

THE COORDINATION CONUNDRUM

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Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.¹

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1. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring).

INTRODUCTION

Justice Souter's oft-repeated quote aptly summarizes the function of strict standards of review in constitutional jurisprudence—to protect unpopular speech from restrictions based on content-laden value judgments. While strict standards have their advantages, commentators have found fault with their rigidity and have questioned whether any decision-making process can, or should, be free of pragmatic considerations. This doctrinal discussion has been reinvigorated by two recent United States Supreme Court opinions. At the root of both cases was the Court's reliance on the distinction between coordinated and independent speech. This Article examines the validity of this divide and challenges the foundation upon which the coordinated and independent dichotomy rests. This Article argues that the Court has introduced a new standard, used in both cases—a coordination standard—that conflates the government's interest in restricting speech with the nature of the speech at issue. This leads to a largely outcome-determinative standard that is not content neutral, and is a cardinal departure from settled First Amendment law. This Article tests its hypothesis by applying the contradicting uses of coordination found in the two cases to a hypothetical test case—restrictions on private aid to impoverished foreign nations in furtherance of a new development model—and proposes a framework for future analysis of First Amendment issues which avoids the pitfalls revealed by the coordination divide.

In *Citizens United*, the Court applied strict scrutiny to speaker- and content-based restrictions on corporate electioneering communications and struck down those restrictions—proclaiming that corporations have free speech rights co-extensive with those of individual speakers.² Essential to the Court's decision was the divide between independent and coordinated speech, with the value of independent speech placed above that of speech coordinated with a candidate and therefore subject to the strictest review. *Holder v. Humanitarian Law Project (HLP)*³ addressed coordinated speech in the context of national security and the war on terror. At issue was whether Congress could bar citizens from providing “training,” or “expert advice or assistance” in coordination with foreign organizations designated as terrorist organizations, even if that advice

2. 130 S. Ct. 876 (2010).

3. 130 S. Ct. 2705 (2010).

entailed teaching non-violent conflict resolution strategies.⁴ Crucial to the Court's decision was the idea that the plaintiffs' speech was "coordinated," and thus deserving of less protection than "independent" speech.⁵ Despite the fact that the restriction was content-based, the Court applied a less stringent standard of review to reach the conclusion that the government has a compelling interest in restricting plaintiffs' speech.

Scholars have discussed the importance of the categorization of speech as coordinated or independent,⁶ but as of yet there is no sufficient analysis of whether "coordination" can or should have the same meaning in both contexts. Some scholars have explained the contradiction in the outcome of these two cases as a failure by the Court to consistently apply strict scrutiny,⁷ others have noted the inconsistent application of categorical rules,⁸ while some have declared it a victory of pragmatism over purposivist accounts of First Amendment protection.⁹ This Article will argue that, upon closer inspection, the Court's use of independent versus coordinated speech in both cases reveals that, despite the use of the same label and standard of review, they are in fact different definitions of the word "coordination." Further still, there is no doctrinal support for importing the concept of coordination from campaign finance cases to other contexts.

Despite the inconsistent use of coordination, this Article argues that the Court in both cases applied a two-tiered standard of review that values independent speech over coordinated speech. I argue that under this standard, the subjective value of coordination is allowed to bleed into the standard of review, creating a content-based standard that fails to live up to the *raison d'être* of standards—to "keep[] the

4. *See id.* at 2715.

5. *See id.* at 2726; Aziz Z. Huq, *Preserving Political Speech From Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16, 23 (2012).

6. *See* Huq, *supra* note 5, at 23 (noting that both *Citizens United* and *HLP* "are organized around the same boundary line between *coordinated* and *independent* speech") (emphasis in original); Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 71 (2011); Patricia Millett et al., *Mixed Signals: The Roberts Court and Free Speech in the 2009 Term*, 5 CHARLESTON L. REV. 1, 21 (2010).

7. *See* Huq, *supra* note 5, at 21–23.

8. *See* William D. Araiza, *Citizens United, Stevens, and Humanitarian Law Project: First Amendment Rules and Standards in Three Acts*, 40 STETSON L. REV. 821, 832 (2011).

9. *See* Rosenthal, *supra* note 6, at 71–72.

starch”¹⁰ in the courts’ review when there is strong political pressure to silence unpopular speech. When the choice of standard is largely outcome determinative, providing courts with two standards to select from—one with a built-in bias against certain types of speech—acts to suppress rather than protect speech.

What makes these cases interesting, and troubling, is that the idea of coordination was not employed to support the government’s interest in regulating speech, rather coordination was used to determine the *value* of the speech at issue. This coordination standard of review is problematic because speech coordinated with other individuals or entities has long been protected—in fact the basis of the right of association is the right to coordinate one’s speech with others. Clearly this lower standard of review cannot be applied to all speech in which the speaker and audience coordinate their discussion or it would be applicable to nearly all cases, undercutting the application of strict scrutiny. The standard must be applied selectively, thus giving courts the option of selecting a lower standard of review for speech that is especially troubling, such as speech made in conjunction with politically unpopular groups. Restricting dissident speech because it is more likely to challenge the status quo is clearly a content-based government interest and would normally be rejected by the courts unless accompanied by a showing of imminent harm from that speech.

A way to test this paper’s hypothesis lies in an unlikely place—with a possible answer to why development aid has done so little to help the world’s poorest countries. A growing body of research by economists suggests that development aid might be part of the problem, rather than the solution, for the world’s most impoverished nations. The research details the way in which donor money can have a corrupting influence on local and national governance and destabilizes markets leading to poor economic growth, both of which increase the likelihood of conflict or a failed state that can serve as a breeding ground for drug traffickers and terrorists. Full treatment of these complicated issues or the myriad proposed solutions is well beyond the scope of this Article. However, the evidence does suggest that there would be some support for a law prohibiting private donations made by non-governmental organizations (NGOs), churches, foundations, other charitable organizations and individuals,

10. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 744 (1996) (Souter, J., concurring).

at least to certain countries for limited periods of time.

A law restricting donations by private actors to foreign entities provides an excellent hypothetical to test the consistency of the Court's recent pronouncements on coordinated speech with established First Amendment doctrine. The test regulation raises the question of when donations are considered speech—the same question in which the divide between coordinated and independent speech first appeared in the campaign finance realm. It also closely mirrors the statute at issue in *HLP*, including the additional categorical justifications given by the Court for giving that speech less strict scrutiny—a deference to the government in matters of foreign affairs and a foreign recipient of speech—allowing for isolation of those factors *vis-à-vis* the coordination question. Finally, the two primary justifications for the hypothetical regulation—the prevention of the corrupting influence of large amounts of money on recipient governments and the need to prevent failing states from becoming breeding grounds for terrorists—draw in the government's articulated interests in both *HLP* and *Citizens United*, providing insight into the value of each interest once one addresses the undue emphasis placed on coordination.

Part I outlines where commentators have placed *Citizens United* and *HLP* in the overall framework of the debate regarding how the Roberts Court employs rigid standards in its analysis of First Amendment claims. It concludes that the cases are more alike than they appear at first blush, and in fact, employ two sides of the same standard—the coordination standard. It then details the origins of the coordination standard in campaign finance precedent with an analysis of *Buckley v. Valeo*¹¹ and *Citizens United*. It shows how the Court's emphasis has subtly shifted from the differences between symbolic speech and pure speech, to the elevation of coordination as the defining category of speech. It then turns to the use of coordination in *HLP* and provides support for the argument that the Court applied the 'less than' strict scrutiny standard borrowed from *Buckley* and its progeny.

Part II argues that the opinions in *Citizens United* and *Buckley* have ushered in a new standard of review—the coordination standard—that, rather than protecting speech, subverts the value of the speech analyzed to normative judgments hidden within the standard. It further demonstrates the ways in which the coordination

11. 424 U.S. 1 (1979).

standard is a poor fit for cases outside of campaign finance, such as *HLP*, and demonstrates how the standard dilutes the value of pure speech by double-counting the government's interest in preventing terrorism—first by denying its value as speech and again when analyzing whether the government's interest is sufficiently tailored under this lesser coordination standard.

Part III begins with a brief justification for a hypothetical regulation on private donations to certain countries by outlining the economic research showing that foreign aid can actually increase corruption and bad governance in recipient countries, stall economic growth and lead to an overall destabilization of recipient nations, all of which combined raise the likelihood of a failed state with the potential to become a breeding ground for terrorists. It then analyzes this hypothetical regulation first under the original two-tiered approach in *Buckley* and then under the coordination standard in *HLP* to determine which standard best predicts results in line with existing First Amendment doctrine. It shows that while the original *Buckley* standards lead to outcomes that fit within existing First Amendment doctrine, the coordination standard fails to create a logically consistent framework for the evaluation of the value of speech. This failure led to results-oriented decisions in both *Citizens United* and *HLP* that cannot be reconciled with the stated government interests at issue in those cases. Part III closes with the conclusion that the coordination standard fails to assign adequate value to First Amendment concerns, and creates a framework in which the Court can too easily reject categorical protections put in place to cabin judicial discretion in difficult cases when the temptation to restrict speech is the greatest. In other words, it undercuts the protection afforded speech precisely when that protection is needed most.

I. THE EVOLUTION OF COORDINATION

This Part locates the Court's opinions in *Citizens United* and *HLP* within the ongoing discussion in the First Amendment literature regarding the relative benefits of rigid standards or pragmatic balancing. While, at first blush, it may seem that *Citizens United* and *HLP* represent polar opposites on the continuum between rigid standards and ad hoc balancing, I argue in this Part that the two cases both employ a standard—in fact, both decisions employ the same standard, which I call the “coordination standard”—though they do so in different ways. This Part maps how the development of the

coordination standard, which began in the campaign finance arena with *Buckley v. Valeo*, dramatically changed course in *Citizens United*, and then ventured into uncharted waters in *HLP*.

A. *The Value of Standards*

The value of standards,¹² as Justice Souter famously noted, is in their potential to exclude subjective prejudices about the content of speech or the identity of the speaker from determinations of the value of such speech.¹³ Standards do not eliminate judicial scrutiny, however.¹⁴ Even the most rigid standards, which place the greatest constraints on judicial discretion, still require courts to undertake some degree of subjective analysis. When courts apply the strictest form of scrutiny, the government may overcome that scrutiny when its justifications for speech restrictions are sufficiently compelling and narrowly tailored. Of course, to decide whether the government's interest is sufficiently compelling and narrowly tailored, a court must

12. The definition of standards varies greatly in academic literature, including the idea that "standards" encompasses the entire range of decision-making that permits any form of judicial discretion. See Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 382 n.16 (1985) (noting definitional variety). This Article uses a different definition. For the purposes of this Article, a standard is a practical tool courts frequently invoke to determine the baseline for the level of protection afforded particular speech—this definition mirrors that outlined by Geoffrey R. Stone. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 50 (1987).

13. *Denver Area Educ. Telecomm. Consortium*, 518 U.S. at 774 (Souter, J., concurring); Araiza, *supra* note 8, at 836 (arguing that rigid standards "provide enough of a thumb on the judicial scale to produce predictable results that do a reasonably good job of protecting the constitutional value at issue"); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 474 (1985) (arguing that standards can and should "confine the range of discretion left to future decisionmakers who will be called upon to make judgments when pathological pressures are most intense"). There are a variety of standards ranging from strict scrutiny to rational basis review, which operate on a continuum based on the value of speech at issue and whether the restriction on speech is content neutral. See Stone, *supra* note 12, at 47–51 (exhaustively cataloging standards employed in speech cases). The determining factors for where speech lands on this continuum are the type of speech at issue—e.g., political speech versus commercial speech—and whether the restriction is content based or content neutral. *Id.* at 48. Thus, when a Court employs a standard, arguably the most important point in its analysis is the determination of the type of speech at issue and the nature of the restriction, which in turn dictate the proper standard of review.

14. As such, some argue that standards do not go far enough to protect constitutional rights and that categorical rules—such as a rule that once speech is found to be political speech it cannot be restricted—are necessary to sufficiently cabin judicial discretion. See Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1910 (2006) (summarizing Justice Scalia's critique of standards that allow for balancing); Schlag, *supra* note 12, at 397 (describing the rules versus standards debate). This Article will not enter into the fray and instead will focus on the gradations within the concepts of standards and ad hoc balancing.

first undertake a subjective analysis of those interests.¹⁵ Even within the rubric of standards, there are gradations in the way a court applies or articulates a standard that allow the court greater or lesser freedom to balance speech rights against the government's interests.¹⁶ At the extreme, courts may reject standards entirely in favor of a case-by-case balancing, taking into account the precise nature of the speech and the government's interest before the court in a particular instance.¹⁷

Commentators often argue, either from a descriptive or normative perspective, about where a particular speech doctrine or case falls on the spectrum between rigid rules and pragmatic balancing.¹⁸ The literature takes particular note of the preferences of individual Justices or courts for rigid standards or more pragmatic case-by-case analysis.¹⁹ Two important First Amendment decisions issued by the Supreme Court in 2010 complicate this discussion, and challenge settled assumptions about the utility and function of standards in First Amendment jurisprudence.

In *Citizens United v. Federal Election Commission*, the Court invalidated section 203 of the Bipartisan Campaign Reform Act of 2002, which prohibited corporations and unions from using general treasury funds for "electioneering communications" that advocated

15. See R. George Wright, *Electoral Lies and the Broader Problems of Strict Scrutiny*, 64 FLA. L. REV. 759, 768 (2012) ("To find an interest to be either genuinely compelling or slightly less than compelling typically requires broad reflection and the exercise of sound moral and practical judgment in several distinct respects.").

16. See Charles W. "Rocky" Rhodes, *What Conservative Constitutional Revolution? Moderating Five Degrees of Judicial Conservatism After Six Years of the Roberts Court*, 64 RUTGERS L. REV. 1, 64 (2011) (noting that narrow standards based on specific factors only minimally cabin judicial discretion); Stone, *supra* note 12, at 54 ("[E]ven within the deferential, intermediate, and strict standards, the actual scrutiny may vary from one case to the next. . . . Gradations exist even within each standard.").

17. See, e.g., Sunstein, *supra* note 14, at 1909 (describing O'Connor's minimalism philosophy as case-by-case analysis that allows for more nuanced determinations, especially when it is unknown how future cases will develop).

18. See Rosenthal, *supra* note 6, at 3 (arguing in favor of pragmatic balancing as the proper interpretative guide); Araiza, *supra* note 8, at 836 (noting that "rigid, acontextual standards simply do not work in all cases"). Araiza argues that both strict standards and balancing have their flaws but that while it is possible that "standards provide the false certainty of a tough-sounding rule that fails when it is most needed," they may still be the best option. *Id.* at 836-37.

19. See Sunstein, *supra* note 14, at 1907 (noting that Justice O'Connor favored case-by-case analysis); Schlag, *supra* note 12, at 397 (arguing that Justice Kennedy strongly supports rigid standards that function as categorical rules); Araiza, *supra* note 8, at 834-37 (analyzing the Roberts Court and describing Justice Stevens' preference for more flexible standards).

for or against a specified candidate for federal office.²⁰ The majority opinion found the expenditure prohibition to be a content- and speaker-based restriction and therefore applied strict scrutiny.²¹ The Court summarily dismissed the government's interest in ameliorating the corrupting force of large aggregations of wealth in the electoral system made possible by the corporate form—converting plaintiff's as-applied challenge into a facial challenge and invalidating the law without even remanding to give the government an opportunity to develop a record in support.²² The Court's decision held firm to rigid strict scrutiny for so-called independent political speech (speech not coordinated with a candidate) stating that "First Amendment standards . . . must give the benefit of any doubt to protecting rather than stifling speech."²³ This adherence to a rigid strict scrutiny test is in line with another 2010-term case from the Roberts Court, which rejected the "ad hoc balancing of relative social costs and benefits" as "startling and dangerous."²⁴

Holder v. Humanitarian Law Project did not continue this trend. The case involved the question of whether Congress could bar groups of Americans from providing "material support" in the form of speech to foreign groups that the government had designated as "foreign terrorists organizations" (FTOs) pursuant to section 301 of the Antiterrorism and Effective Death Penalty Act of 1996, as amended by the PATRIOT Act.²⁵ Two U.S. citizens and six domestic organizations brought the as-applied challenge, including the Humanitarian Law Project, who wished to continue their support of the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE) by teaching humanitarian and international law to those groups and engaging in political advocacy on their behalf.²⁶

20. *Citizens United v. FEC*, 130 S. Ct. 876, 889–90 (2010).

21. *Id.* at 898.

