

SUPER PACS AND THE ROLE OF “COORDINATION” IN CAMPAIGN FINANCE LAW

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[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.¹

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I. INTRODUCTION

In January 2010, the United States Supreme Court decision in *Citizens United v. FEC* struck down a federal ban on independent expenditures in political campaigns by corporations. Two months later, in *SpeechNow.org v. FEC*,² the Court of Appeals for the District

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1. *Citizens United v. FEC*, 558 U.S. 310, 357 (2010).

2. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

of Columbia Circuit, sitting en banc, ruled 9-0 to strike a longstanding FEC interpretation of the Federal Election Campaign Act (FECA).³ That interpretation had limited the size and sources of contributions to political committees that made no campaign contributions and operated independently of any candidate or political party.⁴ The FEC did not appeal *SpeechNow.org*, and the decision has generally been accepted and followed nationally, including in the states.

The result of *Citizens United*, and even more its offspring, *SpeechNow.org*, has been the creation of “independent expenditure committees,” dubbed “Super PACs” in common parlance.⁵ Thanks to *SpeechNow.org*, these Super PACs can raise money in unlimited sums and without source restrictions in order to make independent expenditures in connection with federal elections. Thanks to *Citizens United*, contributions to Super PACs may include corporate money.

Both decisions were based on the Supreme Court’s longstanding position that, as a matter of law, political expenditures made independently of a candidate or party do not pose a sufficient threat of corruption to justify the infringements on speech and association that result from government regulation of campaign contributions and spending. This privileged position for independent expenditures has been at the core of constitutional analysis of campaign finance law since it was first announced in *Buckley v. Valeo*.⁶

Although the impact of Super PACs on elections can be and has been overblown,⁷ there is no doubt that they are an important development for the political system.⁸ Whether Super PACs are good

3. 2 U.S.C. §§ 431–57 (2012).

4. See 599 F.3d at 690–91.

5. The term appears to have been coined by Eliza Newlin Carney, a reporter and opinion columnist for the Washington D.C. publication Roll Call. See David Levinthal, *How Super PACS got their name*, POLITICO (Jan. 12, 2012), <http://www.politico.com/news/stories/0112/71285.html>. “PAC,” of course, is the colloquial term for what the FECA calls a “political committee” that is not connected to a party or candidate.

6. 424 U.S. 1 (1976).

7. Super PAC spending accounted for about \$950 million of the \$7 billion spent in 2012, but Super PAC spending lagged behind traditional PAC spending, which totaled around \$1.2 billion. Tarini Parti, *\$7 Billion Spent on 2012 Campaign, FEC Says*, POLITICO (Jan. 31, 2013), <http://www.politico.com/story/2013/01/7-billion-spent-on-2012-campaign-fec-says-87051.html>.

8. For criticism of the role of Super PACs, see Anna Palmer & Jim Vandehei, *A New Way To Buy Real Influence*, POLITICO (Oct. 24, 2011), <http://www.politico.com/news/stories/1011/66673.html> (quoting Rep. Tom Cole) (“It’s really putting a candidate out there and tying at least one arm behind their back, if not more, because they have no mechanism to respond . . . They have to hope that another super PAC by another anonymous group comes in and so

or bad for the political process, their ability to raise and spend large sums hinges on their legal independence from candidates and party committees. Under the FECA, an "expenditure" becomes a "contribution" to a candidate or party if it is made in "coordination" with that candidate or party. And if a Super PAC makes a contribution to a candidate or party, including a contribution in the form of a "coordinated expenditure," it loses its ability to operate as a Super PAC and must comply with the source and dollar limitations on contributions faced by traditional PACs. Contributions to a traditional PAC are limited to just \$5,000, and union and corporate contributions are prohibited. Thus, whether a Super PAC operates independently of candidates is a significant issue.

The 2010 and 2012 elections brought forth numerous claims that, in fact, Super PACs were not operating independently from the candidates they supported with their ostensibly independent expenditures. "When your old consultants and your best buddies are setting them up, you can pretty much suspect there's been a lot of discussion beforehand," said Rep. Tom Cole, in discussing the rise of Super PAC spending in Congressional races.⁹ Rep. Cole, as the former chairman of the National Republican Congressional Campaign Committee, is no stranger to fundraising. "They are breaking the law [T]hey have former aides running this[.]" declared former GOP Senator Alphonse D'Amato about Priorities USA, a super PAC supporting the re-election of President Obama.¹⁰

"In practice, noncoordination is a joke," writes law professor Kyle Langvardt. "Everybody knows the big super PACs coordinate with candidates. Jon Huntsman's father heavily contributed to his super PAC, and Romney's and Obama's former aides run theirs."¹¹

you are the littlest guy on the playground and you are looking for one bully to save you from another bully."); see also Dan Eggen, *New Breed of "Super PACs," Other Independent Groups Could Define 2012 Campaign*, WASHINGTON POST (July 4, 2011), http://articles.washingtonpost.com/2011-07-04/politics/35237010_1_crossroads-gps-pacs-groups ("So begins the shadow campaign of 2012, in which a new breed of "super PACs" and other independent groups are poised to spend more money than ever to sway federal elections."). For a quick defense of Super PACs as a good thing, see Bradley A. Smith, *Why Super PACs are Good for Democracy*, U.S. NEWS & WORLD REPORT (Feb. 17, 2012), <http://www.usnews.com/opinion/articles/2012/02/17/why-super-pacs-are-good-for-democracy>.

9. Palmer & Vandehel, *supra* note 8.

10. John Twarog, *Former NY Senator on Obama Campaign: "They Are Breaking the Law,"* REDALERTPOLITICS.COM (August 9, 2012), <http://redalertpolitics.com/2012/08/09/former-ny-senator-on-obama-campaign-they-are-breaking-the-law/>.

11. Kyle Langvardt, *The Sorry Case for Citizens United: Remarks at the 2012 Charleston Law Review and Riley Institute of Law and Society Symposium*, 6 CHARLESTON

Such claims can create a cynicism among the general public, which understands that Super PACs are clearly working to elect particular candidates, and therefore does not see them as “independent” in the sense of being “disinterested” or somehow unknown to the candidate. This is particularly true when these claims are combined with rhetoric that suggests that the conduct skirts the law or openly flouts it.

The problem is that the behaviors just noted in these accusations do not, in fact, amount to illegal coordination. For example, contrary to Professor Langvardt’s suggestion, it is not coordination, as the term exists in campaign finance law, for friends or former staffers to make expenditures benefiting a candidate unless they have had certain conversations with the candidate about those expenditures. There is, indeed, a great deal of confusion about what coordination prohibits and why. At times, allegations of coordination are nothing more than an opposing campaign’s propaganda efforts to discredit their opponents. At other times this confusion is well-intentioned error. And sometimes it appears to be intentionally misleading advocacy in an attempt to create support for overturning *Buckley*’s doctrine on independent expenditures.

In fact, more than 35 years after *Buckley* was decided, courts and commentators have engaged in remarkably little analysis of the theory of coordination and independent expenditures. *Buckley*’s attention to the issue is limited to noting, in passing, that “controlled or coordinated expenditures are treated as contributions, rather than expenditures under the Act.”¹² Two later Supreme Court decisions, dubbed *Colorado Republican Federal Campaign Committee I* and *II*, focus on the rather unique question of whether political parties a) can be presumed to coordinate with their candidates;¹³ and b) should be allowed to coordinate with their candidates.¹⁴ Lower court decisions are equally rare, with only one district court case, *FEC v. Christian Coalition*,¹⁵ contributing to the discussion. Similarly, commentators have paid very little attention to the theory of coordination outside of the unique circumstances of the *Colorado Republican* cases.¹⁶

L. REV. 569, 574 (2012) (citations omitted).

12. *Buckley v. Valeo*, 424 U.S. 1, 46 (1976).

13. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996).

14. *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001).

15. 52 F. Supp. 2d 45 (D.D.C. 1999).

16. Among the few in-depth analyses of the theory of coordination in *Buckley* are Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88 (2013);

This short essay is an attempt to clarify *Buckley's* theory of coordination, how it has played out in campaign finance law, and what it means for regulation of Super PACs, which seemed to be the main source of public concern in the 2010 and 2012 elections.

Part II of this essay briefly discusses the core purpose of coordination in campaign finance and the role of coordination in *Buckley's* First Amendment theory. Part III discusses efforts to apply *Buckley* in practice, and how *Buckley's* theory of coordination comes into play regarding Super PACs. In a brief conclusion, I suggest that tighter coordination rules, fueled by a misunderstanding of *Buckley* and highly charged rhetoric about Super PACs, ought not to be used as a backdoor means for attempting to overturn *Buckley's* theory on expenditure limits.

