay-to-play law in the broadest possible manner, directly violating the tailoring requirements for political contribution restrictions set forth by the Supreme Court.[155] In 2014, the SEC brought action against an investment adviser that made contributions to officials employed by a government issuer.[156] However, the issuer itself was already invested in and committed to the fund, the fund itself was in "wind-down" mode, and the government did not allege that the investment adviser sought to market additional funds within two years of the contributions in question.[157] Therefore, the contributions did not have an improper effect on the issuer

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[152] *See, e.g.*, G-37 Amendments Request for Comment, *supra* note 109.

[153] *See, e.g.*, Coates v. Cincinnati, 402 U.S. 611, 614 (1971) ("[a law] is unconstitutionally vague [if] it subjects the exercise of the right of assembly to an unascertainable standard").

[154] Telephone Interview with Kenneth Gross & Patricia Zweibel, *supra* note 41.

[155] Telephone Interview with Stefan Passantino, *supra* note 42.

[156] *See generally* TL Ventures, Inc., 3859 S.E.C. 3-15940 (2014).

[157] *Id.*

because there were no investment decisions that the issuer could have made beyond that point in time. This nullified the idea that corruption could possibly have occurred.

The FEC, for its part, first touched on the issue of strict liability for federal contractors making contributions related to federal elections (in violation of the FECA) in a 2011 Matter Under Review ("MUR"), or agency enforcement action.[158] According to the MUR, several Alaska corporations, which the government alleged to be federal contractors, made contributions to an independent expenditure-only committee supporting incumbent Senator Lisa Murkowski during the 2010 election cycle.[159] Ultimately, the FEC determined that, although the corporations appeared to be federal contractors and did in fact engage in government contracting, they were unaware of the government lease arrangements that gave them federal contractor status.[160] Furthermore, the money paid by the federal government to these corporations was "relatively small"[161] and appeared to primarily benefit the public interest.[162] Finally, the independent expenditure-only committee itself was not found to have coordinated with Murkowski's campaign.[163] In the end, for these reasons, the FEC chose to exercise its prosecutorial discretion and dismiss the charges against the corporations accused of improper activity under the FECA.[164] Thus, at the agency level, the FEC's more discretionary enforcement of its own rules relating to the prevention of corruption lies in contrast to the SEC's strict liability approach.

V. IMPLICATIONS FOR FUTURE ELECTIONS

Pay-to-play laws have the potential to affect both state and federal elections, including presidential elections in which one or more candidates is a covered state official. Indeed, New Jersey

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[158] FEC MUR 6403 (Alaskans Standing Together), Complaint (2011).

[159] *Id.*

[160] FEC MUR 6403 (Alaskans Standing Together), Certification (2011).

[161] *Weekly Digest: Week of November 28 to December 2*, FEC (Dec. 2, 2011), http://www.fec.gov/press/press2011/20111202digest.shtml [http://perma.cc/577B-UDN8].

[162] *Id.*

[163] *Id.*

[164] *See* FEC MUR 6403, Certification, *supra* note 160.

governor Chris Christie, a 2016 presidential candidate, has faced accusations that a board member of the financial services firm Prudential plc traded contributions for a $300 million New Jersey state pension management contract.[165] Such presidential candidates may also face potential legal conflicts when they exit the primary and return to office in their home state.[166]

At the congressional level, pay-to-play laws are very likely to have an impact on House and Senate races: congressional candidates are often drawn from the ranks of the state legislature, and these laws could stifle the ability of candidates to compete for federal office if they are sitting legislators in a state with strict pay-to-play laws.[167] At the presidential level, in the past, potential candidates have responded to the possibility of being affected by pay-to-play laws by not running at all,[168] or by not selecting a covered state official as a running mate.[169]

That said, even candidates who resign from a covered state position and are legally qualified to receive contributions from individuals and PACs connected with investment advisers may face an uphill battle in garnering contributions. Because the penalties for violating pay-to-play laws are severe, risk-averse covered advisers may choose instead to sit on the sidelines when

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[165] David Sirota, Matthew Cunningham-Cook & Andrew Perez, *Chris Christie Officials Sent Pension Money to Subsidiary of Donors Foreign Firm*, INT'L BUS. TIMES (Mar. 16, 2015), http://www.ibtimes.com/chris-christie-officials-sent-pension-money-subsidiary-donors-foreign-firm-1847744 [http://perma.cc/JJE8-26H5].

[166] During the 2016 presidential election cycle, these candidates included Christie, Wisconsin Governor Scott Walker, Ohio Governor John Kasich, and Louisiana Governor Bobby Jindal. Heather Haddon & Rebecca Ballhaus, *State Contractors Aid Governors' Campaigns*, WALL ST. J. (Aug. 25, 2015), http://www.wsj.com/articles/state-contractors-aid-governors-campaigns-1440547616 [http://perma.cc/L2KB-JTDZ].

[167] Telephone Interview with Kenneth Gross & Patricia Zweibel, *supra* note 41.

[168] Telephone Interview with Stefan Passantino, *supra* note 42.

[169] Pundits suspect that New Jersey's strict pay-to-play laws may have been a factor in Mitt Romney's decision not to select New Jersey governor Chris Christie as his pick for Vice President. *See, e.g.*, Lois Romano, *Balz book: Christie considered 2012*, POLITICO (July 2, 2013, 1:55 PM), http://www.politico.com/story/2013/07/dan-balz-book-chris-christie-2012-93663.html [http://perma.cc/H35U-KN2L] (referring to a book by Washington Post chief correspondent Dan Balz recounting the 2012 Presidential campaign).

a state official runs for federal office.[170] This effectively puts those candidates (such as former state governors) at a competitive disadvantage with relation to other candidates (such as Senators and Congressmen).[171] Given the fact that state governorships are a common springboard for the Presidency,[172] as well as the sheer amount of funds needed to run a successful campaign, this could have tremendous implications on who chooses to run for President, as well as which candidates ultimately win the fundraising war—and perhaps the nation's highest office.

