

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

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

In January 2010, the United States Supreme Court decision in *Citizens United v. Federal Election Commission*, struck down a federal ban on independent expenditures in political campaigns by corporations. Two months later, in *SpeechNow.org v. Federal Election Commission*,² the Court of Appeals for the District of Columbia Circuit, sitting en banc, ruled 9-0 to strike the FEC’s longstanding interpretation of the Federal Election Campaign Act (“FECA”).³ That interpretation had limited the size and sources of contributions to political committees that made no campaign contributions and operated independently of any candidate or political party.⁴ The FEC did not appeal *SpeechNow.org* and the decision has generally been accepted and followed nationally, even in the states.

The result of *Citizens United*, and even more its offspring, *SpeechNow.org*, has been the creation of “independent expenditure committees,” dubbed “Super PACs” in common parlance.⁵ Thanks to *SpeechNow.org*, these Super PACs can raise money in unlimited sums and for the purpose of making independent expenditures in connection with federal elections. Thanks to *Citizens United*, contributions to Super PACs may include corporate money.

Both decisions were based on the Supreme Court’s longstanding position that, as a matter of law, political expenditures made independently of a candidate or party do

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¹ *Citizens United v. Federal Election Commission*, 558 U.S. 310, 357 (2010).

² *SpeechNow.org v. Federal Election Com’n*, 599 F.3d 686 (D.C. 2010).

³ 2 U.S.C. 431 et seq.

⁴ 599 F.3d 686 (2010).

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

not pose a sufficient threat of corruption to justify the infringements on speech and association that result from government regulation of campaign contributions and spending. This privileged position for independent expenditures has been at the core of constitutional analysis of campaign finance law since it was first announced in *Buckley v. Valeo*.⁶

Although the impact of Super PACs on elections can be and has been overblown,⁷ there is no doubt that they are an important development for the political system.⁸ Whether Super PACs are good or bad for the political process, their ability to raise and spend large sums hinges on their legal independence from candidate and party committees. Under the FECA, an "expenditure" becomes a "contribution" to a candidate or party if it is made in "coordination" with that candidate or party. And if a Super PAC makes a contribution directly to a candidate or party, it loses its ability to operate as a Super PAC and must comply with the source and dollar limitations on contributions faced by traditional PACs. While a Super PAC can spend unlimited sums for independent expenditures, a traditional PAC's contributions – including coordinated expenditures – are limited to just \$5000. Thus, whether or not a Super PAC is operating independently of candidates is a significant issue.

The 2010 and especially 2012 elections brought forth numerous claims that, in fact, Super PACs were not operating independently from the candidates they supported with their ostensibly independent expenditures.

"When your old consultants and your best buddies are setting them up, you can pretty much suspect there's been a lot of discussion beforehand," said Rep. Tom Cole, in discussing the rise of Super PAC spending in Congressional races.⁹ Rep. Cole is no stranger to fundraising, as he is the former chairman of the National Republican Congressional Campaign Committee. "They are breaking the law... they have former aides running this," declared former GOP Senator Alphonse D'Amato of

⁶ 424 U.S. 1 (1976).

⁷ Super PACs spending amounted to about 5% of total \$7 billion spent in 2012. Tarini Parti, *\$7 billion spent on 2012 campaign, FEC says*, POLITICO (Jan. 31, 2013), <http://www.politico.com/story/2013/01/7-billion-spent-on-2012-campaign-fec-says-87051.htm>.

⁸ For criticism of the role of Super PACs, see e.g. Anna Palmer & Jim Vandehei, *A New Way To Buy Real Influence*, POLITICO (Oct. 24, 2011), <http://www.politico.com/news/stories/1011/66673.html> (quoting Rep. Tom Cole, "It's really putting a candidate out there and tying at least one arm behind their back, if not more, because they have no mechanism to respond," Cole said. "They have to hope that another super PAC by another anonymous group comes in and so you are the littlest guy on the playground and you are looking for one bully to save you from another bully."); see also Dan Eggen, *New Breed of "Super PACs," Other Independent Groups Could Define 2012 Campaign*, WASHINGTON POST (July 4, 2011), http://articles.washingtonpost.com/2011-07-04/politics/35237010_1_crossroads-gps-pacs-groups ("So begins the shadow campaign of 2012, in which a new breed of "super PACs" and other independent groups are poised to spend more money than ever to sway federal elections.). For defenses of Super PACs as a good thing, see e.g. Bradley A. Smith, *Why Super PACs are Good for Democracy*, U.S. NEWS & WORLD REPORT (Feb. 17, 2012), <http://www.usnews.com/opinion/articles/2012/02/17/why-super-pacs-are-good-for-democracy>.

⁹ Anna Palmer & Jim Vandehei, *A New Way To Buy Real Influence*, POLITICO (Oct. 24, 2011), <http://www.politico.com/news/stories/1011/66673.html>.