II. THE PURPOSE AND THEORY BEHIND ANTI-COORDINATION RULES

A. *Coordination Rules and Circumvention*

Some type of "anti-coordination rule" is generally presumed to be necessary for any system of campaign finance regulation that relies on limitations and prohibitions on spending and contributing funds, and that hopes to remain effective.¹⁷ The typical approach is to treat coordinated spending as a contribution to the candidate's campaign, subject to both the limits on campaign giving and, if applicable, campaign spending. Absent such a rule, limitations on financial contributions to candidate campaigns, or on spending by those campaigns,¹⁸ are circumvented with relative ease through the simple

Richard Briffault, *Campaign Finance, the Parties, and the Court: A Comment on Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 14 CONST. COMMENT. 91 (1997); Thomas R. McCoy, *Understanding McConnell v. FEC and its Implications for the Constitutional Protection of Corporate Speech*, 54 DEPAUL L. REV. 1043, 1051–56 (2005); Meredith A. Johnston, *Note: Stopping "Winks and Nods": Limits on Coordination as a Means of Regulating 527 Organizations*, 81 N.Y.U. L. REV. 1166 (2006); and James Bopp, Jr. & Heidi K. Abegg, *The Developing Constitutional Standards for "Coordinated Expenditures": Has the Federal Election Commission Finally Found a Way to Regulate Issue Advocacy?*, 1 ELECTION L.J. 209, 210 (2002).

17. See *Shays v. FEC*, 528 F.3d 914, 919–20 (D.C. Cir. 2008) (quoting *Shays v. FEC*, 508 F. Supp. 2d 10 (D.D.C. 2007)) ("The reason . . . is obvious. Without a coordination rule, politicians could evade contribution limits and other restrictions by having donors finance campaign activity directly, e.g., by asking a donor to buy air time for a campaign-produced advertisement.").

18. In the United States, the Supreme Court has held that compulsory limits on campaign spending are unconstitutional. *Buckley v. Valeo*, 424 U.S. 1, 51 (1976). However, because the state may condition the receipt of government funds for campaigning on a

expedient of the candidate (or his campaign manager or other agent) directing a would-be donor on precisely how to spend money to benefit the campaign. Limits on coordinated activity are, therefore, a means of preventing circumvention of the core limits on contributions to candidates and candidate spending.

It is worth noting that even such coordinated spending probably does not benefit a candidate as much as a direct contribution. Even where the candidate provides direct instruction and content to the spender, the coordinated spending still involves transaction and monitoring costs that are almost certainly higher than those involved in a direct contribution to the campaign. There is the possibility that the orders will be garbled or misinterpreted, or that the spender will decide to alter or adjust them in ways contrary to the preferences of the candidate. The candidate will lose the flexibility to rapidly reallocate spending and resources as conditions change daily in the campaign. If there is concern about quid pro quo dealing—the basic constitutional justification for regulation under *Buckley*—the candidate will face monitoring costs to assure that the spender carries out his end of the bargain, and those monitoring efforts themselves may well leave a trail that tips off the public to the quid pro quo nature of the transaction. In short, while an anti-coordination rule might help a regime based on contribution limits and prohibitions to accomplish its goals, an air-tight anti-coordination rule is not necessary for the system to have at least some effectiveness.

This recognition is important because once a regulatory system of contribution and spending limits and prohibitions has been decided on, and once it is further decided to accompany such a scheme with limitations on coordinated activity, it becomes necessary to answer two questions: 1) what spending will count as campaign spending, and thus be subject to the anti-coordination rule; and 2) what conduct will remove an activity from the category of independent expenditure to the category of coordinated expenditure, thus treating it as a contribution? The more activity and speech that is brought into the

candidate's agreeing to limit his spending, *id.* at 108–09, the desirability of limits on coordinated spending, from a regulatory standpoint, remain important. The federal government and several states maintain systems of government financing of campaigns that require candidates to limit their total campaign spending in order to obtain a government subsidy. *See, e.g.*, FED. ELECTION COMM'N, PUBLIC FUNDING OF PRESIDENTIAL ELECTIONS (1996) (updated Jan. 2013), *available at* <http://www.fec.gov/pages/brochures/pubfund.shtml>; *see also* ME. REV. STAT. tit. 21-A, § 1124 (2011); David Brancaccio, *Fixing Democracy: The Clean Election Movement*, PBS (November 1, 2002), <http://www.pbs.org/now/politics/cleanelections.html>.

coordination regime, the greater the “effectiveness” of the regulatory system. But, the wider the regulatory net, the greater the infringements on non-corrupting speech and association that we normally wish to encourage. *Buckley* and thirty-five years of succeeding cases have made it clear that the government’s ability to regulate political speech and association is limited. Tradeoffs must be made, and it is easier to understand the tradeoffs required by *Buckley* once we realize that no system will address every potential source of corruption, and that a regulatory regime can be effective without being even close to perfect.

This essay focuses on the second of these questions: what conduct and contacts will turn an expenditure from protected speech to unprotected conduct? This is not because the first question—content—is unimportant. In fact, it is a very important question. But the content question ultimately pertains to efforts to provide a substantive safe harbor for speakers who wish to avoid investigation for coordination, a bright line to cut off intrusive investigations at the outset.¹⁹ The confusion that has emerged from the 2010 and 2012 elections, however, has focused on whether a speaker’s conduct meets the legal requirement for coordination.

B. The Meaning of Coordination in Buckley v. Valeo

Understanding the regulation and meaning of coordination, like most every other question in campaign finance law, requires a review of the Supreme Court’s touchstone decision in *Buckley v. Valeo*.²⁰ *Buckley* firmly established the legal principle that campaign finance laws may not generally regulate the funding of political speech undertaken independently of candidates, parties, and campaign committees. This notion, in turn, hinges in substantial part on distinguishing between contributions and expenditures, and the reasoning behind that distinction.

The FECA, set before the Court in *Buckley*, was the most

19. Investigations into alleged coordination are particularly intrusive on the rights of political association. See Bradley A. Smith & Stephen M. Hoerding, *A Toothless Anaconda: Innovation, Impotence, and Overenforcement at the Federal Election Commission*, 1 ELECTION L.J. 145 (2002). A rule that excludes certain public communications from the definition of a coordinated communication can thus provide certainty to speakers that they will not face a speech-chilling investigation. As both a constitutional and a policy matter, it may be deemed beneficial to have a safe harbor that protects certain speakers. See Bopp & Abegg, *supra* note 16.

20. 424 U.S. 1 (1976).

sweeping act of campaign finance regulation in the nation's history. Its many provisions included extensive regulation of political committees, compelled registration and disclosure to the State of huge swaths of political activity, a complex matrix of restrictions and prohibitions on political giving and the funding of campaigns, and further restrictions on funding and spending for political speech outside of campaigns.²¹ Restrictions on political giving included not only restrictions on giving to candidates, parties, and political committees, but broad restraints on any "expenditures by individuals and groups 'relative to a clearly identified candidate,'" which were limited to a mere \$1,000 a year.²² These restrictions were all challenged as infringements of political speech and association.²³

In *Buckley*, the Court recognized that virtually every provision of the FECA infringed on First Amendment rights, thus necessitating a compelling government interest and a least restrictive solution to withstand constitutional scrutiny, which would be set at a high level.²⁴ It rejected as "wholly foreign to the First Amendment" any government claim that it could restrict the speech of some in order to equalize political speech and influence.²⁵ But it did find that the state had a compelling interest in preventing corruption or the appearance of corruption in government.²⁶ Working from these premises, the Court would ultimately uphold the constitutionality of limits on contributions, while striking down limitations on political expenditures.

Although *Buckley* begins with an analysis of contribution limits, it is perhaps easier to understand the decision, and in particular its treatment of coordinated expenditures as contributions, by looking first at expenditure limits. The Court began its analysis of expenditures by noting that limits on expenditures directly limit the total amount of speech. Such limits, therefore, "limit political expression 'at the core of our electoral process and [] First

21. See Herbert E. Alexander, *The Regulation of Election Finance in the United States and Proposals for Reform*, in 4 COMPARATIVE ISSUES IN PARTY AND ELECTION FINANCE, 6-8 (F. Leslie Seidle ed., 1991).

22. *Buckley*, 424 U.S. at 19.

23. *Id.* at 15.

24. *Buckley* used the terms "sufficiently important interest" and "closely drawn." *Id.* at 25. It later referred to the level of scrutiny as "exacting scrutiny." *Id.* at 44.

25. *Id.* 48-49.

26. *Id.* at 27.

Amendment freedoms.”²⁷ Having accepted the government’s proffered anti-corruption rationale, the Court noted that spending their own money in an election did not corrupt candidates, and that they were equally uncorrupted by spending any money raised in a noncorrupting fashion. Implicit in this is a rejection of the idea that speech itself can corrupt the democratic process. If speech itself were corrupting, even a candidate’s own spending from personal funds might be regulated. Further, the Court in *Buckley*, and in decisions since, has rejected the idea that speech is potentially corrupting because it might persuade voters, or because an officeholder might be grateful to supporters for their assistance and, after election, may allocate more of his time and effort to satisfying them. Speech and the reactions it might generate are not the type of corruption that the Court feared. Thus, speech, and the expenditures needed to fund it, may not be limited.