Another key matter that future courts may address involves whether federal contractors may give to independent expenditure-only committees, or Super PACs. Such PACs have already proven to be tremendously influential in the 2016 election cycle,[173] and will likely continue to hold a great deal of sway in federal elections for the foreseeable future. This issue has not yet been litigated: notably, the plaintiffs in *Wagner v. FEC* (discussed *supra* in Part I, Section C) explicitly limited the scope of their claim to exclude Super PACs.[174]

The FEC, for its part, has declined to find reason to believe that a contribution to a super PAC from an entity alleged to have ties to a government contractor would constitute a violation of federal election laws. In a bipartisan vote on a MUR in 2014, the FEC dismissed charges alleging that Chevron Corporation violated the federal contractor contribution ban by contributing to an independent expenditure-only committee.[175] According to the facts of the enforcement matter, Chevron USA, a wholly owned subsidiary of Chevron Corporation (which made the contribution), owned a subsidiary that owned another subsidiary that owned a

[170] Wary investment advisers with no desire to "test" opaque pay-to-play laws may use these laws as an excuse not to give to certain campaigns, even if the contribution is completely legal. Telephone Interview with Stefan Passantino, *supra* note 42.

[171] Carrie Dann, *"Competitive Disadvantage"?: Pay-to-Play Rules and the 2016 Stakes*, NBC (Jan. 15, 2015, 1:36 PM), http://www.nbcnews.com/politics/first-read/competitive-disadvantage-pay-play-rules-2016-stakes-n286936 [http://perma.cc/BQ8B-VYUN].

[172] Four out of the past six presidents—George W. Bush, Bill Clinton, Ronald Reagan, and Jimmy Carter—were former state governors.

[173] Dann, *supra* note 171.

[174] Oral Argument at 25:59–26:33, 793 F.3d 1 (D.C. Cir. 2015) (No. 13-5162).

[175] FEC MUR 6726 (Chevron Corporation) at 7 (2014).

federal contractor.[176] In so voting, the FEC appeared to concede that if a parent company that makes independent expenditures receives sufficient funds from sources other than its federal contractor subsidiary, such expenditures are permissible.[177] Moreover, in November of 2015, the FEC deadlocked on whether to pursue a petition for rulemaking that would prevent subsidiaries of government contractors from contributing to super PACs.[178] Campaign finance experts have flagged the outcome of MUR 6276, as well as the failed rulemaking petition, as highlighting the doctrinal fragility of the federal contractor ban in certain cases.[179]

CONCLUSION

The Supreme Court's decisions in *Citizens United* and *McCutcheon* shifted the standard by which alleged corruption in politics is measured. Based on this jurisprudence, it appears that the Court will continue to limit the definition of corruption to acts that involve, or appear to involve, a quid pro quo exchange of contributions in exchange for official acts or promises, at least for the purposes of campaign finance laws and regulations. Furthermore, access to or influence upon government officials or candidates resulting from contributions or expenditures does not—at least as far as the Court is concerned—constitute corruption.[180]

Current practitioners of political law have acknowledged that the holding in *McCutcheon* has raised the bar, as far as regulating political corruption is concerned.[181] When that bar is raised, the question arises whether a penalty (such as the one imposed by

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[176] *Id.* at 1–3.

[177] *Id.* at 7.

[178] *FEC Refuses to Close the 'Chevron' Loophole in the Ban Against Campaign Contributions from Government Contractors*, PUB. CITIZEN (Nov. 11, 2015), http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=5729 [http://perma.cc/48RG-HB5G].

[179] Robert Kelner, Robert Lenhard & Kevin Glandon, *In Chevron Case, FEC Brings Clarity to the Federal Contractor Ban and Super PACs*, INSIDE POLITICAL LAW (Apr. 11, 2014), http://www.insidepoliticallaw.com/2014/04/11/in-chevron-case-fec-brings-clarity-to-the-federal-contractor-ban-and-super-pacs/ [http://perma.cc/Q8KW-3EPZ].

[180] McCutcheon v. FEC, 134 S. Ct. 1434, 1438 (2014) ("[a]ny regulation must instead target what we have called 'quid pro quo' corruption or its appearance").

[181] Telephone Interview with Kenneth Gross & Patricia Zweibel, *supra* note 41.

Rule 206(4)-5) rather than a simple ban (such as the one imposed by Rule G-37) is an undue restriction of investment advisers' First Amendment rights.[182] Indeed, when Rule G-37 was promulgated, regulators were allegedly careful to give investment advisers the option of doing contract business or making contributions, rather than simply imposing a penalty that could overburden their First Amendment rights.[183]

Thus far, the Court's jurisprudence has not specifically addressed Rule 206(4)-5, and the underpinnings of its earlier opinion upholding Rule G-37 have shifted as well. If the Court does eventually address these laws, the same constitutional and administrative principles protecting political speech, expenditures, and contributions may apply to pay-to-play laws, given their intertwinement with campaign finance laws. In the end, if courts choose to apply the same First Amendment analysis to pay-to-play laws as they do to campaign finance laws and regulations, the compelling state interest behind the pay-to-play legal framework—that is, the presupposition of corruption—may well come into question in the near future.

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[182] *Id.*
[183] *Id.*