22. *See id.* at 967 (Stevens, J., dissenting) ("If our colleagues were really serious about the interest in preventing *quid pro quo* corruption, they would remand to the District Court with instructions to commence evidentiary proceedings."); *see also* Millett, *supra* note 6, at 14 ("[In *Citizens United*] the Roberts Court reached out beyond the question presented to it and beyond what the facts of the case required to decide a broad legal question facially invalidating a provision of federal law, and overturned twenty-year-old constitutional precedent to boot").

23. *Citizens United*, 130 S. Ct. at 891.

24. *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010); *see also* Araiza, *supra* note 8, at 829 ("Chief Justice Roberts explicitly and forcefully rejected ad hoc balancing of the value of a given type of speech against its social costs.").

25. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010).

26. *Id.* at 2713, 2716; *see also* Randolph N. Jonakait, *The Mens Rea for the Crime of Providing Material Resources to a Foreign Terrorist Organization*, 56 BAYLOR L. REV. 861,

Although the Court found the restrictions content based, it rejected the application of strict scrutiny and instead applied an undefined, lower standard of review.²⁷ After a cursory analysis, the majority determined that the government's interest in preventing terrorists from receiving any form of support, even support not material to their terrorist goals, outweighed the plaintiffs' speech and associational rights. Crucial to the Court's decision was the fact that the plaintiffs' proposed speech was "coordinated" with the PKK or LTTE and thus deserving of less protection than "independent" speech.²⁸

These two cases, issued six months apart, have left scholars scratching their heads. What, if anything, does the 2010 term show about the legal theory underpinning the Roberts Court's First Amendment jurisprudence? *Citizens United* was a clear victory for rigid standards.²⁹ The opinion in *HLP*, on the other hand, applied the opposite of clear standards. The opaque nature of the Court's reasoning has led to confusion about what standard the Court actually applied.³⁰ It is not surprising that a number of commentators and courts have assumed that the Court applied strict scrutiny, after all, the majority acknowledged that the restrictions are content based and

871–72 (providing description of PKK, LTTE, and plaintiffs' involvement with the organizations).

27. See *Humanitarian Law Project*, 130 S. Ct. at 2723–24 ("Plaintiffs want to speak to the [FTOs], and whether they may do so . . . depends on what they say."); *id.* at 2724 (holding that the regulation does not "prohibit pure political speech"); see also David Cole, *The First Amendment's Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147, 158 (2012) (describing the standard of review as "deferential strict scrutiny"); Peter Margulies, *Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech*, 63 HASTINGS L.J. 455 (2012) (referring to the Court's analysis as applying a "hybrid approach that blended intermediate and heightened scrutiny with the avoidance canon").

28. See *Humanitarian Law Project*, 130 S. Ct. at 2728 ("[M]ost importantly, Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups."); see also, Huq, *supra* note 5, at 21.

29. See Araiza, *supra* note 8, at 825 (noting that Kennedy's opinion adhered to a rigid view of strict scrutiny).

30. Compare *id.* at 831 (recognizing that although the court found the restrictions to be content based, it did not apply strict scrutiny), and Cole, *supra* note 27, at 158 (arguing that "deferential strict scrutiny" was the standard actually applied), and Wadie E. Said, *Humanitarian Law Project and the Supreme Court's Construction of Terrorism*, 2011 BYU L. REV. 1455, 1499 (2011) (noting that the Court did not use the term 'strict scrutiny'), with Huq, *supra* note 5, at 20 (accepting lower court's interpretation that strict scrutiny was applied without analysis), and Rosenthal *supra* note 6, at 71 (describing *HLP* as applying strict scrutiny standard).

that they were directed at speech, not conduct.³¹ Normally such restrictions would ensure that pure speech (as opposed to conduct) is subject to strict scrutiny.³² But this reading flies in the face of the Court's repeated rejection of the plaintiffs' argument that their proposed speech should be evaluated as "pure political speech."³³ The opinion distinguished the speech at issue from "pure political speech" on the grounds that it is coordinated with FTOs.³⁴ In other words, because the plaintiffs' speech is coordinated, it does not receive the same protections as "pure speech," even if the other triggers of strict scrutiny, such as a content-based restriction, are present. Whatever standard the majority applied, it never claimed to be using strict scrutiny.³⁵

It is thus no surprise that pragmatists claim *HLP* as a victory for pragmatic balancing.³⁶ They argue that the Court disavowed

31. *Humanitarian Law Project*, 130 S. Ct. at 2723–24.

32. See Cole, *supra* note 27, at 153 (noting that content-based restrictions generally employ strict scrutiny, including those cited by the Court for content-based restrictions in *HLP*).

33. *Humanitarian Law Project*, 130 S. Ct. at 2722 ("Congress has not, therefore, sought to suppress ideas or opinions in the form of 'pure political speech.'"); *id.* at 2724 (the question at issue is "not whether the Government may prohibit pure political speech"); *id.* at 2728 ("Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups."); *id.* at 2730 (stating that the regulation of independent speech may not "pass constitutional muster"). The dissent notes that the content-based restrictions should be scrutinized "strictly" by the majority, but were not. *Id.* at 2734 (Breyer, J., dissenting).

34. See *id.* at 2722–23 (rejecting plaintiff's argument that the restrictions ban "pure political speech" because the plaintiffs "may speak and write freely" as long as they do it independently).

35. This lesser standard of review helps explain the critique that the Court gave significantly less scrutiny to the government's interest in *HLP* than strict scrutiny requires. See Huq, *supra* note 5, at 25. Indeed, commentators who presume strict scrutiny was applied have noted that *HLP* is the only still valid case in the Court's history where a content-based restriction on speech was upheld under the strict scrutiny standard. Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 300 (2012) ("Of [the Court's strict scrutiny precedents], only in *Humanitarian Law Project* did a majority of the Court allow a law to pass what appeared to be content-discrimination strict scrutiny."); Ashutosh Bhagwat, *Sorrell v. Ims Health: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 870 (2012) ("I am aware of only one valid Supreme Court precedent in which a majority of the Court has upheld a content-based regulation of speech under strict scrutiny: *Holder v. Humanitarian Law Project*."). Rather than being an anomaly in strict scrutiny jurisprudence, especially given the majority's refusal to explicitly adopt strict scrutiny, it seems much more likely that the Court was applying a different, lesser, standard of review (or no standard at all). It strains credulity that the Court intended the government's scant justification for the regulation as applied to plaintiffs' proposed speech to set the gold standard for compelling government interests and narrow tailoring.

36. See Margulies, *supra* note 27, at 516 ("Within *HLP*'s parameters, the Court's

traditional standards for restrictions on speech in favor of a practical approach to the delicate problem of preventing inadvertent support to terrorist organizations.³⁷ While there are differing opinions on the outcome of the Court's balancing act, pragmatists read the Court's opinion as working relatively independent of the standards that have characterized much of First Amendment jurisprudence. It seems odd, however, that the Court, in the same term as *Citizens United* and *Stevens*, would feel free to embrace ad hoc balancing with such ardor.

This Article's thesis is that the *HLP* opinion did not summarily reject the use of standards, but rather that it utilized a standard of review borrowed from campaign finance. While others have noted the importance of the categorization of speech as coordinated or independent in *Citizens United* and *HLP*,³⁸ there is yet no sufficient analysis of whether "coordination" has the same meaning in both contexts. This Article proposes that the Court's use of independent versus coordinated speech reveals that both cases are applying the same, or substantially similar, dichotomy despite the different meanings of the word "coordination" in each context. It argues that the standard of review for contributions developed in earlier campaign finance doctrine has lost its moorings and evolved into a focus on coordination in *Citizens United* and that this is the standard of review borrowed by the Court in *HLP*. Further still, there is no support for a standard of review that devalues or inflates the type of speech at issue based on its level of coordination in either case.

B. A Standard is Born: Coordination in the Realm of Campaign Finance Law

The search for the definition of "coordination" must start with *Buckley v. Valeo*, which laid out the rubric used to evaluate campaign finance restrictions. *Buckley* analyzed the spending caps on contributions made to political campaigns (contributions) and direct

holding appropriately trades off doctrinal elegance for pragmatic results."); Rosenthal, *supra* note 6, at 71 (arguing that *HLP*'s holding "demonstrates that First Amendment jurisprudence is at its core about balancing and not categorical protection").

37. See Margulies, *supra* note 27, at 516; Rosenthal, *supra* note 6, at 71.

38. See Cole, *supra* note 27, at 166–67 (noting briefly that the rationale for the idea of coordination in campaign finance cases does not transfer to *HLP*); Huq, *supra* note 5; Peter Margulies, *Accountable Altruism: The Impact of the Federal Material Support Statute on Humanitarian Aid*, 34 SUFFOLK TRANSNAT'L L. REV. 539, 555 (2011) (evaluating coordination as discussed in *HLP* by drawing parallels with coordination in campaign finance cases).

expenditures on election communications made independently of a campaign (expenditures) under the Federal Election Campaign Act.³⁹ It found that the limits on both contributions and expenditures implicated the First Amendment rights of speech and association. Rejecting the government's argument that the restrictions regulated conduct (the spending of money) rather than speech, the Court noted that "[s]ome forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two" but that "the expenditure of money" does not "introduce a nonspeech element or . . . reduce the exacting scrutiny required by the First Amendment."⁴⁰ It also found that contribution and expenditure limitations "impinge on protected associational freedoms" including the right to affiliate with a candidate and the ability for "like-minded persons to pool their resources in furtherance of common political goals."⁴¹

After determining that limits on contributions and expenditures both implicate First Amendment concerns, the *Buckley* Court drew a distinction between the two types of speech.⁴² It held that contributions to political campaigns are a form of symbolic speech as the act of donating expresses a message of general support for the candidate. Thus, the Court reasoned, the *amount* of the donation is somewhat inconsequential and may be limited with minimal interference with the expressive content of the contributor's message.⁴³ The fact that the candidate may use the contribution for electioneering communications is not relevant to the question of the *contributor's* right to donate because the candidate's expenditures on speech are the candidate's speech, not the contributor's.⁴⁴

39. *Buckley v. Valeo*, 424 U.S. 1, 7 (1976).

40. *Id.* at 16.

41. *Id.* at 22.

42. *See* Huq, *supra* note 5, 18–19 (recognizing the different standards of review for contributions and expenditures).

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

44. *See id.* at 21 ("While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor."). The contribution and expenditure analysis thus anticipates three parties in the lifecycle of political speech. A contributor donates to a campaign (either a candidate or association). These contributions are a symbolic expression of support and association, which may be limited as to size, but not banned outright. The candidate or association then uses that donation, amassed with other donations, for its electioneering communications to the public and limitations on that speech are judged by the standard for expenditures.

In addition to symbolic speech, the “primary First Amendment problem” raised by the contribution limits is their restrictions on “the contributor’s freedom of political association.”⁴⁵ Again, the act of contributing is a way of associating with a group of like-minded people and thus is a “fundamental” right, but limits on the *amount* of the contribution have little effect on the ability of a contributor “to become a member of any political association and to assist personally in the association’s efforts on behalf of candidates.”⁴⁶

Given the weighty First Amendment concerns, the Court determined that the limits on contributions should be “subject to the closest scrutiny” and the government must “demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgment of associational freedoms.”⁴⁷ It found the “prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions” was a sufficiently important interest to limit, but not ban outright, campaign contributions.⁴⁸ Crucial to the Court’s conclusion was that limits on contributions did not infringe on the contributor’s right to speak in favor of the candidate or issues through the direct expenditures of money to reach her desired audience.⁴⁹

Expenditures are distinguished from contributions in *Buckley* because the expenditure of money is necessary to facilitate almost all modes of speech in a mass society.⁵⁰ Thus, unlike contributions, restraints on the amount of money a candidate or individual can spend “impose direct and substantial restraints on the quantity of political speech.”⁵¹ Spending money to purchase air time for a 30-second commercial is not a symbolic act, it is a necessary prerequisite for bringing a message to its intended audience—the less money spent, the fewer people reached. Likewise, limits on the amount associations can spend to “amplify[] the voice of their adherents” infringe more deeply on the right of association than caps on

45. *Id.* at 24.

46. *Id.* at 22.

47. *Id.* at 25; *see also id.* at 29 (noting that contribution limits were subjected to a “rigorous standard of review”).

48. *Id.* at 25.

49. *See id.* at 21, 28–29 (“Significantly, 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 by individual citizens, associations, the institutional press, candidates, and political parties.”).

50. *Id.* at 19.

51. *Id.* at 39.

contributions by stifling the ability of the group to bring its message to the general public.⁵² For these reasons, limits on expenditures “impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions”⁵³ and the government’s justification must “satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.”⁵⁴ In other words, restrictions on expenditures are subject to strict scrutiny.

The Court rejected the anti-corruption argument used to justify the limitations on campaign expenditures as insufficiently tailored to correct the problem.⁵⁵ It found that the government’s stated concern with quid pro quo corruption was less likely where the speaker acts independently from the candidate, thus the government has less interest in restricting independent expenditures than contributions.⁵⁶ It is important to note that this dichotomy of coordinated and independent speech is first raised in the context of evaluating the government’s interest in preventing quid pro quo corruption—not in determining the proper standard under which to analyze the speech.⁵⁷

Subsequent cases did not turn on the question of coordination nor did they restrict the government to the quid pro quo corruption argument.⁵⁸ The Court accepted the dangers posed by corruption

52. *Id.* at 22.

53. *Id.* at 23.

54. *Id.* at 44–45; *see also* Huq, *supra* note 5, at 17–18 (summarizing the different standards of scrutiny in *Buckley*).

55. *Buckley*, 424 U.S. at 48–51 (rejecting a government interest in “equalizing the relative ability of individuals and groups to influence the outcome of elections” as antithetical to the notion of an unfettered marketplace of ideas that is central to the First Amendment).

56. *See id.* at 47 (“The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as quid pro quo for improper commitments from the candidate.”).

57. *Id.* at 46 (first mention of “coordinate”).

58. *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659–60 (1990) (holding that regardless of whether concerns about quid pro quo corruption are “sufficient to justify a restriction on independent expenditures,” the State of Michigan has a legitimate concern in preventing “a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas”); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257–60 (1986) [hereinafter *MCFL*] (listing cases discussing the aggregation principal and then rejecting restrictions on expenditures as applied to nonprofit issue corporations because corporations formed solely to advocate political issues do convey, in a proportional amount, the political values of its shareholders).

from large aggregations of wealth made possible by the corporate form as a valid government concern.⁵⁹ *Austin v. Michigan Chamber of Commerce* and *Federal Election Commission v. Massachusetts Citizens for Life (MCFL)* did not turn on the distinction of independent versus coordinated speech—the court found that either type of spending implicates the concern of disproportionate influence from corporate aggregations of wealth.⁶⁰ In *Austin*, Justices Scalia and Kennedy each penned scathing dissents attacking the validity of any type of corruption other than quid pro quo corruption—such as the idea of aggregate corruption upheld by the majority—and argued that restrictions on independent speech are invalid under any theory of corruption by virtue of the speaker’s independence from the candidate.⁶¹ Focusing on the distinction between independent and coordinated speech, Kennedy most clearly reinterpreted *Buckley* to make the perceived absence of the risk of quid pro quo corruption the reason why “independent expenditures are entitled to greater protection than campaign contributions.”⁶²

In *Citizens United*, the *Austin* dissents carried the day. The Court overruled *Austin* and dismissed the idea that any type of corruption other than quid pro quo corruption could justify a restriction on election spending. In summarizing *Buckley*, the Court noted only that contributions are distinguished from expenditures because contributions are more likely to lead to quid pro quo corruption, or the appearance of such corruption.⁶³ In this description of *Buckley*, the majority jettisoned the reason why contributions

59. The aggregation argument is that corporations amass wealth based on their success in the commercial marketplace but spend that wealth in the political marketplace of ideas in a way that does not necessarily reflect the values of its shareholders or customers. These expenditures artificially inflate the amount of the corporation’s speech vis-à-vis its political support. See *MCFL*, 479 U.S. at 258 (“Relative availability of funds is . . . a rough barometer of public support. The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation’s political ideas. They reflect instead the economically motivated decisions of investors and customers.”).

60. See *Austin*, 494 U.S. at 659 (acknowledging the distinction between contributions and expenditures, but recognizing that precedent left open the possibility to “demonstrate a danger of real or apparent corruption posed by . . . expenditures”).

61. *Id.* at 683–84 (Scalia, J., dissenting) (arguing that quid pro quo corruption is the only meaning for the word “corruption” and that independent advocacy does not pose a substantial risk of it); *id.* at 703 (Kennedy, J., dissenting) (rejecting notion that the aggregation concern is a form of corruption or that independent expenditures could pose a risk of “true” corruption).