Contribution limits posed a different set of issues. Though it is often overlooked, the *Buckley* Court saw the major issue with contribution limitations not as their infringement on speech, but on association.²⁸ However, the court believed that the danger posed by “political *conduct*” could justify “broad restrictions” on the right of political association.²⁹

To be sure, contribution limits could indirectly limit speech by making it harder for candidates and political committees to assemble the resources to reach a broad audience. From the standpoint of candidates, the Court noted that their speech was limited to the extent that contribution limits indirectly reduced their available funds for speaking. But it was not obvious that candidate speech would always or even usually be restricted. A candidate with, for example, a \$1 million campaign spending goal might be able to raise that \$1 million with or without limits. Absent limits, it might be easier, but unless campaign restrictions made it impossible to amass the funds needed for effective campaigning, the Court was prepared to uphold the restrictions as a marginal burden, rather than a limitation, on candidate speech. “There is no indication,” said the Court, “that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political

27. *Id.* at 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).

28. *Id.* at 24.

29. *Id.* at 27 (emphasis added) (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973)).

associations.”³⁰

Of course, donors have speech interests, too. But the Court noted that the speech value of a contribution itself was relatively small—a contribution expressed support, but “[did] not communicate the underlying basis for the support.”³¹ Continuing, the Court argued that

[a] limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor’s freedom to discuss candidates and issues.³²

Note the crucial final clause in the Court’s logic. Any burden on speech resulting from contribution limits was slight in significant part because the contributor was otherwise free to discuss candidates and issues to the extent desired, through what we now call “independent expenditures.” Contribution limits would not necessarily reduce the quantity of speech at all, because what could not be given in contributions could be spent directly by the would-be donor. Thus, the First Amendment analysis of contribution limits hinged on the ability of persons to spend freely and independently of a candidate’s campaign. Without the escape valve of independent expenditures, contribution limits would constitute a much greater infringement on speech.

We see, then, that in analyzing both contributions and expenditures, the Court rejects the idea that speech itself is corrupting. If it had accepted that notion, its decision regarding independent expenditures might have been different.

In tolerating restrictions on contributions, *Buckley* was tolerating restraints on a form of associational conduct—not the conduct of spending money, as the Court of Appeals had decided, but the conduct of bargaining for favors. *Buckley* justified contribution limits because “[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office

30. *Id.* at 21. Not until 30 years later, in *Randall v. Sorrell*, 548 U.S. 230 (2006), would the Court find a limit too low to allow adequate dissemination of ideas.

31. *Buckley*, 424 U.S. at 21.

32. *Id.*

holders, the integrity of our system of representative democracy is undermined.”³³ Such exchanges occurred within the context of “large contributions [being] given to secure a political quid pro quo.”³⁴

Thus, *Buckley* finds that the type of corruption sufficient to justify limitations on First Amendment activity must include conduct—some type of quid pro quo exchange. Such a definition inherently rejects as sufficient justification for regulating speech the idea that large sums of money distort the process and do not reflect actual public support for the political ideas espoused.³⁵ Speech itself is not corrupting, and is not made corrupting merely because the speech may be effective in persuading voters or because candidates might be grateful for the support.³⁶

The Court upheld limits on contributions because the process of contributing opened the possibility for explicit exchange bordering on bribery. *Buckley* rejected the idea that corruption was limited solely to malfeasance of the sort that would be illegal under bribery laws: “laws 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.”³⁷ But it demanded behavior of a similar type, if not degree. Contributions to candidates and parties, *Buckley* held, posed a direct threat of corruption similar to bribery—donors might give to a candidate or officeholder with the understanding that in return, the officeholder (or candidate/future officeholder) would take some official action he would not otherwise take.³⁸

At no point does the Court deny that speech will influence races,

33. *Id.* at 26–27.

34. *Id.* at 26.

35. The Court would briefly accept this idea in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659–60 (1990), but emphatically reject it in *Citizens United v. FEC*, 558 U.S. 310 (2010).

36. *Citizens United*, 558 U.S. at 314 (“[T]his Court now concludes that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. That speakers may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy.”).

37. *Buckley*, 424 U.S. at 27–28.

38. It is important to recognize that for corruption to have any meaning, it must be believed that the contribution will influence the officeholder to act in a particular way. If the officeholder would have acted in that fashion in any case, there has been no quid pro quo transaction and no “corruption” of the process. Additionally, the *Buckley* Court argued that contributions had relatively little communicative value, being mere proxy speech, so the imposition on First Amendment rights was not so severe. *Id.* at 20–21.

or that it may create a sense of indebtedness on the part of the officeholder. Indeed, the Court specifically recognized that independent expenditures could be used by “unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office.”³⁹

But it dismissed the constitutional importance of this concern. In doing so, it suggested that independent expenditures were likely to be of less value to a candidate than direct contributions, and might even be counterproductive.⁴⁰ More importantly, however, it noted that the requirement of independence—the absence of “prearrangement and coordination”—alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.⁴¹ This point re-emphasizes the Court’s focus on conduct resulting in the possibility of quid pro quo exchange as the type of corruption sufficient to justify government regulation of political contributions and spending. The Court was willing to give the government leeway to regulate activity that did not rise to the level of bribery,⁴² but it insisted upon an explicit quid pro quo exchange—as opposed to merely the existence of some common goal shared by the parties, or pressures placed on an officeholder by a persuaded electorate.

The insistence upon a quid pro quo exchange indicates that the Court is not allowing limitations on speech. Rather, it is allowing regulation of a particular type of conduct—the overt exchange of campaign contributions for legislative favors that may not extend to the level of bribery.⁴³ Thus, when the Court in *Citizens United* proclaimed that “independent expenditures . . . do not give rise to

39. *Id.* at 45.

40. *Id.* at 47. For examples of the inefficiency and ineffectiveness of independent expenditures, see Thomas B. Edsall, *In Political Campaigns, Do You Get What You Pay For?*, OPINIONATOR (April 10, 2013, 9:21 PM), <http://opinionator.blogs.nytimes.com/2013/04/10/in-political-campaigns-do-you-get-what-you-pay-for>. In fact, independent expenditures are often a nuisance or hindrance to the candidates they are ostensibly intended to help. See, e.g., Ian Vadewalker, *The Campaign Finance Law of Unintended Consequences*, BRENNAN CTR. FOR JUSTICE AT N.Y. UNIV. SCH. OF LAW (June 1, 2012), <http://www.brennancenter.org/blog/campaign-finance-law-unintended-consequences>.

41. *Buckley*, 424 U.S. at 47.

42. Most states’ bribery laws, read to a literal extreme, might cover campaign contributions as a form of bribery. Daniel H. Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 329 (1989). In fact, however, bribery is usually recognized as pertaining to personal financial gain outside of holding office, not merely to gaining advantages in winning re-election. States do not, in fact, prosecute campaign contributions as bribery.

43. McCoy, *supra* note 16, at 1053.

corruption or the appearance of corruption[,]"⁴⁴ it was making a statement of constitutional law, not of the perceptions of some segment of the population. The Court was referencing a specific type of unethical behavior by supporters and officeholders, not whatever some observers might call *corruption* from some undefined baseline of political influence, or some broad sense that officials were too responsive to some interests.

Accordingly, the Court has not accepted what might be termed the "gratitude" theory of corruption. Merely because an officeholder might be grateful to those who supported him, and thus inclined to listen more sympathetically to their requests or consider more generously their desires for government policy, that does not mean that the officeholder is corrupt.⁴⁵ Candidates may be aware of a supporter's spending, and accordingly may be inclined to reward supporters. But mere speech by supporters is not a form of conduct that can be regulated.⁴⁶ Similarly, the Court has rejected the idea that mere "access" to a politician is itself a form of corruption that justifies restrictions on political contributions and spending.⁴⁷ The Court also rejects the idea that an effort to make one's speech effective, by, for example, developing media to compliment the candidate's own efforts, hiring persons familiar with the candidate's views to help develop independent messages, or working with persons familiar with the race, constitutes conduct that can be regulated.⁴⁸

One final element of *Buckley's* reasoning merits review. In addition to the prevention of corruption, *Buckley* recognizes limiting "the appearance of corruption resulting from large individual financial contributions" as an important state interest sufficient to justify restrictions.⁴⁹ This, however, is not an expansive license to find corruption in everything that the public may not like about politics, or distrust in officeholders. The Court discusses the appearance of corruption, in the same breadth and sentence as actual corruption, as

44. *Citizens United v. FEC*, 558 U.S. 310, 357 (2010).

45. *Id.* at 357. In fact, support and general gratitude are at the heart of electoral process, in which politicians seek support from voters by promising them benefits or public policies that are congenial to voters' wishes. And even those candidates who make no promises but the intention to exercise good, Burkean judgment will likely feel gratitude to those who have supported their candidacy.

46. McCoy, *supra* note 16, at 1054.

47. *Citizens United*, 558 U.S. at 359; *see also* *McConnell v. FEC*, 540 U.S. 93, 302 (2003) (Kennedy, J. dissenting).

48. McCoy, *supra* note 16, at 1053.

49. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976).

“the extent that large contributions are given to secure a political quid pro quo from current and potential office holders.”⁵⁰ It further describes the appearance of corruption as “public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”⁵¹ The abuse the Court was referring to is, of course, that of quid pro quo exchange.

In accepting the appearance of corruption as a compelling state interest, the Court seemed to recognize the inherent difficulty of determining if a quid pro quo exchange has taken place, given that written proof will typically be lacking and only the parties will know the details of any arrangement. Because it is extremely difficult to determine why an official takes any particular action, an officeholder can almost always justify his action on the basis of some neutral principle. If the measure is popular, he can cite the wishes of constituents; if it is unpopular, his own judgment; if it benefits his district, he can argue he was “bringing home the bacon”; if it does not benefit his district directly, he can argue he acted for the good of the nation.⁵² Thus, the appearance of corruption standard can be a means of getting past these burden of proof issues. It also addresses the argument that limitations on contributions fail the overbreadth doctrine because most contributors do not seek any special favors.⁵³ Because voters cannot know what goes on in private meetings between donors and candidates/officeholders, and thus proving quid pro quo activity will be difficult, the public may suspect much quid pro quo activity is occurring. The appearance of corruption standard deals with this concern. But in all cases, the appearance of corruption is firmly tied to the actual corruption found by the Court—quid pro quo exchange.⁵⁴

50. *Id.*

51. *Id.* at 27.

52. See, e.g., Andrew D. Martin, *Congressional Decision Making and the Separation of Powers*, 95 AMERICAN POLITICAL SCIENCE REVIEW 361 (2001), available at <http://cerl2.arts.wustl.edu/media/pdfs/apsr01.pdf>.

53. See Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045 (1985).

54. As noted above, the Court has at times waived from this, primarily in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). However, *Citizens United* clearly restricts the type of corruption or appearance of corruption sufficient to justify First Amendment restrictions to quid pro quo exchange.

For the reasons above, it must be concluded that *Austin* was not well reasoned. The Government defends *Austin*, relying almost entirely on ‘the quid pro quo interest, the corruption interest or the shareholder interest,’ and not *Austin*’s expressed anti-distortion rationale. When neither party defends the reasoning of a precedent, the

This emphasis on conduct must be squared with other language in *Buckley*. The *Buckley* opinion begins by rejecting the position advocated by the government and accepted by the lower court, that regulation of campaign finance was not regulation of speech, but of conduct, thus falling under the *O'Brien* line of cases.⁵⁵ The Court of Appeals, applying *O'Brien*, had held that the FECA was a valid regulation of the conduct of spending money.⁵⁶ But it is perhaps telling that in rejecting this reasoning, the Court wrote that “the *expenditure* of money simply cannot be equated” with conduct restrictions.⁵⁷ The Court continued that “[e]ven if the categorization of the *expenditure of money* as conduct were accepted, the limitations challenged here would not meet the *O'Brien* test because the governmental interests advanced in support of the Act involve ‘suppressing communication.’”⁵⁸ This sentence best explains how the Court in fact treated limits on contributions and expenditures. The state’s interest could not support the actual suppression of speech. Expenditure limits directly reduce the amount of speech and so are unconstitutional. Contribution limits, on the other hand, do not necessarily reduce speech, so long as they are not so low as to prevent the candidate from adequately campaigning, and so long as unlimited expenditures remain an alternative outlet for speech by contributors and would-be contributors.

Rather than think of coordinated expenditures as having been converted into contributions that can be limited, it makes more sense under *Buckley* to think of contributions as expenditures that can be limited because they are coordinated. It is the act of coordination that the Court allows to be limited.⁵⁹ The common, relevant attribute of both contributions and coordinated expenditures is that the donor

principle of adhering to that precedent through stare decisis is diminished. *Austin* abandoned First Amendment principles, furthermore, by relying on language in some of our precedents that trace back to the *Automobile Workers* Court’s flawed historical account of campaign finance laws.

Citizens United v. FEC, 558 U.S. 310, 363 (2010) (internal citations omitted).

55. 424 U.S. at 15–16 (discussing *United States v. O'Brien*, 391 U.S. 367 (1968)).

56. *Buckley v. Valeo*, 519 F.2d 821, 840 (D.C. Cir. 1975).

57. 424 U.S. at 16 (emphasis added).

58. *Id.* at 17 (emphasis added).

59. Indeed, the Court has insisted on focusing on the actual conduct by speakers even where the speaker concedes that the conduct is coordinated. In other words, the words coordinated or independent are not talismanic labels that determine the outcome. Rather, it is the actual conduct that concerns the Court. See *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 622 (1996) (*Colorado Republican I*).

deals directly with the candidate or his campaign agents to provide the candidate with something of value.⁶⁰ It is this direct contact in the context of providing something of value that creates the opening for corruption, the opportunity to bargain the quid in exchange for the quo. But were the value of speech itself to a campaign enough to create corruption or its appearance, independent expenditures could be limited. *Buckley* rejected the Court of Appeals' holding that spending money to amplify one's speech is conduct of the sort that led to the result in *O'Brien*, but it allows the regulation of a different sort of conduct—association with political candidates that provides opportunities for quid pro quo exchange out of the public eye.

Buckley is thus best understood not as allowing the suppression of some speech that might be corrupting, but rather as allowing the suppression of certain associational activities because they allow the opportunity for corruption. The Court does not see speech as corrupting at all, nor does it see spending money to amplify one's speech as corrupting. The corruption is in the bargain. The bargain can take place in the context of contributions or expenditures. Contributions are by definition coordinated with the candidate, and so subject to some limitations across the board. Expenditures are not inherently coordinated with the candidate, and so can only be limited as an incidental result if such coordination occurs.⁶¹

With this understanding, the Court's ruling on the overbreadth challenge comes to clarity. The *Buckley* plaintiffs argued that the law was impossibly overbroad because the vast majority of campaign contributors do not wish to engage in any inappropriate quid pro quo dealing.⁶² This is almost certainly true. But the Court could dismiss that argument because the conduct—the direct dealing with the officeholder or his agents while offering something of value—provided unique opportunities for corruption to occur. And some prophylactic was justified, because it is “difficult to isolate suspect contributions, [and], more importantly, Congress was justified in concluding that the interest in safeguarding against the appearance of

60. See *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 447 (2001) (*Colorado Republican II*) (coordinated expenditures are the “functional equivalent” of contributions).

61. See *Colorado Republican I*, 518 U.S. at 610 (“The provisions that the [*Buckley*] Court found constitutional mostly imposed *contribution* limits—limits that apply both when an individual or political committee contributes money directly to a candidate and also when they indirectly contribute by making expenditures that they coordinate with the candidate.”).

62. 424 U.S. at 29.

impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated."⁶³

Buckley, then, rejects anything that directly limits speech. What it allows are rules limiting contact between speakers and the candidate or his agents.⁶⁴ And it is around that insight that coordination rules must be shaped.

In all of the arguments that I have summarized above, *Buckley* has been criticized. It has been criticized for its dichotomy between contributions and expenditures,⁶⁵ for its supposedly cramped definition of corruption,⁶⁶ and, alternately, for allowing some regulation due to the mere appearance of corruption.⁶⁷ It has been criticized from the political right⁶⁸ and from the political left.⁶⁹ I have criticized some of these arguments of *Buckley*.⁷⁰ But criticisms notwithstanding, *Buckley*'s distinctions, findings, and holdings are

63. *Id.* at 30.

64. McCoy, *supra* note 16, at 1052.

65. See Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045, 1063 (1985) ("The distinction between expenditures and contributions has been so severely criticized that it may no longer support a different level of scrutiny for contribution than for expenditure limitations."); see also Archibald Cox, *Foreward: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 58 (1980) ("The majority also sought to chart a constitutional distinction between the ceilings upon expenditures, which were held to violate the first amendment, and the ceilings upon contributions, which were sustained. This is plainly the most difficult and important aspect of the case.").

66. Robert E. Mutch, *On the Origins of Campaign Finance Regulation*, 7 ELECTION L.J. 145-47 (2008).

67. See, e.g., Robert F. Bauer, Response, *The Varieties of Corruption and the Problem of Appearance: A Response to Professor Samaha*, 125 HARV. L. REV. FORUM 91 (2012); Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 121, 149 n.90 (2004).

68. See, e.g., Lillian R. BeVier, *Mandatory Disclosure, "Sham Issue Advocacy," and Buckley v. Valeo: A Response to Professor Hasen*, 48 UCLA L. REV. 285 (2000); see also Wanda Franz & James Bopp, Jr., *The Nine Myths of Campaign Finance Reform*, 10 STAN. L. & POL'Y REV. 63 (1998-1999); Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. LEGIS. 179 (1998).

69. See, e.g., Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31 (2004-2005); see also Fred Wertheimer, *Supreme Court's Corruption of Election Law*, POLITICO (Dec. 14, 2010), <http://www.politico.com/news/stories/1210/46410.html>; *Campaign Finance Reform and the Constitution: A Critical Look at Buckley v. Valeo*, Before the H. Comm. on the Judiciary and Subcomm. on the Constitution, 105th Cong. (1997) (statement of Burt Neuborn, John Norton Pomeroy Professor of Law, New York University School of Law), available at <http://judiciary.house.gov/legacy/22223.htm>.

70. BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM (2001).

not nonsensical. In particular, there are reasons for treating contributions and expenditures differently,⁷¹ and for rejecting the idea that independent expenditures are corrupting in a manner that justifies restrictions on core protected speech. My goal is not to relitigate these issues, but to point out that *Buckley* and its progeny have attempted to seriously address these issues in a manner that allows some regulation of the worst potential excesses of government corruption, while broadly protecting the ability of Americans to operate in the political system.