62. See *id.* at 702 (Kennedy, J., dissenting) (“Candidate campaign contributions are subject to greater regulation because of the enhanced risk of corruption . . . independent expenditures pose no such risk.”).

63. *Citizens United v. FEC*, 130 S. Ct. 876, 901–02 (2010).

deserve less protection than expenditures—because they are symbolic rather than pure speech—and instead focused on the fit between the government’s rationale and the restrictions.⁶⁴ This led to the solidification of the focus on coordination versus independent speech as the dividing line in determining what value to place on speech in the campaign context—in essence putting the cart before the horse by prioritizing the importance and fit of the government interest to determine what level of protection a category of speech should be afforded.

C. Humanitarian Law Project: Coordination Expands

In *HLP*, the Court once again raised the issue of coordinated versus independent speech in an entirely different context—the war on terror. Considering the plaintiffs’ First Amendment challenge, the Court rejected the government’s argument that intermediate scrutiny should apply because the statute regulates conduct with only an incidental burden on speech.⁶⁵ Intermediate scrutiny was not the proper standard of review, the Court reasoned, because the statute is content based—“Plaintiffs want to speak to the [FTOs], and whether they may do so under [the statute] depends on what they say.”⁶⁶ Even though the statute generally regulates conduct, the Court recognized that “as applied to plaintiffs, the conduct triggering coverage under the statute consists of communicating a message” and thus the restrictions must be subject to “a more demanding standard.”⁶⁷

However, the Court also repeatedly rejected the notion that the speech plaintiffs wished to engage in was “pure political speech.”⁶⁸

64. Huq argues that “the truly important doctrinal distinction . . . is between independent and coordinated speech” because the Court recognized that a contributor could merely contact a candidate and ask what type of advertising they need and then run that advertising with the candidates “‘approval (or wink or nod).”’ Huq, *supra* note 5, at 18. This position ignores the *Buckley* Court’s reasoning supporting the differing value of speech for contributions and expenditures. See *id.* at 9. As it turns out, the distinction between independent and coordinated spending may not even function as an effective dividing line as modern Super PACs coordinate with candidates through winks and nods in the media and through cross staffing to an extent that greatly limits the anti-corruption value assigned to so-called “independent” speech. See, e.g., Mike McIntire & Michael Luo, *Fine Line Between ‘Super PACs’ and Campaigns*, N.Y. TIMES, Feb. 25, 2012, at A1 (“In practice, super PACs have become a way for candidates to bypass the limits by steering rich donors to these ostensibly independent groups, which function almost as adjuncts of the campaigns.”).

65. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2723 (2010).

66. *Id.* at 2723–24.

67. *Id.* at 2724.

68. *Id.* at 2722 (“Congress has not, therefore, sought to suppress ideas or opinions in the

The crux of the Court's reasoning is that the plaintiffs' proposed speech would be coordinated with FTOs, which transforms the speech into something less than pure speech, deserving of less stringent scrutiny.⁶⁹ The Court declined to define what level of coordination would be necessary to fall within the statute and trigger this lower standard because it claimed the plaintiffs had not provided sufficient articulation of "the degree to which *they* seek to coordinate their advocacy."⁷⁰

Despite finding that the "most important" factor weighing in favor of the statute's constitutionality is that it respects the divide between coordinated and independent speech, the majority opinion did not provide a single citation as to why "coordinated" speech as a category is deserving of lesser protection than "independent" speech.⁷¹ The majority provided a litany of ways that support for an FTO's legitimate aims can be co-opted into support for their terrorist activities,⁷² but, like coordination in *Buckley* and *Citizens United*,

form of 'pure political speech.');" *id.* at 2724 (explaining that the question at issue is "not whether the Government may prohibit pure political speech"); *id.* at 2728 ("Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups."); *id.* at 2730 (clarifying by stating that the majority "in no way suggest[s] that a regulation of independent speech would pass constitutional muster").

69. *See id.* at 2728 ("Finally, and most importantly, Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups."). The Court also relied on the independent/coordinated distinction to reject the vagueness challenge advanced by plaintiffs to avoid the constitutional question. Because it is clear that "personnel" and "service" encompasses only coordinated speech, and clearly excludes independent advocacy, the definitions were found to be specific enough to cabin the regulations so as to only restrict lesser protected, coordinated speech. *Id.* at 2722.

70. *Id.* at 2722 (emphasis in original). The dissent rejects this characterization of the record. *Id.* at 2743 (Breyer, J., dissenting) (citing to complaints and affidavits in the record that "describe in detail the forms of advocacy these groups have previously engaged in and in which they would like to continue to engage"); *see also* Said, *supra* note 30, at 1497 (noting that the type of coordination plaintiffs envisioned was "clear and specific and the Supreme Court should have answered the question, even in the pre-enforcement context"). The true nature of the record in *HLP* is less important for this argument than the fact that the legal standard the majority utilized is one in which coordination, or lack thereof, is the determining factor in analyzing the protection available to speech.

71. *See Humanitarian Law Project*, 130 S. Ct. at 2733 (Breyer, J., dissenting) (noting that '[c]oordination' with a group that engages in unlawful activity . . . does not deprive the plaintiffs of the First Amendment's protection under any traditional 'categorical' exception to its protection").

72. For example, the Court raised the fact that FTOs generally lack firewalls, which can allow humanitarian donations to be used in furtherance of terrorist ends. *Id.* at 2724; *see also id.* at 2725 (suggesting that the provision of material support "frees up other resources within

these factors spoke only to the weight of and proper tailoring to the government interest. They provided no justification for why “coordinated” political speech is not “pure political speech” or why the content-based restriction on speech should fail to trigger strict scrutiny.⁷³

Looking at the opinion as a whole, there is ample support for the hypothesis that the Court in *HLP* did indeed intend to create (or reinforce) a category of speech distinct from standard strict scrutiny. The majority took care to note that they “in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations.”⁷⁴ In other words, the standard of review for coordinated and independent speech (which is subject to strict scrutiny) are divergent enough that—even with identical government interests at play—one may be restricted while the other is sacrosanct.

This parallels the divide between contributions and expenditures in *Buckley*, where expenditures received the type of strict scrutiny normally associated with content-based restrictions—strict in theory, fatal in fact.⁷⁵ Restrictions on contributions, on the other hand, received a close tailoring analysis, but the standard of review was lenient enough to allow some restrictions on contributions to stand. This divide between contribution and expenditure subtly shifted both linguistically and substantively to a dichotomy of coordinated and independent speech in *Citizens United*.⁷⁶ Thus, it would appear that

the organization that may be put to violent ends,” and that support lends legitimacy to FTOs making it easier for them to raise funds and recruit members). The legitimacy of these government justifications as applied to plaintiffs’ speech will be explored in Part III of this Article.

73. Margulies argues that the Court intended coordination to mean the regulation of the agency relationship between plaintiffs and FTOs and that the lower standard of review can be explained by deference to regulations on agency relationships such as the relationship between a lawyer and client. Margulies, *supra* note 27, at 486. This argument does not address the fact that the Court in *HLP* appears to require a significantly less involved relationship between two entities than an agency relationship requires. Also, it ignores the fact that if the Court intended to limit “coordination” to only cases involving agency relationships, it could have simply said so and imported the law of agency to answer the question of how much coordination is required to trigger lower scrutiny instead of punting the question. *See supra* note 70 and accompanying text.

74. *Humanitarian Law Project*, 130 S. Ct. at 2730. The Court also noted that prohibitions on material support to domestic organizations may not pass constitutional muster either. This issue is addressed in Part III.

75. *See supra* Part I.B.

76. *See supra* note 64 and accompanying text.

the Court borrowed the idea of “coordination” as a separate category of speech from *Buckley*, or more specifically, the characterization of *Buckley* in *Citizens United*.⁷⁷

The Court did not make the distinction between coordinated and independent speech in *HLP* in weighing the government’s interest in restricting the speech, but rather in determining the type of speech at issue and, as follows, the standard by which to review it.⁷⁸ Thus the Court reviewed the speech at a standard similar to *Buckley*’s review of campaign contributions—more demanding than intermediate scrutiny but less rigorous than strict scrutiny—what this Article refers to as the coordination standard. The coordination standard is one that, unlike strict scrutiny, is not fatal in fact for content-based restrictions.⁷⁹

II. THE COORDINATION CONUNDRUM

This Part argues that *HLP* adopted a standard of review from the campaign finance cases that improperly focuses on the government interest in coordination to determine the value of speech—the coordination standard. It then demonstrates that, given its origins,

77. Further supporting this argument is the Court’s summary dismissal of plaintiffs’ freedom of association claim. Without determining the precise associational interests involved in plaintiffs’ challenge, the Court found that plaintiffs’ association rights were at best coterminous with their speech rights and thus the same government interests justified the restrictions. *Humanitarian Law Project*, 130 S. Ct. at 2730–31. Recall that in *Buckley* the Court granted contributions less speech protections because they are rooted primarily in freedom of association, which has traditionally been granted less protection than pure speech. *Buckley v. Valeo*, 424 U.S. 1, 24 (1975) (“[T]he primary First Amendment problem raised by the Act’s contribution limitations is their restriction of one aspect of the contributor’s freedom of political association.”). Again, the Court equates the speech at issue in *HLP* with the lesser standard provided to contributions in *Buckley*. Whether the devaluing of the right of association is normatively justifiable is an open question. Ashutosh Bhagwat makes a compelling case that “[d]espite the biases of the modern Court and most modern scholarship, free speech should not be given any precedence in the relationship between free speech and the freedoms of assembly, association, and petition.” Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 994 (2011).

78. *Humanitarian Law Project*, 130 S. Ct. at 2722–23 (The restriction does not ban “pure political speech” because it “does not prohibit independent advocacy or expression of any kind.”).

79. Although the coordination standard was not articulated as a distinct standard in the *HLP* opinion, it does function as one. The Court used it to demote content restricted speech to less than pure political speech and to take away the protection provided by strict scrutiny. See *supra* note 33 and accompanying text. This is not the first incremental standard the Roberts Court has employed in a constitutional contexts. See Rhodes, *supra* note 16, at 63 (noting the Roberts Court’s penchant for standards that are “either narrowly crafted or subject to an uncertain underlying categorization scheme allowing for discretion in future cases”).

this standard is a poor fit for evaluating the type speech at issue in *HLP*.

A. *The Coordination Standard*

Although the Court did not cite *Citizens United* in *HLP*, the language of the two cases is similar enough that commentators have drawn parallels between the doctrinal distinctions made in both cases.⁸⁰ That the Court felt confident enough in the lesser value of coordinated speech that they did not feel the need to shore up the claim by building an argument drawing from various sources suggests that the Court had a pre-existing standard in mind—the coordination standard.⁸¹

Supporters of doctrinal standards should not take this as cause for celebration. Strict categorical rules are meant to “keep[] the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.”⁸² While there is debate as to whether categorical evaluations are or should be the driving force behind the Court’s First Amendment jurisprudence,⁸³ to the extent they have value, it is in providing a framework that separates the value of speech using a content-neutral perspective from the political hot-button issues of the day.⁸⁴ Without that separation, standards do not ameliorate the danger of political cries for limitations on unpopular speech. If a categorical approach allows the government interest to bleed into the question of what standard of review to apply, it loses its value as a normative tool.

Determining the value of the government’s interest in restricting speech and considering whether the restrictions are sufficiently tailored to meet those ends inevitably requires value judgments.⁸⁵

80. See Huq, *supra* note 5, at 24 (noting the “divergent standards of strictness in the review for regulations of independent and coordinated speech” in *Citizens United* and *HLP*); see also Margulies, *supra* note 38, at 555 (comparing the coordination rationale in *HLP* with campaign finance cases).

81. At least one commentator has taken the Court’s lead and accepted, without analysis or citation outside of *HLP*, the notion that coordinated speech is de facto less valuable than “independent” speech. See Rosenthal, *supra* note 6, at 71 (stating without citation that “[i]ndependent advocacy, of course, implicates weightier liberty interests”).

82. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring).

83. See, e.g., Rosenthal, *supra* note 6.

84. See Rhodes, *supra* note 16, at 64 (noting that narrow rules based on specific factors lose the value of predictability).

85. Wright, *supra* note 15, at 768 (“To find an interest to be either genuinely compelling

Standards are meant to prevent these value judgments from overriding the protection of unpopular speech by setting a minimum level of protection based on the values inherent in the First Amendment—such as a robust marketplace of ideas or the freedom of self-governance.⁸⁶ If the standard is one that incorporates a particular normative value that diminishes (or increases) the value of a particular kind of speech, the standard subverts the speech at issue to the value judgment incorporated in the standard. In other words, a standard that is not content neutral does more harm than good.

The coordination standard is this type of standard-balancing hybrid, taking on the worst features of both by combining the moral certainty and rigidity of a standard with the subjective bias of ad hoc balancing. It also incorporates as a negative one of the most important values of political speech—its associational element.⁸⁷ Putting a rights-limiting value into the standard devalues associational speech and compounds the weight given to the danger that “coordinated” speech poses.⁸⁸ This, in turn, relieves the government of its burden to justify the restrictions because the justification is already built into the test.

The coordination standard is especially insidious because it cannot survive as a universally applied standard without rewriting a century of First Amendment law. The First Amendment canon is replete with cases involving speech made in coordination with others. Publishers have the right to coordinate the creation of true crime nonfiction with authors, even if that coordination involves payments to convicted criminals for their stories.⁸⁹ States cannot bar the coordination necessary to find clients and direct the course of impact litigation between an association and its network of counsel, including

or slightly less than compelling typically requires broad reflection and the exercise of sound moral and practical judgment in several distinct respects.”).

86. See Araiza, *supra* note 8, at 836 (arguing that rigid standards “provide enough of a thumb on the judicial scale to produce predictable results that do a reasonably good job of protecting the constitutional value at issue”); see also Bhagwat, *supra* note 77, at 993–94 (describing main theories underlying the importance of free speech).

87. See Bhagwat, *supra* note 77, at 981 (arguing that “assembly, petition, and association are at least as central to the process of self-governance as is free speech”).

88. See Cole, *supra* note 27, at 163 (“The fact that the law selectively punishes speech when expressed in association with another would seem to render the law more unconstitutional (because it violates both the rights of speech and association), not save it from invalidation.”).

89. See *Simon & Schuster, Inc. v. Members of the Crime Victims Bd.*, 502 U.S. 105 (1991).

the payment of attorney fees, even by content-neutral restrictions on legal solicitation.⁹⁰ Non-profit organizations have a First Amendment right to hire (and coordinate with) fundraisers to solicit funds for their organization and engage in advocacy—even though the commercial speech of professional fundraisers is unprotected.⁹¹ At its essence, coordination is a necessary tool for exercising the right of association, so it is unsurprising that it frequently arises in tandem with First Amendment claims.⁹²

The First Amendment canon is not free of outliers in this regard—courts have stumbled in the protection of unpopular associations. Convictions for speech made in connection with radical labor movements like the Industrial Workers of the World or the Communist Labor Party under criminal syndication statutes were routinely upheld prior to 1969.⁹³ The threat of these movements was not from actual acts of violence, “but the perceived unnerving nature, to the ruling classes, of the [groups’] goal of redefining socio-economic relations within the United States.”⁹⁴ By the 1960s, courts began to draw “what appeared to be a clear line between advocacy and action, with the former protected and the latter criminalized.”⁹⁵ This shift culminated in the overturning of *Whitney v. California* in *Brandenburg v. Ohio*. *Brandenburg* articulated the “imminent danger” test—holding that advocacy may only be criminalized when it constitutes an “incitement to imminent lawless action.”⁹⁶

90. See *NAACP v. Button*, 371 U.S. 415 (1963).

91. See *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980); *Sec’y of State of Md. v. John H. Munson Co., Inc.*, 467 U.S. 947 (1984).

92. Bhagwat, *supra* note 77, at 986-89 (detailing the history of First Amendment cases with strong associational elements).

93. See *Whitney v. Cal.*, 274 U.S. 357 (1927); *Burns v. United States*, 274 U.S. 328 (1927); *Dennis v. United States*, 341 U.S. 494, 495-97 (1951) (upholding prosecutions on speech even when the advocacy of violent overthrow was not realistic); see also Said, *supra* note 30 (“During the first part of the twentieth century, radical labor unions were considered so illegitimate . . . that even nonviolent speech could be equated to violence in service of such groups.”).