III. COORDINATION RULES UNDER THE *BUCKLEY* REGIME

A. *Trying to Get a Rule*

Developing coordination rules that comport with *Buckley* and make sense as a matter of policy has proven, like so many things, more difficult in practice than in theory. For many years, for example, the FEC's coordination regulations included a nonrebuttable presumption that any spending by a political party mentioning a candidate, or the candidate's opponent from a different party, was coordinated. The idea was that parties were inherently engaged with their candidates, so their expenditures must be coordinated. The Supreme Court struck down this regulation in 1996, in *Colorado Republican Federal Campaign Committee v. FEC (Colorado Republican I)*.⁷²

In 1999, another FEC approach to policing coordination fell when the Federal District Court for the District of Columbia rejected the FEC's interpretation of coordination to cover an "insider trading" scenario in *FEC v. Christian Coalition*.⁷³ Responding to the *Christian Coalition* decision, the FEC revised its coordination rules in 2000, with the Commissioners disagreeing almost immediately on precisely what the new rules meant—in particular, what types of communications were covered by the rules.⁷⁴ Whatever those rules

71. See Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment after Austin*, 21 CAP. U. L. 381, 401 (1992).

72. 518 U.S. 604 (1996).

73. 52 F. Supp. 2d 45 (D.D.C. 1999).

74. Compare Karl J. Sandstrom, *Letter to the Editor*, 33 NAT'L J. 604 (Mar. 3, 2001) (statement of FEC Commissioner Sandstrom) ("[A]bsent from the [FEC's Coordination rule] is any requirement that the public political communication contain express advocacy as a threshold requirement for regulation"), with Bradley A. Smith, *Letter to the Editor*, 33 NAT'L J. 758 (Mar. 17, 2001) (statement of Commissioner Smith) ("Commissioner Sandstrom's

meant, the campaign finance reform community harshly criticized them,⁷⁵ and so supporters of the 2002 Bipartisan Campaign Reform Act (BCRA) sought to use the BCRA as a vehicle for amending the rules. But when supporters actually tried to write a new rule, they quickly found the task almost insurmountable. In the end, therefore, the BCRA simply repealed the existing FEC rule and instructed the FEC to write a new one, with some broad guidelines on what the FEC should not require.⁷⁶

The FEC's efforts to comply with that BCRA mandate on Coordinated Communications have been, to put it mildly, less than a complete success. The Commission's first attempt at a new definition was struck down by a federal court as "arbitrary and capricious" in 2004.⁷⁷ A second effort met a similar fate in 2007.⁷⁸ The Commission has been unable to agree on new rules since. In the remainder of this section, I deal with some of the reasons why defining coordination has proven such a difficult task, and why many of the criticisms aimed at the FEC are incorrect.

B. Problems in Developing a Workable Rule

Recall that one reason *Buckley* allowed restraints on association going beyond the traditional definition of bribery was the difficulty of smoking out or proving bribery. Thus, the prophylactic of limiting contributions was upheld. Presumably, the Court might have upheld a much broader prophylactic. For example, at the extreme, it might have upheld limits on all expenditures, not as restrictions on expenditures, but on the presumption—arguably necessary because of

words may mislead the community into thinking that the commission has, in fact, made a determination that the new coordination regulations apply to issue advocacy. In fact, the regulations do not address the issue one way or the other.”).

75. See, e.g., THE BRENNAN CTR. FOR JUSTICE AT N.Y. UNIV. SCH. OF LAW, *Letter to FEC Re: Proposed Rules on General Public Communications Coordinated with Candidates: Comments of Brennan Center for Justice at NYU Law School*, BRENNANCENTER.ORG (February 22, 2000), <http://www.brennancenter.org/analysis/letter-fec-re-proposed-rules-general-public-communications-coordinated-candidates-comments> (“The standard fails to cover expenditures that are plainly not independent and that are of real value to campaigns. The test is thus inconsistent with the purposes of the [FECA], which seeks to reduce the potential for real and perceived corruption.”).

76. See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 214(c), 116 Stat. 81, 95 (2002).

77. *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005).

78. *Shays v. FEC*, 508 F. Supp. 2d 10 (D.D.C. 2007), *aff'd*, 528 F.3d 914 (D.C. Cir. 2008).

the burden of proof issues—that all expenditures were the result, at some point, of quid pro quo bargaining. Such a holding, however, would have been inconsistent with the general protection of free speech. Instead, *Buckley* upheld targeted contributions limits because they were “focuse[d] precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified—while leaving persons free to engage in independent political expression.”⁷⁹ “Significantly,” the Court added, “the Act’s contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues.”⁸⁰

In fact, in its sole foray into the question of what constitutes coordination, the Court made clear that coordination could not be presumed, but had to be proven through certain acts giving rise to the opportunity for corrupt bargaining. In *Colorado Republican I*, the Court rejected an FEC regulation that presumed coordination in any spending by a political party in support of its candidates.⁸¹ In finding that the expenditure was independent of the candidate, the Court noted that the candidate did not request the expenditure and “that all relevant discussions took place at meetings attended only by Party staff.”⁸² Beyond *Colorado Republican I*, the Supreme Court has not undertaken any analysis of what type of conduct is sufficient or necessary to establish coordination, and lower court decisions have been sparse, with only two giving the issue much thought.

In *Clifton v. FEC*,⁸³ the Court of Appeals for the First Circuit rejected on statutory grounds an FEC regulation that prohibited any oral communication between a candidate/candidate’s campaign and an organization preparing a voter scorecard, listing, rating or analyzing the legislator’s votes.⁸⁴ The Court suggested that if the regulation were a valid interpretation of the statute, it would raise serious constitutional questions under the “unconstitutional conditions” doctrine.⁸⁵ The Court believed that the scorecard

79. *Buckley v. Valeo*, 424 U.S. 1, 28 (1976).

80. *Id.* at 28–29.

81. 518 U.S. 604 (1996).

82. *Id.* at 613–14. Of course, *Colorado Republican I* posed a unique set of facts in that the candidate had not even been selected—the ads in question attacked the incumbent. *Id.*

83. 114 F.3d 1309 (1st Cir. 1997).

84. 114 F.3d 1309, 1309 (1st Cir. 1997).

85. *Id.* at 1315 (citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540,

producer, Maine Right to Life, could not be prevented from publishing a scorecard merely because it had discussed a candidate's position orally with the campaign, in order to assure a correct scorecard. The FEC regulation did allow Maine Right to Life to contact candidates in writing to ascertain their position on an issue, but not orally. Of course, a written communication, lacking the give and take of oral exchange, might seem inadequate or at least cumbersome as a means for pinning down or understanding a candidate's position. But if we view coordination restrictions as restrictions on conduct raising the possibility of quid pro quo corruption, as I have suggested is *Buckley's* intent, then the FEC's regulation may be a very reasonable compromise, allowing the speaker to ascertain correct information but limiting the opportunity for the offending bargaining conduct.⁸⁶ The majority's position, then, becomes one of deciding how far the prophylactic can stretch.

Maine Right to Life is like many political players in that it is interested in both elections and in issues. Indeed, it is interested in the former because it is interested in the latter. Persons—whether individuals or organizations—that are active in issues will typically be active in elections as well. *Buckley* seems to anticipate that the conduct limited by the FECA would have a rather minimal, incidental effect on speech, since speakers could still make independent expenditures. But if the coordination rule is so broad as to demand that speakers choose between effective lobbying and communication with officeholders, and engaging in independent speech, then the law's effect on speech would be far from incidental. Organizations such as the NAACP, the NRA, the Sierra Club, and other fixtures of

545 (1983)). The doctrine of unconstitutional conditions is usually interpreted as holding that while the government may withhold a benefit altogether, if it chooses to grant the benefit it may not condition that benefit on the waiver of a constitutional right. Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech and Abortion)*, 70 B.U. L. REV. 593, 621 (1990). The *Clifton* Court extended it to the notion that the exercise of one constitutional right could not be made contingent on waiving another constitutional right. 114 F.3d at 1315. *Clifton* raises another interesting question in that, in publishing a scorecard such as that of Maine Right to Life, it will often not be clear which candidate, if either, gains a benefit. *Id.* at 1316. Yet such a scorecard would almost certainly meet the statutory definition for "expenditure," unless the coordination statute is interpreted to exclude communications based on some content safe harbor, a controversial subject in and of itself. See *Christian Coalition v. FEC*, 52 F. Supp. 2d 45, 86–89 (D.D.C. 1999); Bopp & Abegg, *supra* note 16; Scott Thomas & Jeffrey H. Bowman, *Coordinated Expenditure Limits: Can They be Saved?*, 45 CATH. U. L. REV. 133 (1999).

86. The dissent analyzed the case in much this manner. See *Clifton*, 114 F.3d at 1317, 1320 (Bownes, J., dissenting).

American political life would be forced to choose—lobbying, or campaign activity. Driving such a wedge between the two would not only limit large amounts of speech (or lobbying), but ignore *Buckley*'s understanding that issues and elections are intimately bound.⁸⁷ Thus, we are left with the notion that some consultation may be limited because it poses the threat of quid pro quo bargaining, but probably not all such consultation. Unfortunately, *Buckley* provides no guidance on where that line might be drawn, beyond its holding that direct contributions can be limited. *Clifton* offers us the only real guidance to date from a federal appellate court, and it is minimal guidance at best.

Similarly, only one federal district court decision has examined coordination in depth. In *FEC v. Christian Coalition*,⁸⁸ the district court rejected an insider trading theory of coordination, in which any use of nonpublic information by a speaker constituted coordination.⁸⁹ Instead, the Court held that an expenditure would be deemed coordinated only if the speaker acted at the campaign's suggestion or consented to the expenditure, if there were candidate or campaign control over the expenditure, or if there were "substantial discussion or negotiation between the campaign and the spender over a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) 'volume' (e.g., number of copies of printed materials or frequency of media spots)."⁹⁰ The Court's opinion recognized the lack of guidance in *Buckley* but, noting that a broad prohibition on any contact would have substantial impact on speech, concluded, "I take from *Buckley* and its progeny the directive to tread carefully, . . . the spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some consultations or coordination with a federal candidate."⁹¹ The result is a decision that requires relatively intense consultation between a candidate and a spender to be considered coordination.

Applying that standard, the *Christian Coalition* Court argued that discussion over which issues to include in a voter guide or scorecard,

87. *Buckley v. Valeo*, 424 U.S. 1, 42 (1976).

88. 52 F. Supp. 2d 45 (D.D.C. 1999).

89. *Id.* at 90–91.

90. *Id.* at 92.

91. *Id.* at 91.

and how those issues were phrased (the Court used the example “‘homosexual rights’ versus ‘human rights’”) would be coordination.⁹² For conversations about a candidate’s position on issues to be deemed coordinated—the issue discussed in *Clifton* as well—“the conversation . . . must go well beyond inquiry into negotiation.”⁹³ Similarly, “discussions of the timing, location of distribution, or volume of voter guide distribution also must transgress mere inquiry.”⁹⁴ The Court applied similar standards to determining if a speaker’s consultations on its “get-out-the-vote” efforts rose to the level of prohibited coordination.⁹⁵ Tough for the state to meet in theory, the Court’s standard proved even tougher when applied to the particular facts of the case. Recognizing substantial contact between the Christian Coalition and various campaigns, the Court nonetheless found no legal coordination absent “discussion and negotiation” sufficient to establish the speaker and the candidate or campaign as “partner[s]” or “joint venture[r].”⁹⁶

The *Christian Coalition* ruling seemed to require consultation that went beyond creating the mere appearance of corruption—the opportunity for corrupt quid pro quo bargaining—to requiring conduct that would actually be corrupt, or at least create a very heightened appearance of corruption. It is not certain whether the *Buckley* Court, had it considered the issue, would have required such a high standard. But the approach taken in *Christian Coalition* fits quite comfortably into the *Buckley* paradigm. The Court implicitly rejected the idea that the Coalition’s effort to instill a sense of gratitude in the various campaigns it assisted constituted corruption, or that the mere efforts to make one’s spending as effective as possible converted that spending from independent to coordinated.⁹⁷

The Court’s interpretation demonstrates a practical approach to elections that anticipates that those citizens and groups most likely to

92. *Id.* at 92–93.

93. *Id.* at 93 (“For example, if the [speaker’s] interpretation of the candidate’s prior statements or votes would lead it to say he “opposes” the issue, and the campaign tries to persuade the corporation to use “supports” on the guide, that is coordination.”).

94. *Id.* (“A [speaker’s] mere announcement to the campaign that it plans to distribute thousands of voter guides in select churches on the Sunday before election day, even if that information is not yet public, is not enough to be coordination. Coordination requires some to-and-fro between [speaker] and campaign on these subjects.”).

95. *Id.*

96. *Id.* at 92, 95.

97. *See id.* at 93–95 (“It may have been recognized by both the campaign and the Coalition that the targeted distribution of its voter guides would assist the . . . campaign.”).

be involved in campaigns will also have issues that they will wish to discuss with officeholders between campaigns, and further, that they will therefore have ample opportunities to become acquainted with officeholders and share ideas and advice. In fact, the FEC sought to include as evidence long ago acquaintances, social interactions, friendships, and passing conversations to prove coordination.⁹⁸ To have adopted a broad prophylactic prohibiting any conduct that might create an opportunity for quid pro quo bargaining—that is, most or any contact between an eventual speaker and the candidate or campaign—would have had the type of broad chilling effect on speech that *Buckley* sought to avoid.⁹⁹ *Buckley* was substantially based on the idea that some limits were acceptable because the speaker retained ample substitutes for political activity.¹⁰⁰ The broad, prophylactic approach toward coordination that the FEC urged would have effectively stripped those substitutes away for the most politically involved citizens. The Supreme Court’s decision in *Colorado Republican I* had made clear that the Court believes that a speaker may make contributions and coordinated expenditures, and separately make independent expenditures.¹⁰¹ Or, to put it another way, the fact that there has been some contact with the candidate or campaign does not deprive the speaker of all ability to undertake substantial activities independently of the campaign.

The FEC responded to *Christian Coalition* by adopting new regulations based on the decision’s “joint venture” criteria.¹⁰² Reform advocates, viewing those regulations as too confining, sought a broader definition as part of the BCRA, but were unable to agree upon a different definition. They instead settled for a congressional repeal of those regulations and an order that the FEC develop new ones, with a particular emphasis on the use of third party common vendors and former employees to coordinate activity.¹⁰³

98. *See id.* at 66–81.

99. *See* Joel M. Gora, *Campaign Finance Reform: Still Searching Today for a Better Way*, 6 J.L. & POL’Y 137, 167 (1997).

100. Aziz Z. Huq, *Preserving Political Speech From Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16, 28 (2012).

101. *McConnell v. FEC*, 540 U.S. 93, 219 (2003), decided a few years later, specifically so held. *McConnell* probably marks the high-water point of judicial deference to regulation of campaign finance, so its decision on this point is made all the more emphatic.

102. General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 Fed. Reg. 76, 140, 76, 146 (Dec. 6, 2000); FEC Coordinated General Public Political Communications, 11 C.F.R. § 100.23 (2001).

103. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 214(c), 116

Therefore, the FEC’s post-BCRA rule on the conduct necessary to make an otherwise independent expenditure coordinated did away with the joint venture standard adopted after *Christian Coalition*. It specified instead that “agreement or formal collaboration” was not necessary to find coordination, but it continued to require “substantial discussions about the communication” to trigger a coordination finding.¹⁰⁴ While somewhat less protective of associational conduct than the *Christian Coalition* standard, this rule fits within a reasonable interpretation of *Buckley* in that it addresses situations in which the parties are in communication over the particular expenditure. Such consultation presents an opportunity for quid pro quo bargaining similar to that which might occur in discussing a direct contribution. But the rule still allows substantial leeway for political association that does not collaterally limit speech rights.¹⁰⁵

One element of the post-BCRA rule, however, raises more serious questions about the conduct necessary to trigger restrictions on the ability to make expenditures.¹⁰⁶ Operating on the belief that

Stat. 81, 95 (2002). Section 203(c) of the BCRA specifically provided that:

The regulations shall not require agreement or formal collaboration to establish coordination. In addition to any subject determined by the Commission, the regulations shall address—

(1) payments for the republication of campaign materials; (2) payments for the use of a common vendor; (3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and (4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.

Id.

104. See *Shays v. FEC (Shays III)* 528 F.3d 914, 920 (D.C. Cir. 2008) (quoting 11 C.F.R. § 109.21(d)(3) (2007)).

105. It is an interesting point whether the FEC’s 2003 rule, passed under the mandate of Bipartisan Campaign Reform Act, was defensible under *Christian Coalition*. *Christian Coalition* was a constitutional decision and binding on the FEC, which had not appealed. See *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 90–92 (D.D.C. 2004). However, the Court of Appeals decisions in *Shays I & III* overruled *Christian Coalition sub silentio* before this claim was ever brought. See *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) (*Shays I*); *Shays III*, 528 F. 3d 914.

106. My focus in this article is on conduct only. The FEC also included in its post-Bipartisan Campaign Reform Act regulations “content standards” that aimed to remove certain types of speech from the scope of coordination. See 11 C.F.R. 109.21(c) (2013). Effectively, content standards aim to classify particular types of speech as outside the definition of contribution. Content restrictions recognize that those who speak on candidate elections will frequently wish to consult with officeholders, and speak publicly, on issues. The goal is to protect speakers from the chilling effect of FEC investigations by suggesting that certain types of speech will be defined as nonelectoral regardless of the level of consultation. An example might be an ad campaign by supporters of the Patient Protection and Affordable Care Act,

former employees and common vendors would be used as go-betweens to facilitate coordination between candidates and speakers, the BCRA ordered the FEC to include in the definition of coordination a speaker's decision to hire such vendors or former employees. The FEC ultimately developed a rule that defined coordination as including any use of a common vendor who had engaged in any of a number of activities for the candidate or the candidate's opponent, including development of media strategy, selection of audiences, polling, fundraising, developing content for or producing public communications, developing voter, mailing, or donor lists, or selecting campaign personnel. Similar restraints were adopted for former campaign employees. However, the FEC limited the reach of the rule to a vendor or former employee who had provided such services to the candidate or campaign within 120 days prior to assisting the otherwise independent speaker.