94. Said, *supra* note 30, at 1464.

95. *Id.* at 1470 (describing history of cases involving membership in the Communist Party); see also Bhagwat, *supra* note 77, at 1003-05 (describing evolution of incitement cases leading from little protection for dissident groups to greater protection under imminent danger test).

96. 395 U.S. 444, 448-89 (1969). The imminent danger test was applied even to communication and organization with the Communist party, which Congress had made detailed findings, was engaged in terrorist conduct in connection with the Soviet Union, an enemy of the United States. See Cole, *supra* note 27, at 161, 168; see also Jonakait, *supra* note 26, at 908 (noting that the “prevention of violent overthrow of the government” in the

Thus, if history is any indication, the coordination standard's most likely use is selective application to cases, like *HLP*, where there is a concern that the speech of a particular group poses a threat.⁹⁷ This adds yet another layer of subjectivity when objective standards are most needed to protect against restrictions on speech of dissident groups and political factions.⁹⁸ The coordination standard essentially sidesteps the imminent danger test.⁹⁹ If broadly applied in cases where the government is most concerned with groups who radically oppose the status quo, the coordination standard could allow the restriction of almost any meaningful speech by dissident organizations without necessitating the direct overruling of decades of reliance on the imminent danger test.¹⁰⁰

While the coordination standard gives the government great latitude in restricting the speech of dissident groups—bulking up the government's power in the national security context—the flip side of coordinated speech, independent speech, paradoxically sets up a nearly insurmountable roadblock to the government's efforts to enact campaign finance reform. “Independent” speech is favored because it is uncoordinated with the candidate.¹⁰¹ This standard, however, presumes that the only valid government interest in electoral corruption is the type of corruption that coordination is more likely to prevent—quid pro quo corruption.¹⁰² Other types of corruption, such

Communist party cases could not have provided a more compelling government interest).

97. See Said, *supra* note 30 (providing a history of terrorism and attempts to restrict the rights of dissident groups); Cole, *supra* note 27, at 149 (finding it troubling that the Court “upheld criminalization of speech advocating only nonviolent, lawful ends on the ground that such speech might unintentionally assist a third party in criminal wrongdoing).

98. See Wright, *supra* note 15, at 776 (noting that evidence surrounding hot button issues tend to be “inconclusive, misleading, questionable, or mistaken” and thus a court already exercises subjective preferences in determining whether to accept such evidence when considering whether an interest is compelling or a regulation sufficiently tailored).

99. See Cole, *supra* note 27, at 149 (questioning whether *HLP* “calls into question the continuing validity of the *Bradenburg* incitement test”).

100. See *id.*; Said, *supra* note 30, at 1470 (noting that since the 1960s, the Court has protected the right to be a member of a terrorist group, provided that the member does “not engage in any specific conduct toward fulfilling the group’s illegal goals”).

101. A distinction that is not supported by the underlying rationale for the original reason electoral spending was divided into two types of speech. See *supra* notes 42–44, 50–54 and accompanying text. The distinction is also questionable given the rationale in *HLP* that money donated for non-terrorist activities frees up money for an organization’s terrorist activities. Likewise, independent spending frees the candidate up to spend campaign money on other expenses. See Cole, *supra* note 27, at 166.

102. See *supra* notes 58–64 and accompanying text (discussing the way in which the coordination standard shifted the Court’s evaluation of aggregate corruption).

as the aggregate influence of large corporate spending, cannot justify regulations because the standard itself includes a bias in favor of independent speech based on the quid pro quo justification. Although the divide between independent and coordinated speech was not the original focus of campaign finance cases,¹⁰³ *Citizens United* confirmed that independent speech, by virtue of its independence, is a sacred category of speech, and overturned precedent that had accepted other corruption justifications.¹⁰⁴ Again, the coordination standard interjects a value-laden determination into the standard itself based on the meaning of coordination in the context of campaign finance—i.e. that only speech coordinated with candidates can corrupt the political system.

B. A Poor Fit

This analysis shows an evolution of the coordination standard starting with Buckley's division between symbolic contributions and pure speech expenditures that was justified, in part, by the stronger government interest in preventing potential corruption caused by a donor's coordination with a candidate. The contribution-expenditure dichotomy then morphed into a focus on coordinated versus independent speech in campaign finance, and in the process lost its mooring to the justification for the lesser protection given to symbolic contributions. Finally, the 'less than' strict scrutiny review of coordinated speech found its way outside the campaign finance arena and into uncharted territory in *HLP*.

The most pressing question for this hypothesis is, if the *HLP* Court intended to use the standard based on coordination that had evolved in the analysis of campaign finance restrictions, why did the Court fail to cite *Citizens United* or any other campaign finance case invoking it? The most obvious answer is that *Buckley* does not support the Court's analysis in *HLP*.

A citation to the campaign finance cases would lay bare the Court's misinterpretation of the original meaning and importance of coordination in that line of cases. Most importantly, it would demonstrate that the distinction between independent and coordinated speech is not a method for distinguishing between two *types* of speech but rather a way to evaluate the applicability of a particular government interest—the avoidance of quid pro quo corruption—in

103. See *supra* notes 42–46 and accompanying text (describing original distinction).

104. See *supra* notes 63–64 and accompanying text.

the campaign finance context. Coordination was merely a factor in determining the weight to be given the government's interest in regulating the two categories of speech found in *Buckley*—symbolic speech and pure speech.¹⁰⁵ Thus the distinction should have been irrelevant in *HLP* as, unlike *Buckley*, it did not involve a determination of what type of “speech” was created when money is spent in particular ways. Plaintiffs in *HLP* simply wished to speak, in the literal sense, with their intended audience.

Also troubling, are the divergent meanings of “coordination” in the two lines of cases. In the campaign finance context it is clear that the “coordination” that creates concern is between the speaker and the candidate, not that with the speaker's audience.¹⁰⁶ While the expressive value of the contribution—that the contributor supports and has chosen to associate with the candidate—is broadcast to the electorate through required campaign disclosures, the government interest is not in preventing coordination between the speaker and her audience (the electorate) but rather the speaker and a third party (the candidate). Thus there are a limited number of actors for whom coordination provides a compelling justification for restrictions on their speech. A speaker is free to “coordinate” her speech in a myriad of other ways: with any audience of her choosing, or with any association or organization be it a PAC, a union,¹⁰⁷ a non-profit organization,¹⁰⁸ or any mass media necessary to facilitate speech, such as a cable provider.¹⁰⁹ None of this coordination removes the speech from the ambit of pure political speech.¹¹⁰

In contrast, the “coordination” raised in *HLP* is between the speakers and their intended audiences. Under *HLP*, a speaker is not allowed to coordinate the message with its intended recipient without losing a significant measure of First Amendment protection. As the

105. *See supra* notes 51–57 and accompanying text.

106. Recall the “lifecycle” of speech where money contributed to a candidate (symbolic speech) turns into an expenditure (pure speech) when the candidate spends that money on electioneering communications made to the public. *See supra* note 44.

107. *Citizens United v. FEC*, 130 S. Ct. 876 (2009) (striking down limits on donations from corporation and union general funds).

108. *FEC v. Mass. Citizens for Life, Inc.*, 497 U.S. 238, 242 (1986) (coordination between members and non-profit corporation to publish campaign newsletter reviewed as “independent expenditures”).

109. *Citizens United*, 130 S. Ct. at 887 (analyzing video-on-demand video whose airing was coordinated with cable company under strict scrutiny).

110. In fact, the tendency is to move more speech from regulated to unrelated alternatives. *See infra* note 123 and accompanying text.

dissent in *HLP* noted, there is no logical stopping point for this type of coordination.¹¹¹ Nearly all speech is “coordinated” in some sense—including the speech involved in numerous landmark First Amendment cases.¹¹² “At the most obvious level, to organize a public assembly requires informing participants of the planned assembly, publicizing it more broadly to attract others, and publicizing the occurrence of the assembly after the fact, in order to influence the political process”—all means of coordination.¹¹³ The same can be said for the desire to teach non-violent conflict resolution to an organization struggling with the concept—there is no way to effectively convey the message without coordination.¹¹⁴ When coordination with an audience is sufficient to remove the protections afforded to “pure speech,” only the lone man pontificating on a soapbox can be certain to benefit from strict scrutiny. There is a compelling argument that the communicative nature of the First Amendment is least served with this type of speech.¹¹⁵

The majority in *HLP* attempted to defuse the difficulty of determining what level of coordination is necessary to remove speech from the “pure speech” category by placing the blame on the plaintiffs for their failure to specify “the degree to which *they* seek to coordinate their advocacy with the [FTOs].”¹¹⁶ The Court’s refusal to address what level of coordination is sufficient to remove the speech from strict scrutiny leaves the lower courts with little guidance as to

111. *Humanitarian Law Project*, 130 S. Ct. at 2736 (Breyer, J., dissenting); *see also*, Cole, *supra* note 27, at 166 (“Speech is almost always a relational act; we almost always speak to, or in connection with, someone else.”).

112. *See, e.g.*, *Simon & Schuster, Inc. v. Members of the Crime Victims Bd.*, 502 U.S. 105 (1991) (protecting speech between publisher and criminal author); *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980) (protecting relationship between non-profit organizations and fundraisers); *Sec’y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (same); *NAACP v. Button*, 371 U.S. 415 (1963) (protecting right of NAACP to coordinate impact litigation with network of attorneys and clients).

113. *See* Bhagwat, *supra* note 77, at 998 (describing the interdependency between speech, association, and assembly). Bhagwat points out that the ability “to form and maintain associations and to communicate an association’s views to outsiders” is necessary to preserve “the structural purposes of the First Amendment.” *Id.* at 998–99. These prerequisites all involve some form of coordination both within an association and with individuals outside of the association.

114. *See* Huq, *supra* note 5, at 28.

115. Bhagwat, *supra* note 77, at 1012 (arguing that the “lone, street-corner speaker” contributes “nothing to First Amendment values if no one is listening”).

116. *See supra* note 70 and accompanying text. It strikes one as unfair to hold the plaintiffs responsible for not sufficiently addressing the requirements for a category of speech that is first mentioned in the Court’s decision.

how to apply this new standard and could lead to potentially ad hoc results where lower courts guess at how much “coordination” is necessary to tip the scales. This type of uncertainty in the law, especially with respect to the regulation of speech, raises serious concerns about the chilling effect of the regulation and is thus generally disfavored.¹¹⁷ Would uploading a video on how to sneak explosives onto an airplane and merely emailing Hamas the website link trigger strict scrutiny, while sending invitations to attend a seminar on non-violent protest to members of the PKK and interacting with the seminar attendees would yield lesser scrutiny as “coordinated” speech?¹¹⁸ The distinction matters immensely because the majority hinted that regulations of independent speech would not necessarily “pass constitutional muster” even if the government can show that the speech benefits a terrorist organization.¹¹⁹ If the lower courts are to follow the Court’s reasoning, they must prioritize the level of coordination over the actual harm the speech may cause leading to potentially absurd (and dangerous) results.

While the *HLP* majority also noted that the restrictions on material support might not be acceptable as applied to domestic organizations, it is not at all clear that it rejected the coordination standard in domestic speech cases.¹²⁰ After all, as we have seen, a similar coordination standard is already in use in domestic campaign finance cases. The language in the opinion suggests that coordination and a foreign recipient of the speech are each independent conditions for the Court’s holding.¹²¹

117. *Citizens United v. FEC*, 130 S. Ct. 876, 891 (2010) (rejecting as-applied challenge because “the interpretive process” involved in drawing lines on a case-by-case basis “would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable”).

118. Margulies provides a fact pattern in support of the idea of coordination as a valuable distinction by arguing that under *HLP* a group is prohibited from entering into an “interactive relationship” with an FTO in which it answers a question that could assist them in using terror to evade human rights law—for example, telling the FTO “what percentage of operatives it can house in a ‘civilian’ site to maintain the site’s legal protection from attack.” Margulies, *supra* note 27, at 500. However, he argues that *HLP* allows an organization to host a seminar on international humanitarian law open to the public and knowingly allow a member of an FTO to attend and ask the exact same question. *Id.* at 502–03. It is difficult to see how the government’s interest in preventing terrorist organizations from gaining information about how to use international law to shield their terrorist activities is served by the former but not the latter. Rather than supporting the value of coordination, the fact pattern undermines it.

119. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2730 (2010).

120. *Id.* at 2730 (“We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations.”).

121. Despite this, at least one commentator is hopeful that the holding in *HLP* is limited

Finally, the coordination standard alters the balance of government power differently in the context of campaign finance than anti-terrorism regulations.¹²² In the campaign finance realm, restrictions on coordinated speech move money to unregulated (independent) entities as those wishing to contribute large sums of money to campaigns must do so independent of campaigns. The cumulative effect is lessening government control over campaign speech as money moves from closely governed campaign contributions to less regulated “independent” expenditures.¹²³ The practical effect of this can be seen by the proliferation of Super PACS spending previously unheard of amounts on elections, largely free from government oversight.¹²⁴ In *HLP*, on the other hand, the restriction on coordinated speech expands government control, since there are few practical ways to circumvent the ban on coordinated speech, with the practical effect of blocking all available speech.¹²⁵ In this respect, the coordination standard protects speech in the campaign finance realm while banning it outright in *HLP*.

The end result is that we are left with two competing meanings of “coordination,” that the Court uses interchangeably. While the majorities in *HLP* and *Citizens United* appear to use the same “coordination standard” of review, there is no doctrinal support for

to fact patterns that involve coordination, a foreign recipient and national security concerns. Cole, *supra* note 27, at 171 (arguing all three are necessary and citing lower court case where court struck down restrictions missing the foreign recipient). Even in those circumstances, however, the coordination standard does not function as a proper measuring tool for the value of speech. The issues posed by a foreign recipient of speech are isolated and evaluated in Part III.

122. See Huq, *supra* note 5, at 27 (“What in the campaign finance context weakens government and empowers speakers has the opposite effect in the national security context, where it shifts authority from private to public hands.”); Jonakait, *supra* note 26, at 896 (noting that in electioneering communications there is an avenue for independent speech but coordination with organizations may be the only way to access and assist certain populations).

123. See Huq, *supra* note 5, at 27–28; see also Buckley v. Valeo, 424 U.S. 1, 21–22 (1976) (“The overall effect of the Act’s contribution ceilings is merely to require candidates . . . to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression.”).

124. See *2012 Election Spending Will Breach \$6 Billion*, Center for Responsive Politics Predicts, OPEN SECRETS CENTER FOR RESPONSIVE POLITICS (Oct. 31, 2012, 2:33 PM), <http://www.opensecrets.org/news/2012/10/2012-election-spending-will-reach-6.html> (detailing the record spending in the 2012 election, most of which was spent by “independent” groups who can largely keep the identity of their donors confidential).

125. See Huq, *supra* note 5, at 28 (“Use of coordination to demarcate bounds to protected speech *expands* the authority of the government because the range of possible substitutions for either well-intentioned or ill-intentioned actors is small.”).

painting with the same brush campaign contributions and the pure speech at issue in *HLP*.

With this understanding, it becomes apparent that the coordination standard itself incorporates a subjective value based on the Court's evaluation of coordination in that case. In *HLP* the Court infuses the standard with an interest in preventing association with disfavored groups. In *Citizens United*, the coordination standard incorporates a rejection of the government's interest in preventing forms of corruption other than quid pro quo corruption. When the government's asserted interest aligns with the value incorporated into the standard, such as *HLP*, the Court essentially double-counts the value of that interest—first to lessen the burden on the government to justify and narrowly tailor the restriction with respect to the plaintiff's intended speech, and second to allow the government to meet that reduced burden. As such, the coordination standard fails to curb judicial discretion and allows courts to give undue weight to the government's interest when it chooses simply by selecting a standard of review that could apply to virtually any speech (as most speech involves coordination of some sort) when that standard aligns with the government's interest in suppressing speech. When the government interest asserted is at odds with the value the Court places on coordination, such as with aggregate corruption in *Citizens United*, the standard serves to apply a discount to the government's interest by negating its value before the merits of the asserted interest are even considered. This has the potential to undervalue legitimate government interests.

III. A TEST CASE TO UNTANGLE THE COORDINATION QUESTION

To explore this hypothesis it is helpful to have a test case that isolates the factors at play in *HLP* and *Citizens United*. An ideal test case would involve expenditures of funds as speech, which includes both types of speech found in the original contribution and expenditure divide (symbolic speech and pure speech), as well as speech "coordinated" between speaker and audience as *HLP* uses the term. The test case should also implicate speech directed to foreign recipients and the deference to governmental interests in foreign affairs to better isolate the value the Court placed on those factors in *HLP*. In addition, the test case should, to the extent possible, allow us to compare apples to apples by requiring the analysis of the same governmental interests in *Citizens United* and *HLP*: corruption and

national security concerns. A law preventing donations of money or fungible goods to individuals or organizations in a foreign nation¹²⁶ meets all these criteria.

This Part will briefly lay out the justifications for this hypothetical statute.¹²⁷ It will then apply *Buckley's* two-tiered standard, which focuses on the type of speech at issue rather than the extent of coordination, to find that the original *Buckley* standard produces outcomes in line with First Amendment doctrine. It then tests the coordination standard, with its emphasis on the amount of coordination between speaker and audience, against the hypothetical test case and finds it fails to properly value speech—both from doctrinal and common sense perspectives. This Part will then compare the government interest supporting the test case with the government interests accepted or rejected in *HLP* and *Citizens United* as further support for the hypothesis that the Court injected subjective values into the coordination standard—either artificially inflating or diminishing the government's interest in each case. Finally, this Part concludes with consideration of the future of the coordination standard.

A. A Test Case—*The Trouble with Development Aid*

In the last 50 years, western donors have spent over \$2.3 trillion on foreign aid, yet an eighth of the world's population lives in stagnant or contracting economies.¹²⁸ During this time, many previously impoverished countries have seen their economies grow

126. This law would further a governmental program to increase the effectiveness of development aid to that nation, prevent corruption and spur economic growth with the intent that these improvements will prevent a struggling nation from becoming a hotbed of terrorist activity. It is described in detail in Part III.A.

127. The goal here is not to provide a convincing case that aid must be drastically reconfigured or that, accepting that governmental aid should be cabined, banning private donations should be a part of that solution. It makes no such normative claims. Nor is it a commentary on the political feasibility of passing such a restriction. Rather, the purpose is to provide sufficient support to utilize the fact pattern as a test for this Article's claims about the nature of the coordination standard.

128. PAUL COLLIER, *THE BOTTOM BILLION* 8–9 (2007). While the majority of the development aid distributed comes from governments or multinational organizations, such as the World Bank or the IMF, private donations play an ever increasing role in development and are even outstripping the amount of money donated by the United States government. See Carol C. Adelman, *Comment: The Privatization of Foreign Aid: Reassessing National Largesse*, *FOREIGN AFFAIRS*, Nov.–Dec. 2003 (noting that American private foreign aid is estimated at \$35 billion a year, three and a half times the amount of official development assistance given by the U.S. government a year).

and the lives of their citizens improve—they can truly be considered from an economic standpoint as “developing nations.”¹²⁹ However, there are around a billion people living in nations that, over the same period, have seen their economies fail to thrive, objective markers of health and wellness decline and in some cases, total governmental collapse.¹³⁰ Paul Collier, an Oxford economist, calls these countries the “bottom billion,” a term this Article will also employ, and argues that “there is a black hole, and . . . many countries are indisputably heading into it, rather than being drawn toward success.”¹³¹

A growing body of literature by economists and social scientists suggest that rather than being a panacea, development aid might be part of the problem.¹³² A significant factor in keeping countries in the “bottom billion” is poor governance.¹³³ Aid increases bad governance by encouraging “rent-seeking,” i.e., the misuse of government authority to misappropriate funds.¹³⁴ “Because aid (the rent) is fungible—easily stolen, redirected or extracted—it facilitates corruption.”¹³⁵ Moreover, foreign aid “short-circuits” the link between taxes and public services, severing the incentives citizens have to hold their governments accountable for corruption.¹³⁶

Even with new national government leaders motivated to clean up corruption, reform is difficult to sustain because a new reform government “inherits a civil service that is an obstacle rather than an

129. COLLIER, *supra* note 128, at 8–9.

130. *See id.* at 7–8 (providing life expectancy, malnutrition and infant mortality rates for the bottom billion); *id.* at 9–10 (showing per capita income in the bottom billion has not grown appreciably since 1970 despite impressive growth numbers in developing nations that started the 1970s impoverished).

131. *Id.* at 6.

132. *See, e.g., id.*; DAMBISA MOYO, DEAD AID: WHY AID IS NOT WORKING AND HOW THERE IS ANOTHER WAY FOR AFRICA (2010); WILLIAM EASTERLY, THE WHITE MAN’S BURDEN (2009). There is a large amount of statistical and economic research available for the evidence presented here, especially Collier’s work, some of which is available at <http://users.ox.ac.uk/~econpco/research/aid.htm>. However, given the limited goal of this Article’s use of the material, I have limited citations to more readily available summaries of the underlying data to make the information more accessible. As noted above, the aim of this Part is to provide an outline of the potential government interest that could be invoked for a hypothetical test case, not to prove or disprove this development model. *See supra*, note 126.

133. COLLIER, *supra* note 128, at 69 (arguing that there is a “bad governance” trap in which three quarters of the bottom billion’s population lives in what can be categorized as a “failed state”).

134. MOYO, *supra* note 132, at 52 (providing estimate that 25% of World Bank funds lent since 1946 have been misappropriated).

135. *Id.* at 52.

136. *Id.* at 58.

instrument.”¹³⁷ This civil service benefits immensely from the current aid structure. For example, a study in Chad tracked money released by the Ministry of Finance for rural health clinics. It found that only 1% of the funds ever reached the clinics—99% of money was stolen along the way.¹³⁸ The 99% was not being taken by the heads of state, the study tracked the money only *after* it was released by the Ministry of Finance, rather it was pocketed pieces at a time every step of the way down the chain of civil service. It does not take much to imagine how—bribes for building permits, payments to police for passage through roadblocks, gratuities to provincial governors and mayors for appointments to positions downstream of aid flows, etc.¹³⁹ Aid money provides corrupt individuals throughout the system the ammunition to fight reformers at the top.¹⁴⁰

Development aid also has negative unintended consequences for economic growth in the bottom billion.¹⁴¹ Dambisa Moyo, a Zambian born economist, provides a salient example: A mosquito net maker in Africa employs ten people who, as is common in Africa, each support upwards of 15 relatives. Concerned with the prevalence of malaria in the area,¹⁴² a western donor sends one million dollars in mosquito

137. COLLIER, *supra* note 128, at 111 (arguing that civil servants are hostile to change because they individually benefit from complicated regulations and aid expenditures that make it easier for them to pocket development largesse).

138. COLLIER, *supra* note 128, at 66 (describing study).

139. Although anecdotal, during my experience as a Peace Corps volunteer I saw all of these forms of corruption and more. To support restrictions on private donations, Congress could call a virtual army of returned Peace Corps volunteers to testify that portions of grants and donations from NGOs and private foundations necessarily find their way into the pockets of corrupt civil servants as there is often no way to conduct business without paying “fees” or “permits” for the privilege of accessing those in need.

140. Even if private funds are not given directly to government actors, local NGOs generally must still go through some network of civil service to accomplish their aims. For example, to provide services to children, international and local NGOs often work with the school system to easily access children and their families. As a result, school boards, principals and even teachers, along with the local governments that appoint them (and can charge for the favor) have an incentive to work against reform as they have invested in careers that allow access to these funds.

141. Large infusions of cash or imports also create what economists call “Dutch disease,” where removing the need to pay for imports devalues local exports by reducing the need to generate foreign exchange to purchase imports. *See* COLLIER, *supra* note 128, at 30; MOYO, *supra* note 132, at 62–64. This causes inflation and slower growth in labor intensive and exporting sectors, such as agriculture. *See* MOYO, *supra* note 132, at 63.

142. The World Health Organization estimates that there were 216 million cases of malaria in 2010 and that the disease killed around 655,000 people that year, mostly children in Africa. *See* WORLD HEALTH ORGANIZATION, WORLD MALARIA REPORT xiii (2011), available at http://www.who.int/malaria/world_malaria_report_2011/9789241564403_eng.pdf.

nets to the region. While the nets have their intended consequence of reducing malarial infections, the influx of free nets also puts the local net maker out of business. In addition, since the donated nets will be torn or damaged within five years and there will be no mosquito net maker in the area with the capacity to replace them, another donor will have to step in.¹⁴³

Even small, individual donations can snowball into the decimation of a domestic market. The vast bulk of clothing donated to Goodwill, the Salvation Army and other charity thrift shops in the West end up being shipped to Africa in the form of donations.¹⁴⁴ These donations have led to a roughly 40% decline in apparel manufacturing production and a 50% decline in apparel employment in Africa and is arguably a large reason why Africa has been unable to step onto the first rung of the economic development ladder—labor intensive manufacturing.¹⁴⁵

The problem of corrupt governments and poor economies, caused and exacerbated by aid, has a wide range of negative effects. Civil war is more likely to break out in low-income countries with stagnant economies and poor governance.¹⁴⁶ Large natural resource revenues, such as oil, also help fuel civil wars, but donations from diasporic communities have “been one of the key sources of finance

The best preventative measure to counter this deadly disease is to sleep under mosquito netting to prevent the mosquito bites that transfer the disease. Given the severity of the problem and the relative ease of the solution, the donation of mosquito nets is one often taken up by humanitarian organizations and social groups. See *infra* notes 172–76 and accompanying text (discussing the Evangelical Lutheran Church in America’s national anti-malaria campaign).

143. MOYO, *supra* note 132, at 44. In Moyo’s example, the donor is a western government but non-profit groups in the United States make similar donations for malaria prevention. See, e.g., Press Release, *Foundation Commits \$750 Million to Global Fund*, THE GATES FOUNDATION (Jan. 26, 2012), available at <http://www.gatesfoundation.org/press-releases/Pages/renewing-commitment-to-the-global-fund-120126.aspx> (announcing the Bill and Melinda Gates Foundation is donating \$750 million to AIDS, tuberculosis and malaria prevention); *ELCA Malaria Campaign*, EVANGELICAL LUTHERAN CHURCH IN AMERICA, <http://www.elca.org/Our-Faith-In-Action/Responding-to-the-World/ELCA-Malaria-Campaign/Our-Work/FAQ.aspx#1-2> (last visited Feb. 8, 2013) (detailing how the Evangelical Lutheran Church in America is attempting to raise \$15 million for malaria prevention by 2015).

144. Garth Frazer, *Used-Clothing Donations and Apparel Production in Africa*, 118 *ECON. J.* 1764, 1765–66 (2008).

145. *Id.* at 1764–65.

146. COLLIER, *supra* note 128, at 19–26 (describing statistical modeling showing the causes of civil war and the likelihood that economic growth will lower chance of war); *id.* at 26 (low income, slow economic growth, bad governance and abundant natural resources also lengthen civil wars).

for rebel movements.”¹⁴⁷ The findings are startling—a nation in the bottom billion has a nearly one-in-six chance of falling into a civil war in any five-year period.¹⁴⁸ In addition, while aid on its own (independent of the negative effects of economic and governance problems) does not seem to make civil war more likely, development aid has been a statistically significant cause of coups, which tend to become repeating events that destabilize nations and increase military spending.¹⁴⁹

Poor governance and weak economic growth are clearly problems for the bottom billion, but these problems also spill out over their borders. Because “conflict generates territory outside the control of a recognized government,” those who wish to pursue illegal activity can use it.¹⁵⁰ Given Afghanistan’s history of conflict and poor governance it is not surprising that Osama Bin Laden and al-Qaeda chose it as their home base.¹⁵¹ As Collier notes, conflict nations have “a comparative advantage in international crime and terrorism.”¹⁵²

Collier has suggested a plan for the use of aid that would focus on a country in transition, after a civil war for example, and restrict monetary aid to the target country for a period of time when, due to a new group of actors at the table, the potential for reform is at its peak but governmental competence is at its worst.¹⁵³ During this time he argues, the most effective use of aid is to flood the country with training expertise to increase the capacity of the civil service and civil society to root out corruption, increase accountability to the population, and better manage future revenues. Because technical assistance cannot be misappropriated, this plan prevents the corruption that goes hand in hand with large amounts of cash pumped into a broken system.¹⁵⁴

147. *Id.* at 21–26; *see also* MOYO, *supra* note 132, at 59–60 (blaming Somalia’s civil wars on competition for large-scale food aid).

148. COLLIER, *supra* note 128, at 32.

149. *Id.* at 105.

150. *Id.* at 31 (noting that “[n]inety-five percent of global production of hard drugs . . . is from conflict countries”).

151. *Id.* The United States government has already recognized that failing states pose a security risk by increasing the U.S. aid budget by 50% in the wake of the 9/11 terrorist attacks. *See id.* at 73.

152. *Id.* at 31.

153. *Id.* at 111–16.

154. *Id.* Collier also argues for a host of other solutions such as setting up independent service authorities, changes to domestic policies that harm the bottom billion, voluntary

Unfortunately, the transition periods when aid can be most effective generally coincide with intense media attention focused on the country and when donors (both public and private) are most generous.¹⁵⁵ This transition will be difficult and there could be a concern those NGOs or foundations that disagree with the plan of cutting off aid might focus their attention disproportionately on the country to make up the difference—which would undermine the efficacy of the program.¹⁵⁶ It may be necessary to use coercion to cabin the flow of aid to these countries in transition—both through treaties for state and multinational government aid and by restricting private aid flow.¹⁵⁷

This Article will assume that Congress accepts these arguments and enacts a statute that authorizes the State Department to enter into a development project with a nation in the bottom billion where the recipient nation (Project Nation) agrees to accept restrictions, enforced by donor nations, on aid both from donor governments and private organizations for a period of five years in exchange for increases in technical assistance and other concessions, such as

international norms and charters for bottom billion governments, and many more. *See id.* at 118–19, 135–56. These aspects of his proposal, while crucial to a successful economic development strategy, are not germane to this Article.

155. *Id.* at 106 (“Aid floods in during the first couple of years [after a transition], then rapidly dries up. Yet the typical post conflict country starts [out] with truly terrible governance, institutions, and policies. It takes some time to improve them to a level at which aid can be of much use.”).

156. This is especially true if reformers are ousted and a new government wishes to resume the flow of aid. The key to any program is signaling both to investors and corrupt entities within the government that the change cannot be undone for a period of time sufficient to outlast corrupt holdouts in the civil service or military. *Id.* at 90 (arguing that to lure in economic investment, reformers must be able to credibly signal the market that the reforms are not temporary); *id.* at 105 (summarizing findings that aid causes coups because those assuming control know that aid money will be there for the taking). Therefore any plan must be irrevocable for a period of years. This may strike many as undemocratic, including NGOs and other private donors. In reality, governments in the bottom billion currently take out multi-billion dollar loans that saddle future governments with crippling debt. Even in the West, future governments are responsible for paying the debt of past governments and are largely stuck with treaties made under previous administrations. That distinction, however, may not matter to an organization that sees suffering under a new government fighting against its predecessor’s development agenda, thereby necessitating a coercive method of stopping aid flows into the country.

157. It is certainly not a universal sentiment that private donations should be prevented. *See, e.g.,* EASTERLY, *supra* note 132 (arguing against broad “big push” plans in favor of smaller, focused projects, like those by smaller NGOs). However, as discussed in this Part, there is evidence that Congress could marshal to support a finding that private aid flows must be restricted for the transition period as well, which is sufficient for purposes of testing the hypothetical.

favorable trade agreements. Once a nation is designated a Project Nation, a set of restrictions on the provision of material support, including any money, property, or tangible goods to any government entity or NGO working in the Project Nation goes into effect.¹⁵⁸ Congress names it the Helping Yield Positive Opportunities Act, or the HYPO Act.

B. Evaluating Standards Under the HYPO Act

An analysis of the HYPO Act is a fertile testing ground to observe how well the two different definitions of coordination lead to results in line with the corpus of First Amendment jurisprudence. First, the HYPO Act involves the question of when and how money is analyzed as speech, bringing the analysis back to the origins of the coordination divide. Second, the HYPO Act so closely mirrors the anti-terror statute at issue in *HLP* that it invokes many of the same ancillary concerns, such as a foreign recipient of speech and the deference to the political branches' judgment regarding foreign affairs, allowing for control over those factors. Finally, the primary justifications for the HYPO Act—the prevention of the corrupting influence of large amounts of money on the governments of Project Nations and the need to prevent failing states from becoming breeding grounds for terrorists—pull in the government's interests in both *HLP* and *Citizens United*, providing an insightful analysis of how those government interests stack up under different definitions of coordination.

1. The *Buckley* Standard

An application of *Buckley's* original two-tiered analysis shows that using content-neutral standards that focus on the nature of speech, without subjective values regarding coordination injected into that standard, leads to results consistent with First Amendment doctrine.