In *Shays v. FEC (Shays III)*, the Court of Appeals struck down the 120-day limitation as arbitrary and capricious under the Administrative Procedure Act.¹⁰⁷ The Court's analysis was cursory, holding that the FEC had not explained why a vendor or former employee's knowledge lost value after 120 days away from the candidate's campaign.¹⁰⁸ Unlike the requirement that there be no "agreement or formal collaboration," however, the specific limitation on the use of vendors and former employees is indefensible under *Buckley*. The theory needed to support such a prophylactic is that common vendors and former employees serve as go-betweens or agents, representing the parties in the type of quid pro quo bargaining *Buckley* held could be limited. In fact, there is no evidence that vendors or former employees are particularly utilized as agents to negotiate quid pro quo arrangements. To the extent they might be, actions by agents are already included in determining what conduct is prohibited for coordination purposes.¹⁰⁹ A bribe is a bribe whether

Pub. L. No. 111-148, 124 Stat. 119 (2010), often referred to as "Obamacare," urging voters to "support President Obama's effort to bring health care to all Americans." Such groups might have met with the President and discussed the value of such a campaign to passing the legislation. The FEC's content standards were struck down by the courts as arbitrary and capricious under the Administrative Procedures Act. See *Shays III*, 528 F.3d at 920-28. The reviewing court did accept that some content standard would be an acceptable interpretation of the Act. *Id.* at 924. For a discussion of the costs and chilling effects that coordination investigations can create, see Bopp & Abegg, *supra* note 16.

107. 528 F.3d at 917.

108. *Id.* at 928-29.

109. 11 C.F.R. § 109.20(a) (2013).

negotiated directly by the parties or by agents representing their interests, so there is no reason to single out vendors and former employees for special treatment when they are not acting as agents. Indeed, vendors are particularly poor choices for such a role, given that campaign disbursements to a vendor must be disclosed pursuant to the Act.¹¹⁰ The trail to the vendor is immediately obvious. A former employee of the candidate currently in the open employ of the independent speaker would seem only a marginally less disastrous choice as the go-between for a corrupt bargain.

The focus by both the *Shays III* plaintiffs and the court on the "value" of the information a former employee or vendor might convey to the speaker is directly contrary to *Buckley*'s holding on expenditures. As we have seen, what *Buckley* specifically rejected was the idea that the mere value of speech, resulting in gratitude, was a sufficient basis to restrict such speech. Nothing in *Buckley* suggests that a speaker may not attempt to make his independent speech as effective and valuable as possible. Nothing suggests that merely because a person has valuable knowledge, his actions can be presumed to be corrupt or corrupting.

A per se restriction on common vendors and former employees can only be justified by holding that a speaker may not employ or contract with an individual who is also currently an agent or employee of the candidate, or who has been one in the very recent past, the idea being that it creates those opportunities for quid pro quo bargaining that concerned the *Buckley* court. Whether such a blanket prohibition on the use of current agents would go too far in restricting conduct under *Buckley* might be debated. But the idea that a speaker may not hire or contract with a party who was at any previous time an agent or former employee of a campaign or candidate goes well beyond the type of prophylactic restraint on conduct *Buckley* supported.¹¹¹

Since *Shays III*, the FEC has yet to adopt a new rule on coordination.

In summary, *Buckley*'s rationale might, in theory, allow for very broad prophylactic measures aimed at cutting off any possibility of quid pro quo bargaining between candidates and spenders. In

110. See 2 U.S.C. § 434 (2012).

111. The FEC's 120-day rule might have been justified by arguing that such a public "cooling off" period removed further any appearance of corruption. However, the "value" of the information known to such a vendor or former employee is irrelevant to the analysis.

practice, those few courts that have considered the issue have concluded, correctly in my view, that such broad readings would be incompatible with *Buckley*, effectively moving the standard far away from a solution that *Buckley* had emphasized was “focus[ed] precisely on the problem . . . while leaving persons free to engage in independent political expression.”¹¹² The precise boundary lines may be debated, but restrictions on coordinated conduct must be tied to a reasonable concern of quid pro quo bargaining, and must not extend so far as to create broad restrictions on independent speech by speakers who are not, in fact, engaged in such bargaining.

*C. Super PACs and the Problems With “Common Sense”
Coordination*

The current interest in coordination has been driven by the arrival on the scene of so-called Super PACs. The ability of Super PACs to raise large sums quickly has made them a preferred device for interest groups, political operatives, and simply concerned citizens who want to get into a race quickly with significant impact.¹¹³ What has particularly shaped concerns about Super PAC coordination, however, is the rise of the single candidate Super PAC, a PAC that is dedicated to offering independent support to only one candidate.

These single-candidate Super PACs have, not surprisingly, drawn their support and often their staff from various associates of the candidate. For example, during the 2012 Presidential election, a Super PAC that supported Rick Perry was managed by his former campaign aides.¹¹⁴ Entitled “Make Us Great Again,” the Super PAC’s sole purpose was to promote Rick Perry’s candidacy for

112. *Buckley v. Valeo*, 424 U.S. 1, 28 (1976).

113. In fact, nothing in the law prohibits a traditional PAC from operating to support a single-candidate. However, the restrictions on fund-raising—no individual may contribute more than \$5000 to a traditional PAC—had kept PACs largely out of the independent expenditure field, preferring to make direct contributions to candidates. *Cf. FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480 (1985) (holding that the section of the Presidential Fund Act limiting political contributions violated the First Amendment). Additionally, prior to the blessing given to independent expenditure committees, as Super PACs are known officially, by the U.S. Court of Appeals for the D.C. Circuit in *SpeechNow.org v. FEC*, 559 F.3d 686 (D.C. Cir. 2010), it is probably fair to say that a single-candidate PAC limiting its activity to independent expenditures in support of a single candidate would have drawn the regulatory eye of the FEC as probable coordination.

114. See Michael Isikoff, *‘Independent’? Maybe, but super PAC heavily backs Perry*, NBC NEWS.COM (Aug. 17, 2011), http://www.nbcnews.com/id/44177667/ns/politics-decision_2012/t/independent-maybe-super-pac-heavily-backs-perry/#.Ub-cSud5YY.

President. "Making Us Great Again" was formed by former staff members of Governor Perry, both from his gubernatorial and campaign staffs. Supporters of the PAC were also substantial donors to Mr. Perry's campaign for the Republican nomination for presidency.¹¹⁵ Another candidate in the 2012 presidential election, Rick Santorum, enjoyed the support of a Super PAC heavily funded by a prominent supporter of and donor to Santorum's campaign, Foster Friess.¹¹⁶ After Santorum ended his bid for the Republican nomination for President, he took on an active role in the Super PAC, using it as a vehicle for his future political aspirations.¹¹⁷ Richard Briffault offers a typical summary indictment:

The single-candidate Super PACs were frequently organized and directed by former staffers of that candidate. For example, [pro-Mitt Romney Super PAC] Restore Our Future was founded on the eve of the 2011–12 election cycle by several former Romney aides, including treasurer Charles R. Spies, general counsel to Romney's unsuccessful run for the 2008 Republican presidential nomination, and board member Carl Forti, the 2008 Romney campaign's political director; [Pro-President Obama Super PAC] Priorities USA Action was set up by two of Obama's former White House aides, Bill Burton and Sean Sweeney; Winning Our Future [supporting Newt Gingrich] was founded by Becky Burkett, who also worked for American Solutions for Winning the Future, a group Gingrich used to run, and Rick Tyler, a senior advisor for the Super PAC, had also worked as a press secretary and spokesman for Gingrich. In many cases, the candidate's campaign committee and the supportive Super PAC relied on the same campaign vendors, such as pollsters, media buyers, television ad producers, and fundraisers, as the candidates they aided. Candidates raised funds for the Super PACs backing them, and representatives of the candidates met with the staffs of and donors to their supportive Super PACs. Republican presidential contender Rick Perry even used footage from his Super PAC's ad

115. Ross Ramsey, *If Their Names Aren't on the Campaign Reports, Take a Look at the Super PAC*, NY TIMES (Feb. 4, 2012), <http://www.nytimes.com/2012/02/05/us/politics/to-find-some-rick-perry-supporters-look-at-super-pac.html>.

116. Shushannah Walshe, *Santorum and His Super PAC: Just Friends, Not Coordination*, ABC NEWS (Feb. 6, 2012, 8:31 PM), <http://abcnews.go.com/blogs/politics/2012/02/santorum-and-his-super-pac-just-friends-not-coordination/>.

117. Alexander Burns, *Santorum's New Platform: The Red White and Blue Fund*, POLITICO (May 3, 2012, 5:16 PM), <http://www.politico.com/blogs/burns-haberman/2012/05/santorums-new-platform-the-red-white-and-blue-fund-122409.html>.

for his own campaign ads, and Foster Friess, the principal donor to Santorum's Super PAC, appeared on stage with Santorum as the two celebrated Santorum's victory in the Missouri presidential primary.¹¹⁸

Professor Briffault undoubtedly speaks for many when he suggests that "such contacts establish that the Committee is actually operating on behalf of the candidate."¹¹⁹ Under a "common sense" definition of coordination, such reasoning might do.

But to say that a committee is operating on "behalf" of a candidate creates a slippery target. To operate on behalf of someone may mean "as a representative of," but it more commonly means "in the interest of."¹²⁰ All independent expenditures in campaigns are, by definition, undertaken to support or oppose a candidate, and thus can be said to be on the behalf of that candidate (or his opponent). But that is a very different meaning from suggesting that they are undertaken as an agent or representative of a candidate. In the former case, the candidate may feel gratitude,¹²¹ but *Buckley* and its legitimate offspring reject the idea that gratitude for political support is corrupting in a democracy. There must be more: the opportunity for quid pro quo bargaining. Absent actual coordination—that is, actual discussions and dealings between the parties—that crucial link is missing.

It cannot be said that the mere presence of the candidate's former associates, staff, or current supporters working with a Super PAC creates an opportunity for bargaining the quid pro quo. To use Professor Briffault's example, Mr. Spies working for Restore Our Future is no more bargaining with the candidate or his agents than Mr. Spies working for a different Super PAC that spends nothing to support Mr. Romney. No bargaining opportunities arise unless he has contact with the campaign or candidate post-Super PAC employment.

118. Briffault, *Coordination Reconsidered*, *supra* note 16, at 90–91 (citation omitted).

119. *Id.* at 93.

120. MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/behalf> (last accessed June 28, 2013). *See also* THE FREE DICTIONARY BY FARLEX, <http://www.thefreedictionary.com/behalf> (last visited June 28, 2013) (suggesting primary meaning "for the benefit of," and secondary meaning "as the agent of"); DICTIONARY.COM, <http://dictionary.reference.com/browse/behalf> (last visited June 28, 2013).

121. Briffault, *Coordination Reconsidered*, *supra* note 16, at 92 ("By giving to a single-candidate Super PAC, these donors were able to provide financial support to their preferred candidates at many times the legal limit and, presumably, enjoy greatly increased gratitude from the candidates who benefited from the Super PAC's spending.").

It is his present conduct, not his past position or conduct, that can be regulated in the interest of preventing corruption. It is possible, of course, that a candidate may issue instructions to a former aide: "Please establish a Super PAC and make expenditures on my behalf. You will be rewarded with government favors and subsidies for your clients." And one might find such a prophylactic tempting. But the candidate can equally do that with someone he has never met, or at least someone who has never worked closely with the candidate. While some leeway may be allowed for the appearance of corruption, the system cannot operate on the assumption that all prior contact with a candidate is suspicious, and therefore disqualifies a would-be speaker from the right to make expenditures. Such a presumption would allow *Buckley's* exception for regulating coordinated activity to swallow the rule protecting independent speech. It would be, in the words of one commentator, an "impermissible kind of gag order by association."¹²²

As a practical matter, most independent speech will come from persons who have some contact with the candidate, if only from having contributed to the campaign. Those who spend the most will frequently be the most enthusiastic supporters, and thus those most likely to be close to the candidate. And because the universe of persons with the requisite skills and desire to operate a Super PAC is relatively small and almost entirely limited to those active in political life, most Super PACs (like most ordinary PACs) will have a variety of social, political, and legal connections to the candidates they support. *Of course* Super PACs will be started and run by friends, associates, and former staffers of candidates; *of course* they will be funded by supporters, who are likely to have also donated to the campaign, as clearly permitted by the Supreme Court;¹²³ *of course* Super PACs will use well-known vendors, and those vendors will likely serve other like-minded clients; *of course* Super PACs will attempt to harmonize their strategy with that of their favored candidates, for maximum effect. This is what they do. This is what *Buckley* specifically protected in striking limits on expenditures.

It is particularly discouraging, then, when legally trained experts such as Professor Langvardt casually announce that "noncoordination is a joke."¹²⁴ Professors Langvardt and Briffault do not argue, I take

122. Gora, *supra* note 97, at 167.

123. *See supra* note 16 and text.

124. *Id.*

it, that the men and women in their examples are actually meeting with the candidate or holding discussion or even communicating in writing with the candidate, all measures that might provide an opportunity to bargain expenditures for official favors. Indeed, the whole point of their argument seems to be that Super PACs don't have to communicate with candidates or campaigns in order to have influence and create gratitude.¹²⁵ But it is the meeting and discussion, not the mere gratitude of the candidate, that provides the opportunity for the quid pro quo. Broad statements suggesting that coordination rules are being violated are out-of-context uses of the legal term that, if followed, would prohibit speakers from attempting to make their speech as effective as possible,¹²⁶ and in many cases from speaking at all. It may be that *Buckley's* decision on expenditures, and particularly independent expenditures, should be reconsidered. Certainly that has been argued ad nauseum.¹²⁷ But coordination should not become a back-door means to overruling *Buckley*.

Professor Briffault is correct when he argues that the FEC's coordination regulations are based on "an older model of independent committee,"¹²⁸ and there may be deserved tweaks to FEC regulations to update those regulations to new political tactics and realities. For example, the FEC allows candidates to personally appeal for contributions of up to \$5000 for Super PACs. When thinking of PACs that support many candidates, allowing officeholders and candidates to raise money for PACs seemed like an appropriate way to accommodate the broader political interests of a politician in the election of other candidates and the support of issues. Since no one

125. See Briffault, *Coordination Reconsidered*, *supra* note 16, at 94.

126. McCoy, *supra* note 16, at 1053.

127. See, e.g., Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 996 (2005).

Buckley falls short as a basis for constitutional doctrine because it frames the constitutionality of campaign finance regulation largely in terms of the implications for free speech, and it found in the danger of corruption the principal constitutional basis for limiting campaign speech. This is much too limited a view of the concerns at stake in campaign funding.

Id. at 998 (citation omitted); see also D. Bruce La Pierre, *Raising a New First Amendment Hurdle for Campaign Finance Reform*, 76 WASH. U. L.Q. 217, 225 (1998) ("In short, the Court permitted Congress to limit political contributions without any evidence that contributions in any particular amounts in excess of \$1000 caused the harms, corruption, or the appearance of corruption, that inspired the restriction."); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1400 (1994) ("Insofar as *Buckley* rejects political equality as a legitimate constitutional goal, it should be overruled.").

128. Briffault, *Coordination Reconsidered*, *supra* note 16, at 92.

could contribute more than \$5000 to the PAC, and since the PACs' receipts would be spread over many recipients in regulated campaign contributions, such a rule posed little threat of corrupt activity, in accord with *Buckley*'s concern about the quid pro quo possibilities in large dollar fundraising. To have the candidate solicit funds that he knows will be spent to support his election, however, raises the same type of quid pro quo bargaining opportunities that constitute the appearance of corruption that concerned the *Buckley* court.¹²⁹

But many of the broader suggestions bandied about—such as treating expenditures as coordinated if the Super PAC focuses its expenditures on one or a small number of candidates and is staffed by individuals who previously worked for the candidate or the candidate's campaign, or has been publicly endorsed by the candidate,¹³⁰ cannot be sustained. Such activity does not frustrate *Buckley*'s rule on expenditures, but fulfills it.

IV. CONCLUSION

Criticism that Super PACs routinely violate the independence required by *Buckley* and *Citizens United* are largely based on an incorrect understanding of those decisions. When *Citizens United* stressed that independent expenditures were constitutionally protected, it did not mean that the spender must be "disinterested in," "ignorant of," or "unconcerned with the result in" an election. Neither *Buckley* nor *Citizens United* permits efforts to maximize the value of expenditures to become a proxy for limiting the speakers' right to speak. The decisions do not seek to broadly restrict political association or speech. To the contrary, they are based on the notion that in a democratic society, speech is inherently not corrupting, and that limits on association must be "narrowly tailored" to the very specific problem of quid pro quo bargaining of money for legislative favors.

Super PACs that actually confer with candidates and their campaigns violate the law. But there is no evidence that this is occurring on a wide scale in the case of Super PACs. We should expect Super PACs to have a variety of connections to candidates and campaigns—the absence of such connections is not the type of

129. I am less certain whether a suitable definition could be developed.

130. See, e.g., Briffault, *Coordination Reconsidered*, *supra* note 16, at 97. Professor Briffault is one of the few to actually make thoughtful, concrete suggestions for changing coordination rules.

independence that the Court demands. Super PACs that do not confer with candidates and campaigns are not coordinating, even if they have many connections and relationships with those running for office.

It may be that *Buckley* is wrong about the constitutional permissibility and the benefits of limiting expenditures. But independent expenditures by Super PACs are no more threatening to democracy than independent expenditures were before the Super PAC revolution of *Citizens United* and *SpeechNow.org*.¹³¹ Coordination rules cannot become a backdoor means of overruling *Buckley* on independent expenditures.

131. See Michael Luo & Jeff Zeleny, *Many Big Donors to Democrats Cut Support*, N.Y. TIMES, (Sep. 29, 2010), <http://www.nytimes.com/2010/09/30/us/politics/30dems.html> (noting independent spending of \$20 million each by George Soros and Peter Lewis in the 2004 presidential election).