In the campaign finance realm, it is beyond question that money contributions and expenditures are the equivalent of speech. *Citizens United* rejected limitations on expenditures without any analysis as to

158. The restrictions could include exceptions for religious materials, medicines not produced domestically or types of aid that have been found to not implicate the concerns discussed in this part, such as microfinance. The exact contours of the restrictions are unimportant for purposes of this Article.

whether such expenditures equate to speech.¹⁵⁹ However, not all expenditures of money are equivalent to speech.¹⁶⁰ The first question is whether the HYPO Act's restrictions on donations are merely restrictions on conduct with an incidental burden on speech, and thus would be subject only to intermediate scrutiny under *United States v. O'Brien*.¹⁶¹ This argument was considered and rejected by the Court in *Buckley* for both contributions and expenditure limitations.¹⁶² The key to determining the type of speech at issue is not whether the expression requires the expenditure of money, but rather whether the expenditure of money communicates a message. The appropriate inquiry is whether "an intent to convey a particularized message was present and whether the likelihood was great that the message would be understood by those who viewed it."¹⁶³

A ban on contributions to NGOs or governments of a Project Nation would infringe on the expressive rights of the contributor in the same way a ban on campaign contributions would. Potential donors would lose their ability to express general support for the recipient of the donation in the Project Nation and to join together with others to express a common belief.¹⁶⁴ This is the same message of general support and association the Court found compelling in *Buckley* for contributions to a particular campaign. Likewise, a ban on expenditures to facilitate speech in the Project Nation would infringe on the speech rights of donors to amplify their voices by "purchasing" speech in the Project Nation.¹⁶⁵

This brings us squarely within *Buckley's* analysis of these two types of expenditures. When distinguishing between the two under the *Buckley* standard, the crucial question is what form the money

159. Deborah Hellman, *Money Talks But It Isn't Speech*, 95 MINN. L. REV. 953, 955 (2011) ("The Court considered it so obvious that restrictions on spending money amount to restrictions on speech that it needed no discussion at all, not even a citation to *Buckley*.").

160. *See id.* at 964 ("If giving and spending money are always expressive, then all economic regulations risk impinging on the First Amendment.").

161. 391 U.S. 367 (1968).

162. *Buckley v. Valeo*, 424 U.S. 1, 16 ("We cannot share the view that the present Act's contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O'Brien*.").

163. *Tex. v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Wash.*, 418 U.S. 405, 410–11 (1974) (detailing the standard for determining whether conduct possesses "sufficient communicative elements to bring the First Amendment into play")).

164. *See Jonakait, supra* note 26, at 886–87 (arguing that the freedom of association includes the right to act in furtherance of common goals, such as support of charity).

165. *See supra* notes 39–57 and accompanying text (discussing *Buckley*).

takes. If the money is a symbolic act meant to express one's association with the recipient and general support for their cause, then it falls under the "contribution" standard.¹⁶⁶ If, however, the money at issue is spent to "amplify[] the voice" of the donors, the expenditures are protected as pure speech.¹⁶⁷ These two categories of speech can be thought of as contributions to a Project Nation and expenditures to facilitate speech in the Project Nation.¹⁶⁸

As proposed, the HYPO Act would cover a broad array of donations to the Project Nation with some, perhaps most, symbolic contributions expressing general support for the recipient and a desire to associate with like-minded citizens. While some have suggested that First Amendment interests would not be implicated by restrictions on charitable giving,¹⁶⁹ that view does not give sufficient credence to *Buckley's* rationale for treating contributions as symbolic speech, nor does it take into account the protections afforded the freedom of association.¹⁷⁰ In general, charitable contributions are made as expressions of the donor's values and belief systems. Charitable donations are more expressive than commercial transactions and tend to reflect sincere views about the donor's morality, religion and conscience, which lie at the heart of the First Amendment.¹⁷¹ A charitable donation is an expression that the donor believes the recipient is worthy of such assistance and trustworthy enough to make good use of it. Charitable giving also forms an

166. *Buckley*, 424 U.S. at 21 ("A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.").

167. *Id.* at 22 (limitations on expenditures preclude "associations from effectively amplifying the voice of their adherents").

168. While the contribution and expenditure labels may not be a perfect fit for this test case, they will be used here for the sake of clarity and consistency in comparing the standards set out in *Buckley*.

169. See Hellman, *supra* note 159, at 965 (arguing that charitable giving is not sufficiently expressive to merit protection).

170. See Bhagwat, *supra* note 77, at 998–1000 (arguing that associations are necessary to allow members to develop their morals and common values and to express those values to others); Jonakait, *supra* note 26, at 886–87 (same).

171. See *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 629 (distinguishing between restrictions on soliciting for private profit and charitable solicitations, with only the latter protected by First Amendment); *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring in part and concurring in the judgment) (advocating position that community service involving the development of morals or self-improvement is expressive); see also Jonakait, *supra* note 26, at 886 (arguing that the right of association necessarily includes the ability to advance lawful objectives, such as the distribution of charity).

association of donors who have chosen to work together to solve a particular problem—expressing both the idea that the problem is worth addressing and that those in the association are the right people for the job.

As the courts are loath to tackle a thorny constitutional question in a vacuum, a concrete example is helpful—take Moyo’s troubling example of donated mosquito nets. The Evangelical Lutheran Church in America (ELCA) is currently engaged in a massive fundraising campaign to raise money for the purchase of mosquito nets for donation to various countries in Africa in connection with local, affiliated churches. Their project includes several countries that would be prime Project Nation candidates, such as the recently created South Sudan.¹⁷²

On their website, the ELCA describes its campaign:

The ELCA, through the ELCA Malaria Campaign, is joining hands with eleven Lutheran church bodies in Africa and becoming part of an historic global movement to say, ‘enough is enough!’ . . .

For many years, the ELCA has been building relationships of accompaniment and mutual respect with our companion churches in Africa. Together with our church partners, we are poised to bring about a massive grassroots movement to contain malaria and bring hope to those who suffer.¹⁷³

The donations of mosquito nets clearly contains an expressive element—a declaration to the world that members of the ELCA believe not only that malaria is one of the more pressing problems facing the world, but also that the ELCA and its members have a responsibility to address it. The associational element is also apparent as the campaign is a decision on the part of members of affiliated churches to band together with Lutheran churches in Africa and with the greater “global movement” to address this issue.

The campaign includes other indicia of expressive meaning

172. *Responding to the World: Where We Work*, EVANGELICAL LUTHERAN CHURCH IN AMERICA, <http://www.elca.org/Our-Faith-In-Action/Responding-to-the-World/ELCA-Malaria-Campaign/Where-We-Work.aspx> (last visited Jan. 19, 2013).

173. *Responding to the World: Our Work*, Evangelical Lutheran Church in America, <http://www.elca.org/Our-Faith-In-Action/Responding-to-the-World/ELCA-Malaria-Campaign/Our-Work.aspx> (last visited Jan. 19, 2013).

inherent in the donation, such as suggested prayers to encourage members to make a donation to the campaign. Such donations are viewed as expressions of members' religious convictions in action.¹⁷⁴

Forgiving God, we confess that we fail to hear the cries of the world. Turn us from selfishness outward. Help us to listen to the voices of others who suffer, in our neighborhood and in our world, and to respond with generosity of heart.
Lord in your mercy . . . hear our prayer.

Or they are intended to encourage secular leaders to act in furtherance of their religious convictions:

Almighty God, you rule with a gracious arm and a loving heart. Inspire governments and leaders to guide their people with justice and to work toward peace. Teach us all to act with mercy so that the hungry are fed, the sick are healed, and the vulnerable are protected.
*Lord in your mercy . . . hear our prayer.*¹⁷⁵

Not all donations may contain such clear-cut expressions of the donor's vision and desire to pool their resources to express their common values and goals.¹⁷⁶ For example, there is a strong case that a donation by a women's group to a regional government for money to create a sports league for girls communicates an expression of the donor's belief that girls should have the same opportunities to engage in activities that may traditionally have been reserved for boys in the

174. Charitable giving as an expression of religious beliefs is not limited to Christian giving. *Zakat*, or the duty to engage in charitable giving, is one of the five pillars of Islam. Michael G. Freedman, Note, *Prosecuting Terrorism: The Material Support Statute and Muslim Charities*, 38 HASTINGS CONST. L.Q. 1113, 1130–32 (2011) (describing history and purpose of *Zakat* and how Muslim Americans fulfill this requirement with charitable giving through their local mosques).

175. *Responding to the World: World Malaria Day 2012*, EVANGELICAL LUTHERAN CHURCH IN AMERICA, <http://www.elca.org/Our-Faith-In-Action/Responding-to-the-World/ELCA-Malaria-Campaign/World-Malaria-Day.aspx> (last visited Jan. 19, 2013).

176. See *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring in part and concurring in the judgment) (“[P]articipation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.”); see also Bhagwat, *supra* note 77, at 1000 (arguing that protected associations include not only ones with expressive goals but also those who ferment “political organization, value formation, and the cultivation of skills relevant to participation in the democratic process”).

Project Nation. On the other hand, there is less of an argument to be made that a donation to the same regional government for general budgetary support is as expressive.

A broad reading of *Buckley*, however, would support the view that all contributions express at minimum a general declaration of support for the recipient.¹⁷⁷ The expressive nature of a contribution is intertwined with the associational qualities of the donation.¹⁷⁸ Thus, the standard for what constitutes an expressive association should be determinative of whether an association's donation is expressive. In the context of freedom of association, this bar has been set very low. To come within the ambit of the First Amendment's protection, an association need not be an "advocacy group" but "must engage in some form of expression, whether it be public or private."¹⁷⁹ Thus, in *Boy Scouts of America v. Dale*, the Court found that the Boy Scouts were an expressive organization because its mission is "to instill values in young people."¹⁸⁰ The Court thought it "indisputable that an association that seeks to transmit such a system of values engages in expressive activity."¹⁸¹

Likewise, organizations that donate to foreign countries in need, including a Project Nation, are expressive organizations that seek to instill in their members, and the general public, the values that form the backbone of their work, be it a desire to live out their faith in the case of the ELCA's mosquito nets or a commitment to gender equality in the case of funding for girls' sports. The forming of an association of like-minded people to better explore and express their moral values, values that inform all manner of political decisions, is at the foundation of the right to associate.¹⁸² The group's inability to express their message of support by donating to those the group identifies as a deserving recipient "significantly burdens" their First

177. *Buckley v. Valeo*, 424 U.S. 1, 21 ("A contribution serves as a general expression of support for the candidate and his views.").

178. *Id.* at 24 ("[T]he primary First Amendment problem raised by the Act's contribution limitations is their restriction on one aspect of the contributor's freedom of political association.").

179. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

180. *Id.* at 649 (quoting the Boy Scouts' mission statement).

181. *Id.* at 650.

182. Bhagwat, *supra* note 77, at 997-98 ("Citizens form their underlying values, both political and personal (if it is possible to distinguish the two), in the context of private associations. If popular sovereignty means anything, it surely means that citizens must be able to decide what they believe and to cooperate in that process of deciding, free from state coercion.").

Amendment rights.¹⁸³

While most donations prohibited under the Act would likely fall into the first category of contributions with expressive meaning, there would likely be some donations that more closely resemble expenditures on speech and thus should be treated as “pure speech” despite their utilization of money to facilitate that speech. For example, take an organization in a Project Nation that uses donor funds to provide writing classes for women from minority ethnic groups, where women are encouraged to write about how their gender and the cultural practices of their ethnic group shape their treatment in society. The organization also uses donor funds to gather the written product generated in these workshops into anthologies, which they publish and distribute (again using donor funds) to libraries in the Project Nation and in donor countries in connection with fundraising efforts. In addition to raising funds, the books are intended to raise awareness in the West about the struggles women in the Project Nation face living their lives at the intersection of gender and cultural struggles.¹⁸⁴

Under the *Buckley* standard, money spent on the costs inherent in speaking are equivalent to the speech itself, and money donated to this organization would be considered pure speech. This outcome is in line with precedent holding that preventing the economic incentive to produce a work from flowing to the author implicates the First Amendment rights of both the author and the publisher.¹⁸⁵ Like the restrictions in *Simon & Schuster*, the HYPO Act would place a financial restriction on the creation of written material on the basis of the content—i.e. that it is generated in a Project Nation.¹⁸⁶ The fact that the authors, citizens residing in the Project Nation, do not fall under the protection of the First Amendment should be of no

183. *Dale*, 530 U.S. at 653 (presence of gay scoutmaster “would significantly burden the Boy Scouts’ desire to not ‘promote homosexual conduct as a legitimate form of behavior’”).

184. This hypothetical is based on an organization in Namibia, the Women’s Leadership Centre, which creates such anthologies. Copies of several of these anthologies are on file with the author.

185. *Simon & Schuster, Inc. v. Members of the Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (striking down under the strict scrutiny standard a requirement that all funds made on “true crime” memoirs be escrowed for five years to be made available to victims of the author’s crimes).

186. *Id.* (“In the context of financial regulation . . . the government’s ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.”).

consequence to this analysis as the donor organization as publisher is also recognized to have a First Amendment interest in financing the work. The NGO's ability to publish the work of their choosing—a first person account of conditions for women in the Project Nation—depends on their ability to find authors in the Project Nation, a project made significantly more difficult without the ability to provide financial incentives.¹⁸⁷

This outcome is also in line with cases protecting the rights of non-profit associations to employ fundraisers to solicit funds. The Court recognized that “solicitation [of donations] is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes . . . and without solicitation the flow of such information and advocacy would likely cease.”¹⁸⁸ Thus, fundraising must be protected because it facilitates further expenditures on speech and is often a form of persuasive speech itself. Just as domestic non-profits need hired fundraisers to solicit donations and advocate for their cause, the organization backing the book project needs the authors to produce work that will do the same. This protection should not be diminished due to the foreign identity of the authors. Even though professional fundraisers, like individuals in Project Nations, have no First Amendment rights, the Court found the organizations themselves still have a First Amendment interest in hiring them.¹⁸⁹

Admittedly, the weakest link in the chain of reasoning linking campaign finance regulations with the regulation of donations to Project Nations is the fact that the impact of expenditures is felt most strongly in a foreign nation. The United States does not receive the full benefit of the money “spent” in the marketplace of ideas, arguably weighing against the value of the speech.¹⁹⁰ In a global world, however, where hot-button political issues often include an

187. *Id.* (recognizing that the requirement that author's remuneration be escrowed for five years makes it difficult for publishers who wish to finance true crime memoirs to find willing authors).

188. *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 960 (1984) (quoting *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)).

189. *Id.* at 955 (fundraising company did “not claim that its own First Amendment rights have been or will be infringed by the challenged statute” and brought claim on behalf of clients).

190. Some of the speech paid for by expenditures work its way back to the United States, most obviously in situations where the speech paid for is meant, in part, to return to the donor organization to be used to persuade other Americans to their cause, such as the books written by women in Project Nations.

international component, this distinction is less compelling.¹⁹¹ Often those who wish to create change utilize both domestic and international advocacy depending on which method they feel will best achieve their purpose.¹⁹²

Take a situation in which the Sierra Club wishes to put an end to irresponsible offshore drilling practices in Angola that are decimating the environment. To encourage oil companies to use responsible drilling practices, they lobby Congress and attempt to garner public support for a tariff on imported oil that is not drilled in accordance with environmental safety standards. The ruling in *Citizens United* gives Exxon Mobile a recognized First Amendment right to independently spend unlimited amounts on advertisements supporting legislators who oppose the Sierra Club's proposed legislation. Outgunned, the Sierra Club may decide that a more prudent course is to provide financing for an Angolan NGO's efforts to raise awareness of the damage caused by unsafe drilling and mobilize the local population to put pressure on their government to stop the polluting practices. In this situation both the Sierra Club and Exxon Mobile are engaging in political speech to bring about the result they favor on an issue involving both international and domestic concerns. Both are using money to amplify their voices. To give value only to speech received in the United States diminishes American speakers' options to engage in political advocacy and favors certain types of advocacy over others.

This section has demonstrated that the *Buckley* standard leads to results in line with Supreme Court precedent regarding freedom of association, expressive speech and money expended in the furtherance of speech. The coordination standard does not fare as well.

191. Toni M. Massaro, *Foreign Nationals, Electoral Spending, and the First Amendment*, 34 HARV. J.L. & PUB. POL'Y 663, 682–83 (2011) (cataloging cases protecting the distribution of foreign speech and noting the cosmopolitan influences drawn upon by the Founders); Timothy Zick, *The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. REV. 941, 990 (2011) (noting that “[g]lobalization and digitization of expression have decreased the significance of territorial borders insofar as First Amendment activities are concerned” and giving examples of ways in which “[t]he marketplace of ideas is rapidly becoming more global”).

192. Massaro, *supra* note 191, at 693 (arguing that “[t]he porous nature of modern global architecture” makes “an emphasis on physical borders seem[] worse than quaint; it appears constitutionally pernicious”); Zick, *supra* note 191, at 1000 (arguing for a more cosmopolitan view of the First Amendment because “self-governance values are often implicated in trans-border contexts”).

2. The Coordination Standard

If we accept that at least some, if not all, of the donations barred under the HYPO Act are a form of speech, the question becomes whether that speech is reviewed under strict scrutiny or the “less than” strict scrutiny used under the coordination standard.¹⁹³ If coordination is the driving factor, then nearly all speech under the Act could be categorically exempted from strict scrutiny. There would be no way to distinguish between sending mosquito nets and funding the publication of authors from the Project Nation because every form of speech would require some measure of coordination.

As noted above, the *HLP* Court attempted to ameliorate the effect of the potentially universal coordination standard by making its holding dependent on the idea that speech must reach a certain threshold of coordination to be considered “coordinated enough” to lose the full protection of the First Amendment.¹⁹⁴ The question of nets versus books brings into focus the absurdity of this standard. To “coordinate” a donation of mosquito nets does not necessitate significant interaction with the recipient. A donor may simply independently identify an area with malaria, search the internet for a local hospital or government agency operating in the area and email them an offer to send a certain number of nets to be shipped to their location. An email of acceptance seals the deal with little “coordination” between donor and recipient.¹⁹⁵

Contrast the book project, where inherent in the creation of the speech is a donor finding the organization that produces work by

193. The question of whether cash or material donations are conduct or speech is more of an open question under *HLP*. In an earlier iteration of the case, when material donations were still at issue, the Ninth Circuit held that the provision of material goods or cash, even those made to groups to engage in political advocacy, should be analyzed under intermediate scrutiny because donations are symbolic conduct rather than speech. *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1135 (9th Cir. 2000). The Supreme Court hinted that it agreed with that analysis. However *Buckley* explicitly rejected intermediate scrutiny as the applicable standard for the symbolic speech in that case. *See supra*, note 54 and accompanying text. It is difficult to reconcile the disparate treatment of money spent on expressive activities in *HLP* and in the campaign finance cases. *See Margulies, supra* note 27, at 485 n.175; *Jonakait, supra* note 26, at 905–06 (arguing that *NAACP v. Clairborne Hardware* requires that active membership, including supporting an organization with material support, is protected under the right of association). This Article will assume that the analysis of the use of money spent in furtherance of speech in the campaign finance arena is used to evaluate the HYPO Act.

194. *See supra* note 70.

195. This is not to say that all such donations are relatively uncoordinated. The ELCA program is heavily coordinated with its local affiliated churches. *See supra* notes 172–75 and accompanying text.

women whose voices they wish to amplify, maintaining contact with the local NGO through the writing and editing process and coordinating the funding of publication and the distribution of the final product. Despite significantly more speech issues in play,¹⁹⁶ the book project would be less likely than the mosquito nets to be able to trim its coordination to a level that qualifies as “independent” speech. Donors who wish to be actively involved in the process of producing speech that will speak to their audience would stand little chance of avoiding the coordination label.

The focus on coordination also penalizes the exercise of freedom of association. The more a donor wishes to engage with the recipient, to build a relationship that expresses their common views and provide for dialogue that enriches the donor’s understanding, the less likely they are to have that association protected.¹⁹⁷ It is counterintuitive to penalize those who wish to form stronger associational bonds, and it is not rational to reward associational speech claims that lack a meaningful measure of coordination within the group.¹⁹⁸

The flip side of “coordination” is independent speech. If speech is “independent” any restrictions on it are subject to strict scrutiny. The application of strict scrutiny to independent speech makes sense in the context of campaign finance because independence is used as an alternative label for expenditures, which are by definition pure speech.¹⁹⁹ But where does that leave the donor who simply ships mosquito nets? Assuming his donation expresses sufficient symbolic meaning, he has engaged in some level of symbolic speech. Does the fact that his symbolic speech was made in general support of the recipient community, but relatively independent of it, qualify it for strict scrutiny under the coordination standard?²⁰⁰ That this question

196. See *Simon & Schuster, Inc. v. Members of the Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (subjecting financial disincentives to publishing certain content to strict scrutiny); see also *supra* notes 185–92 and accompanying text.

197. See *Cole*, *supra* note 27, at 163 (“The fact that the law [in *HLP*] selectively punishes speech when expressed in association with another would seem to render the law more unconstitutional (because it violates both the rights of speech and association), not save it from invalidation.”).

198. See *id.* at 166 (arguing that speech and association should receive at least the same protection as speech alone); Bhagwat, *supra* note 77, at 1027 (concluding that association is a key component of speech because “speech is not usually about self-expression; it is about bonding, associating and attempting to find a community”).

199. See *supra* notes 50–56 and accompanying text.

200. This perverse inversion of less protection for more involved donors is ironic given that the most levied critique of development aid is that donors do not coordinate their agency priorities (and the ensuing donations) closely enough with aid recipients. The story of aid

arises under the coordination standard is a good indication that the standard does not hold up as a viable method of correctly valuing different types of speech.

C. Isolating the Government Interest

As we have seen, the coordination standard injects the government's justification for the speech restriction into the question of the type of speech at issue. This leads to double-counting the government's interest—first in discounting or elevating the type of speech at issue and thereby lowering or raising the standard of review and then again when evaluating whether the government's interest meets that standard. This Section isolates and reevaluates the government interest in *HLP* and *Citizens United* by comparing them to the justifications for the HYPO Act and then uses the Act to explore whether each interest is sufficiently tailored to meet the more accurately weighted government justification.

The HYPO Act is a compelling test case because the governmental interests presented are hybrids of those involved in *Citizens United* and *HLP*. The economic literature supports three governmental interests Congress could turn to in justifying the HYPO Act's restrictions. First, the prevention of corruption in foreign governments and the civil service by cutting off the money that fuels it. As the evidence demonstrates, until a nation addresses these systemic corruption issues it is difficult for the support provided by the United States and its allies to provide any meaningful assistance to a failing state. Second, the restrictions help prevent the market distortion caused by large influxes of foreign cash and material goods that undermine the efficacy of the domestic market. Again, these market distortions are roadblocks to the U.S. government's development policy. Finally, there is a national security concern underpinning the government's interest in development—that failing states provide a fertile breeding ground for foreign terrorists. A country with a corrupt government and failed economy is a loose

gone wrong is replete with examples of donors sending goods that are not useful to recipients or sending the right goods to the wrong people. *See generally* Easterly, *supra* note 132, at 87 (“The quest to help the poor has put far too little effort into learning about their informal social arrangements.”). Especially important here, the lack of follow up, oversight, and accountability (all forms of coordination) is one of the root causes why aid so often becomes a corrupting influence. A test that disincentivizes donors from working with local groups to determine needs and efficient delivery systems and discourages oversight of donations would exacerbate the problem the HYPO Act is intended to solve.

cannon on the international stage.

1. The Government Interest in Preventing Terrorism

a. Terrorism in *Humanitarian Law Project*

In *HLP* there was no question that “the Government’s interest in combating terrorism is an urgent objective of the highest order.”²⁰¹ The question at issue was whether the restrictions on plaintiffs’ proposed speech help further that interest. The Court identified several Congressional determinations regarding how the restrictions on “material support” work to combat terrorism. First, FTOs “are so tainted by their criminal conduct that *any contribution to such an organization* facilitates that conduct.”²⁰² Donations to FTOs for peaceful activities may be redirected to terrorist aims and, even if they are used for their proper purpose, “free[] up other resources within the organization that may be put to violent ends.”²⁰³ Second, material support to FTOs “lend legitimacy to foreign terrorist groups” which “makes it easier for those groups to persist, to recruit members, and to raise funds.”²⁰⁴ Finally, because of attacks by FTOs on foreign governments who are allies of the United States, allowing American citizens to provide material support to these groups would strain relations with those governments.²⁰⁵ Before addressing the question, the Court noted the traditional deference given to the political branches in the area of international affairs and national security.²⁰⁶

The Court found the restrictions sufficiently tailored because they only cover a limited number of organizations (designated FTOs), are well defined, and “most importantly,” do not restrict “independent advocacy.”²⁰⁷ Critics have noted that the “most important” factor—that only coordinated speech is banned—is not in line with two of the

201. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724 (2010).

202. *Id.* at 2724 (quoting § 301(a)(7)) (emphasis in original).

203. *Id.* at 2725.

204. *Id.*

205. *Id.* at 2726. The Court provides Turkey as an example of a country where the PKK has been engaged in a “violent insurgency” against the Turkish government and “[f]rom Turkey’s perspective” the PKK is involved in no “‘legitimate’ activities.” *Id.* at 2726–27.

206. *Humanitarian Law Project*, 130 S. Ct. at 2728 (“The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions.”).

207. *Id.* at 2728.

three government interests identified.²⁰⁸ Independent advocacy would lend legitimacy to an FTO to the same or greater extent than coordinated speech and foreign governments who take offense to Americans engaging in advocacy in favor of organizations trying to overthrow their regime are unlikely to take comfort in the distinction that the American's speech is not "coordinated" with the FTO.²⁰⁹

The only potential justification that requires distinguishing between coordinated and independent speech is the concern that giving FTOs any fungible goods can lead to misappropriation of those goods to further their terrorist aims. This raises the question—how is a ban on training members of an FTO to engage in peaceful negotiations with international agencies supported by this justification?²¹⁰ The Court suggests that the FTO could "pursue peaceful negotiation as a means of buying time to recover from short-term setbacks, lulling opponents into complacency, and ultimately preparing for renewed attacks"²¹¹ or could use their knowledge of how to work with the United Nations to infiltrate refugee camps and use them as a base for terrorist activities."²¹² As the dissent and other commentators have pointed out, two hypothetical situations with no evidence in the record that these types of hypotheticals are what Congress had in mind when prohibiting training as a form of "material support" to FTOs are somewhat flimsy "evidence" that pure speech with no connection to terrorist activities can be coopted in the

208. See *id.* at 2736 (noting that legitimacy is conveyed perhaps even stronger by independent advocacy and independent advocacy is not likely to sooth offended allies) (Breyer, J., dissenting); Cole, *supra* note 27, at 165 ("On the government interest side of the analysis, coordinated advocacy is no more harmful than independent advocacy.").

209. See Cole, *supra* note 27, at 165–66; Said, *supra* note 30, at 1503 (noting that support for "legitimacy" argument involved no proof that legitimacy helps terrorist ends). But see Margulies, *supra* note 27, at 495–96 (arguing that the "legitimacy" argument in *HLP* is a "linguistic" flaw and that the majority intended to legitimacy to connote an agency relationship between the speakers and the FTOs). Even if Margulies is correct, the result is merely to merge the legitimacy argument into the coordination justification.

210. The bulk of the Court's support for the restrictions throughout the majority opinion are ways in which funds or material goods could be used or misused by FTOs. See *Humanitarian Law Project*, 130 S. Ct. at 2725–26; see also Said, *supra* note 30, at 1503 (noting that the majority cited no empirical support in the record for the idea that plaintiffs' speech is fungible).

211. *Humanitarian Law Project*, 130 S. Ct. at 2729 (citing a book "describing the PKK's suspension of armed struggle and subsequent return to violence").

212. *Id.* at 2729–30 (citing a State Department affidavit describing how the UNHCR closed a Kurdish refugee camp "because the camp had come under the control of the PKK, and the PKK had failed to respect its 'neutral and humanitarian nature'").

same way as more fungible support.²¹³

The hypothesis that governmental interest is counted twice under the coordination standard could explain why the Court required so little of the government to justify a total ban on plaintiff's speech.²¹⁴ The Court indicated that it would not necessarily find the government's interest in preventing terrorism sufficient if analyzed under the strict scrutiny test.²¹⁵ Thus, the value of the government's interest lies somewhere between what is necessary for the "less than" coordination standard and strict scrutiny. Analyzing the HYPO Act through the same lens allows us to unpack whether the Court's distinction in this regard has merit.

b. The Terrorism Interest Under the HYPO Act

The HYPO Act raises the same deference to governmental decision making in foreign affairs. As demonstrated in *HLP*, the Court generally is hesitant to second-guess the government's value judgments regarding foreign policy, especially when national security issues are in play. The argument that failing states are potential breeding ground for terrorists should give Congress and the State Department broad leeway in crafting solutions to develop stable governments in the poorest areas of the world.

213. *See id.* at 2735 (Breyer, J., dissenting); Cole, *supra* note 27, at 158–59 (arguing the majority "offered up its own arguments" that the government never asserted and based its support on conclusory assertions in the Congressional record); Said, *supra* note 30, at 1501 (noting majority only cites four sources that all came from government or former government officials and were out of date). *But see* Margulies, *supra* note 27, at 489–90, 496–97 (describing independent sources not cited by the majority that support the government's interest better).

214. *See* Cole, *supra* note 27, at 158–59 (noting that the Court relied upon conclusions from the Congressional record that were not supported by factual findings and boilerplate generalizations about all FTOs without individual evidence regarding them); Huq, *supra* note 5, at 25 ("[The *HLP* analysis] is barely recognizable as First Amendment scrutiny at all given the Court's express acceptance of loosely defined and evolving governmental goals on the one hand, and predictions instead of facts on the other."); Said, *supra* note 30, at 1500–01 (describing limited sources relied upon by Court, which were largely outdated and involved generalizations based on groups other than those involved in the case). The majority rejected the characterization that the speech was banned because plaintiffs are still free to speak "independently" of the FTOs. However the content of that speech (training in peaceful diplomatic measures) is a null set if plaintiffs cannot arrange for the audience to hear it. The Court's suggestion is akin to telling plaintiffs they are welcome to teach to an empty classroom.

215. *Humanitarian Law Project*, 130 S. Ct. at 2730 (noting that the government interest would not necessarily be sufficient to ban "independent" speech, which is analyzed under strict scrutiny).

This justification is strongest when looking to a country such as Somalia, where the lawless state has led to well-publicized acts of piracy against foreign ships, including American vessels.²¹⁶ But does this terrorism concern hold up for restrictions on donations to Project Nations that are historically allies of the United States? In *HLP*, the Court was unconcerned with the fact that the organizations the plaintiffs wished to train were involved in struggles against foreign governments and not likely to focus their terrorist activities on the United States, although it noted that both organizations have attacked American citizens abroad.²¹⁷ The opinion never suggested that the likelihood that a particular organization will attack American soil or American citizens is a factor in weighing the government's interest—leaving FTOs that are friendly with American interests still subject to the ban.²¹⁸ Thus whether a Project Nation is likely to harbor terrorists with ill will towards America should not be a factor in the analysis.

By separating symbolic contributions from donation expenditures, both the coordination and strict scrutiny standards are present when analyzing whether a total ban is justified under the HYPO Act. To prevent the corrupting influence of cash or other fungible donations, a ban on both types of speech is necessary because the money, not the speech, is the problem. There is no way to allow an American organization to donate funds to a school, for example, without providing incentive for people to enter the civil service to have access to those funds.²¹⁹ This result is in line with the government's interest in *HLP* with respect to cash or goods provided to FTOs. Money or goods in the hands of FTOs is arguably a problem, not because there is a communicative element, but because it can too easily be used (or transformed into something that can be used) to further terrorism.²²⁰ Thus, in both cases, a total ban on monetary or fungible support is the minimal restriction necessary to address the government's concern regarding its use.

216. See *Exclusive: Somali Pirate Kingpins Enjoy 'Impunity'—U.N. Experts*, REUTERS (July 17, 2012), <http://www.reuters.com/article/2012/07/17/us-somalia-un-piracy-idUSBRE86GOZN20120717> (describing Somali piracy and the Somali government's assistance to pirate leaders).

217. *Humanitarian Law Project*, 130 S. Ct. at 2727.

218. See Said, *supra* note 30, at 1489–90 (noting that material support is barred to all FTOs, even those with “no direct quarrel with the United States”).

219. See *supra* notes 131–35 (describing how aid encourages corruption in the civil service through rent seeking).

220. But see Jonakait, *supra* note 26 (arguing pre-*HLP* that even the material support ban requires an intent element to be in line with constitutional precedent).

Pure speech, however, is a different matter. There is no reason for the HYPO Act to prevent an organization from sending someone to the Project Nation to teach a class on the proper use of malaria nets, run a writing workshop, coordinate with union organizers, or any other manner of communication as those lessons will not lead to the problems the Act was enacted to prevent—corruption and market distortion that could lead to a failed state.

Likewise, in *HLP* whether the regulations still allowed independent (or “pure speech”) is irrelevant to whether the government’s regulations are narrowly tailored. The distinguishing factor between pure speech and symbolic speech is the particular use for the money provided. Without money at issue, the *HLP* Court gave no other grounds for refusing to consider the plaintiffs’ proposed speech to be “pure speech.”²²¹ The proper question for the tailoring analysis should have been whether the speech at issue has the potential to advance the terrorist goals of the organization. If it does not, then the speech is not fungible and it need not be subject to regulation to further the government interest.

This is the argument made by the dissent. Focusing on the definition of “material” in the statutory language “material support,” the dissent argued that “material” should be read to incorporate an intent requirement into the statute.²²² When pure speech is at issue, the government must show that the defendant “knows or intends that those activities will assist the organization’s unlawful terrorist actions.”²²³ “Material” is thus a requirement that the speech at issue be “of real importance or great consequence” to the terrorist aims of the organization or else it is unlikely to trigger the government’s interest in preventing assistance to FTOs in furtherance of terrorist

221. *Humanitarian Law Project*, 130 S. Ct. at 2732 (Breyer, J., dissenting) (“That this speech and association for political purposes is the *kind* of activity to which the First Amendment ordinarily offers its strongest protection is elementary.”).

222. There is statutory support for such a reading. *See id.* at 2741. The statute defines “material support or resources” as “any property, tangible or intangible,” which necessitates a definition of “material” that includes tangible and intangible assistance. Thus “material” most clearly means “being of real importance or great consequence” and not “of a physical or worldly nature,” as the latter would encompass no speech at all. “Training,” “expert advice or assistance,” and “service” are all defined as categories of “material support” and thus “these activities fall within the statute’s scope only when they too are ‘material.’” *See Jonakait, supra* note 26 (arguing pre-*HLP* that the statute includes the requirement that support be provided with the intent to further terrorist activities).

223. *Humanitarian Law Project*, 130 S. Ct. at 2740 (Breyer, J., dissenting).

acts.²²⁴ To bolster their statutory interpretation, the dissent cites reports from the House of Representatives demonstrating that Congress' concern regarding the provision of expert services and assistance to FTOs was rooted in training that would further terrorism directly, such as an aviation expert giving advice that could facilitate an aircraft hijacking or an accountant providing training that will help an FTO conceal its funds.

In such cases, "the act of providing material support to a known terrorist organization bears a close enough relation to terrorist acts that . . . it likely can be prohibited notwithstanding any First Amendment interest."²²⁵ Only this definition of "material" lines up closely enough with the government interest to survive strict scrutiny—or put differently, the speech falls outside of the First Amendment in these cases because it is akin to the criminal act of aiding and abetting a crime. The majority may have still used their two hypothetical situations to justify the argument that training in peaceful negotiations could be "material" to the terrorist aims of an FTO, but under the proper standard these hypotheticals are more difficult to square with the restriction of pure political speech.²²⁶

2. The Government Interest in Preventing Corruption

In *HLP*, even if the regulations were not sufficiently tailored to omit speech that was not materially useful, the concept that providing fungible support to FTOs could further their terrorist goals is relatively clear. With the HYPO Act, the cause and effect relationship is less transparent. In order to accept that the restrictions on aid will help prevent failed states from becoming incubators for terrorist organizations, one must agree that the type of corruption and market distortions that aid encourages are the cause of the destabilization of a state. The HYPO Act directly engages the problems of corruption and market destabilization as the root causes of state decline in the hopes that a secondary effect will be a stable government that is an ally in the war on terror. Thus, the prevention

224. *Id.* at 2741.

225. *Id.* at 2740; *see also* *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (finding no First Amendment protection for speech that is an "integral part of conduct in violation of a valid criminal statute").

226. A less charitable view of the majority opinion might suggest that the reason for adopting the coordination standard and double-counting the government's interest was result driven because the Court recognized that the government's support would be inadequate under strict scrutiny.

of corruption and market distortion are not only independent governmental interests supporting the HYPO Act, but also a prerequisite for the acceptance of terrorism as a legitimate interest addressed by the Act.

The anti-corruption justification is the most compelling support for the restriction of funds to a Project Nation based on the empirical evidence.²²⁷ As Collier has demonstrated, corruption of the government and civil service makes a nation unable to utilize inflows of aid and retards economic growth. Large inflows of foreign aid incentivizes individuals to pursue positions within the government and civil service that put them at the receiving end of donor largess or in a position to profit from those who wish to use donor funds for legitimate ends.²²⁸ Those who misappropriate donor funds for their own benefit then have the resources to push out the competition for highly coveted jobs, leaving crooks in charge of the government and civil service and the best and brightest pushed to the margins.²²⁹ Any advocate for the type of substantial change needed to attract investment and economic growth must fight against these moneyed interests who benefit from the entrenchment of the status quo. Without a functioning government, markets have little chance of significant growth as property and capital investments are not sufficiently protected to give investors the comfort they need to put money into the local economy.²³⁰

This government interest would put the Court in a tight spot. In *Citizens United*, it rejected a similar aggregate corruption argument. The opinion overturned *Austin v. Michigan Chamber of Commerce*, which upheld restrictions on corporate campaign donations to prevent “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”²³¹ In *Citizens United*, the Court, like the dissent in *Austin*, described this interest as an attempt to equalize the relative voice of speakers,²³² but the argument is really that large

227. See *supra* Part III.A.

228. See *id.*

229. See *id.*

230. COLLIER, *supra* note 128, at 88–89 (describing how investors refuse to invest in countries without functioning governments).

231. 494 U.S. 652, 660 (1990).

232. See *Citizens United v. FEC*, 130 S. Ct. 876, 904 (2010); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 704–05 (1990) (Kennedy, J., dissenting); *id.* at 484–85 (Scalia, J.,

amounts of money not tied to an individual's political preferences can corrupt the system by giving disproportionate influence to corporate ideas that are not representative of public support.²³³ Likewise, one of the concerns with large influxes of aid is that the money being poured into the Project Nations provide incentives that are not in line with the goals of the majority of the population, but rather allows certain players to manipulate the system for their own interests.²³⁴

The analogy is not exact. The corruption interests at play in *Citizens United* are not identical to those implicated in the question of foreign aid. In the United States, the concern is not that campaign funds will end up in the candidate's pocket, but rather the effect that money has on the system. An unscrupulous politician can align himself with moneyed interests because those interests will devote their vast resources to keeping a friendly politician in office. For those individuals staying in power is the end goal—not the actual theft of the money donated.²³⁵ But elections can be altered even with politicians that hold steadfast values. Large aggregations of money can lead to an outcome where candidates with a certain set of fixed values (for example, opposed to environmental regulation) are more likely to prevail because corporate entities can outspend the candidates' opponents. Even if the candidate already supports the corporation's interest (and thus is not tempted by campaign cash to change his position), the campaign funds alter the landscape of the election in favor of the candidates most in line with corporate interests.²³⁶

This is a gross oversimplification of the role of money in electoral politics, a full analysis of which is outside the scope of this Article. The important point for this discussion is that, like foreign aid, the presence of money in the electoral system has the potential to pull people who hold viewpoints aligned with moneyed interests into positions of power. With aid, it is those who support a broken system that allows for abuse of their authority; with election politics, it is

dissenting).

233. *Austin*, 494 U.S. at 660.

234. *See supra* Part III.A.

235. Personal financial interests are not irrelevant to the American public servant. Many legislators enjoy lucrative post-government positions in the private sector consulting corporations that they previously regulated.

236. *See* *McConnell v. FEC*, 540 U.S. 93, 149 (2003), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (providing evidence that "soft money" influences Congressional voting).

those whose policies favor entities with large aggregations of wealth.²³⁷

Despite the differences between campaign finance and foreign aid, the flat rejection of the dangers of aggregate corruption in *Citizens United* would make it difficult to uphold the HYPO Act even under the lesser coordination standard. In *Citizens United*, the Court rejected even the possibility that a corruption argument not based on the prevention of quid pro quo corruption could support a restriction on campaign speech, as evidenced by its refusal to remand the case for the government to develop a record to support its arguments. In essence the Court held that there is no possible evidence the government could muster that would justify a restriction on “independent” speech because it is, by definition, not coordinated and thus unlikely to lead to quid pro quo corruption.²³⁸ In his concurrence, Justice Scalia dismissed other definitions of corruption, such as the concern that money in the electoral system may lead to “moral decay” or that it “does not serve public ends” as improper interests that would lead to unlimited censorship power by the government.²³⁹

It would be impossible to square the idea that Congress may restrict the speech of Americans to avoid corruption of foreign governments but cannot restrict speech to avoid a similar corrupting influence at home.²⁴⁰ Given the extremely high value placed on political speech relating to domestic elections, there must necessarily be a discounting of the speech regulated by the test case. This lower value for non-electoral speech, however, would be outweighed by the higher interest Congress has in ensuring the integrity of our electoral system versus its interest in preventing corruption of foreign governments. It is impossible to reconcile a finding that corruption of foreign governments is a legitimate government interest, sufficient to withstand strict scrutiny, but potential corruption in one’s own

237. Obviously the former is undisputedly a negative trait for a government official. Viewpoint alignment with large corporations, banks or unions is not necessarily a negative quality for a politician, but Congress was sufficiently concerned with dominance by such entities over other viewpoints to enact the campaign finance reform struck down in *Citizens United*.

238. Quid pro quo corruption of foreign government officials, like domestic bribery, is already prohibited by the Foreign Corrupt Practices Act. 15 U.S.C. §§ 78dd-1 to -4.

239. *Citizens United*, 130 S. Ct. at 928.

240. This holding would not be limited to *Citizens United*. Even under *Buckley*, the Court’s concerns about quid pro quo corruption would only allow for a limitation on symbolic contributions—not an outright ban.

political system does not merit further consideration.

If the aggregate corruption interest is illegitimate, the other justifications for the regulations begin to crumble and the HYPO Act is unlikely to survive even the lower “coordinated” scrutiny, let alone strict scrutiny.²⁴¹ Such result would be consistent with the value given the government’s interest in *Citizens United*. However, the result would come into conflict with *HLP*.

As discussed, the Court in *HLP* gave significant weight to three factors: (1) that the speech is coordinated, (2) that the recipients are foreign entities, and (3) the deference given the government on matters of foreign affairs.²⁴² The HYPO Act is also a restriction of coordinated speech with a foreign entity that would be justified by the government’s carefully considered foreign policy concerns. A rejection of the Act would suggest that despite its emphasis on the ways the speech in *HLP* differs from “pure political speech,” the Court’s decision is not based on a convergence of those three factors, but rather rests solely on the weight of the government’s interest in preventing terrorism.²⁴³

D. The Future of the Coordination Standard

Taking into account the various government interests makes it clear that the outcome in *HLP*, in large part, came down to immense deference to the government’s asserted interest in preventing terrorist attacks. There is always a measure of pragmatism in evaluating the normative value of the government’s interest.²⁴⁴ It is tempting to write off the Court’s decision as pragmatic balancing requiring the convergence of terrorism, foreign speech and coordination.²⁴⁵ Given

241. The market distortion concern in this context would be an issue of first impression for the Court. It could be used to buttress the government’s antiterrorism concerns—low income is a strong indicator of future conflict and a country with a few economic opportunities is a fertile recruiting ground for terrorist organizations who can offer opportunities unavailable in the legitimate economy. *See supra* Part III.A. It seems unlikely, however, that it could support the weight of the restrictions under either strict scrutiny or even the lesser coordinated standard on its own.

242. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2730 (2010).

243. With so much riding on the government justification, it is even more startling that the Court focused so little attention on the actual evidence the government presented regarding the dangers of the plaintiffs’ proposed speech. *See supra* note 45.

244. *See supra* notes 15–18 and accompanying text (discussion of pragmatism in balancing).

245. *See Cole, supra* note 27, at 176–77 (arguing that a reading requiring all three elements would “restrict[] the damage Humanitarian Law Project does to First Amendment doctrine”). Although these three factors can be present in other circumstances without a clear

the current war on terror, even this limitation is unsettling in the leverage it gives Congress to prohibit political speech made in connection with deeply unpopular international political groups, especially if courts are willing to embrace a broad definition of terrorism and what tools may be used to fight it.²⁴⁶

What is more troubling, however, is the establishment of the coordination standard, released from the campaign finance realm and free to run amok through other First Amendment doctrine. Although it may give the appearance of an objective standard, it is really the result of the government's interest bleeding into the initial determination of the value of the speech at issue. Speech has less value because it is "coordinated," but *HLP's* definition of coordination is so broad as to encompass a wide range of speech that is traditionally protected as pure political speech.²⁴⁷

Perhaps what the Court intended to convey is that speech coordinated *with terrorists* deserves less protection because the government's interest in restricting it is greater.²⁴⁸ That may be the end result of a two-step analysis—certainly even under a pure speech test teaching terrorist organizations how to fly an airplane or launder money could be banned as akin to a criminal act given the likelihood it will help further terrorist ends.²⁴⁹ Coordination may be a relevant factor in determining the strength of the government's interest in the restriction or in evaluating the restriction's fit to that interest. The original use of coordination as a factor in favor of restricting campaign contribution demonstrates this.²⁵⁰ This reading preserves the "starch" in the standard while still taking into account a compelling government interest. But that is not the rationale the *HLP* Court used. Instead it took pains to take "coordinated speech" outside

normative justification for the restrictions, such as the HYPO Act discussed herein, which at a gut level feels like government overreaching.

246. For example, the HYPO Act discussed herein meets all three prerequisites for restrictions of speech, yet as discussed above allows broad restrictions on the expression of deeply meaningful moral convictions and political beliefs based on an attenuated connection to terrorism.

247. See *supra* notes 118–21 and accompanying text.

248. See Margulies, *supra* note 27, at 486 (arguing government has interest in regulating agency relationship between organizations and FTOs to prevent FTOs from exploiting asymmetries in information).

249. *Humanitarian Law Project*, 130 S. Ct. at 2741–42 (Breyer, J., dissenting) (arguing that providing training that is of material use in the furtherance of terrorist ends, such as aviation expertise, may be banned).

250. See *supra* notes 51–56 and accompanying text.

the realm of “pure political speech” and into a nebulous space with a largely undefined standard that already has a heavy thumb on the scales against its protection.

Because nearly all speech is coordinated in some way, the Court may use this new standard to pick and choose when coordination triggers a lower level of protection based on the identities of those speaking. This leaves open the very real possibility that the coordination standard can be used to selectively restrict speech with dissident organizations. The Court has a rocky history when it comes to the protection of speech made in connection with groups seen as a threat to national security.²⁵¹ While the imminent danger test overturned the most egregious cases of criminalizing association with dissident groups, the coordination standard may be poised to revisit those mistakes in this new war on terror.²⁵²

The victory of the coordination standard in *Citizens United* also raises important, but more subtle, issues regarding election spending as speech. The shift in focus from the nature of the different types of spending (symbolic or pure speech) toward a strong emphasis on the coordinated or independent character of the speech greatly limits the government’s ability to address the ever increasing amounts of money being pumped into electoral contests.²⁵³ Inherent in the idea that independent speech is unassailable is the notion that quid pro quo corruption is the only legitimate government interest. By defining independent speech as immune to “real” corruption (i.e. quid pro quo corruption), the Court essentially forecloses any other government interest in favor of expenditure restrictions. Perhaps proponents of campaign finance would do well to take the Court at its word and focus on enforcing existing regulations and enacting new laws that directly restrict the way candidates may interact with PACs, corporations, unions and other “independent” supporters. If coordination is the true danger, then Congress and the states should be free to limit cross staffing between candidates and PACs, meetings between campaigns and “independent” fundraisers and the like.

251. See *supra* notes 93–96 and accompanying text (discussing early cases allowing broad restrictions on speech and association in coordination with radical labor unions and the Communist party).

252. See Rhodes, *supra* note 16, at 68 (noting that it is conceivable that the purpose of the Roberts Court in “continually crafting narrow rules, each of which individually appears moderate” is that “the Court might eventually be able to construct an entirely new constitutional architecture”).

253. See *supra* note 124 (discussing campaign spending in 2012 election).

CONCLUSION

Regardless of whether Congress can find a way around *Citizens United*, the problems with the coordination standard remain. An optimist might hope that the standard will remain within the confines of the two opinions, and perhaps it will. Whatever its future, the coordination standard provides a compelling reminder to courts to refrain from injecting normative judgments about the government's interest into the standard of review.