Priorities USA, a super PAC supporting the re-election of President Obama.¹⁰

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

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

The problem is that the behaviors just noted in these accusations do not, in fact, amount to legal coordination. For example, contrary to Professor Langvardt's suggestion, it is not "coordination," as the term exists in campaign finance law, for friends or former staffers to make independent expenditures benefiting a candidate. There is, indeed, a great deal of confusion about what coordination prohibits, and why. At times allegations of "coordination" are nothing more than the propaganda efforts of campaigns to discredit their opponents; other times this confusion is well-intentioned error; and sometimes it appears to be intentionally misleading rhetoric by advocates of greater regulation of campaign finance, to create support for overturning *Buckley's* doctrine on independent expenditures.

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

¹⁰ John Twarog, *Former Senator: Obama is "Breaking the Law" for Coordination with Super PAC*, RedAlertPolitics.com, August 9, 2012 (<http://redalertpolitics.com/2012/08/09/former-ny-senator-on-obama-campaign-they-are-breaking-the-law/>).

¹¹ Kyle Langvardt, *The Sorry Case for Citizens United*, 6 *Charleston L. Rev.* 569, 574 (2012)(citations omitted).

¹² *Buckley*, 424 U.S. at 46.

¹³ *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996).

¹⁴ *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001).

¹⁵ 52 F.Supp 2d, 45 (D.D.C. 1999)

coordination outside of the unique circumstances of the *Colorado Republican* cases.¹⁶

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

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

II. THE PURPOSE AND THEORY BEHIND OF ANTI-COORDINATION RULES

A. Coordination Rules and Circumvention

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

¹⁶ Among the few in-depth analyses of the theory of coordination in *Buckley* are Richard Briffault, *Coordination Reconsidered*, 113 Colum. L. Rev. Sidebar 88 (2013); Richard Briffault, *Campaign Finance, the Parties, and the Court: A Comment on Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 14 Const. Commentary 91 (1997); Thomas R. McCoy, *Understanding McConnell v. FEC and its Implications for the Constitutional Protection of Corporate Speech*, 54 DePaul L. Rev. 1043, 1052-56 (2005); Meredith A. Johnston, *Note: Stopping "Winks and Nods": Limits on Coordination as a Means of Regulating 527 Organizations*, 81 N.Y.U. L. Rev. 1166 (2006); and James Bopp, Jr. & Heidi K. Abegg, *The Developing Constitutional Standards for "Coordinated Expenditures": Has the Federal Election Commission Finally Found a Way to Regulate Issue Advocacy?*, 1 Elec. L. J. 209, 210 (2002).

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

¹⁸ In the United States, the Supreme Court has held that compulsory limits on campaign spending are unconstitutional. *Buckley*, 424 U.S. at 51. However, because the state may condition the receipt of government funds for campaigning on a candidate's agreeing to limit his spending, *id.* at 108-09, the desirability of limits on coordinated spending, from a regulatory standpoint, remain important. The federal government and several states maintain systems of government financing of campaigns that require candidates to limit their total campaign spending in order to obtain a government subsidy. See e.g. Federal Elections Commission, *Public Funding of Presidential Elections* (2013),

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

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

This recognition is important because once a regulatory system of contribution and spending limits and prohibitions has been decided on, and once it is further decided to accompany such a scheme with limitations on coordinated activity, it becomes necessary to decide two questions: 1) What spending will count as campaign spending, and thus be subject to the anti-coordination rule?; and 2) what conduct will remove an activity from the category of independent expenditure to the category of coordinated expenditure and, hence, contribution? The more activity and speech that is brought into the coordination regime, the greater the "effectiveness" of the regulatory system. But the wider the regulatory net, the greater the infringements on non-corrupting speech and association that we normally wish to encourage. The Supreme Court, in *Buckley* and 35 years of succeeding cases has made clear that the government's ability to regulate political speech and association is limited. Tradeoffs must be made, and it is easier to understand the tradeoffs required by *Buckley* once we realize that no system will address every potential source of corruption, and that a regulatory regime can be effective without being perfect, or even close.

In this essay, I focus on the second of these questions: what conduct and contacts will turn an expenditure from protected speech to unprotected conduct. This is not

<http://www.fec.gov/pages/brochures/pubfund.shtml>; see also Me. Rev. Stat. tit. 21-A, § 1124 (2011); see also David Brancaccio, *Fixing Democracy: The Clean Election Movement*, Public Broadcasting Service (November 1, 2002), <http://www.pbs.org/now/politics/cleanelections.html>.

because the first question – content- is unimportant – it is very important, indeed. However, the content question is ultimately an effort to provide a substantive safe harbor for speakers who wish to avoid investigation for coordination, a bright line to cut off intrusive investigations at the outset.¹⁹ The confusion that has emerged in the 2010 and 2012 elections, however, have focused around whether a speaker's conduct meets the legal requirement for coordination.

B. The Meaning of Coordination in *Buckley v. Valeo*

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

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

The basic contours of the Court's response to this extensive regulatory regime is well-known to any long-time student of campaign finance but should be at least quickly reviewed here. The Court recognized that virtually every provision of the Act infringed on First Amendment rights, thus necessitating a compelling government interest and a least restrictive solution if to withstand constitutional

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

²⁰ 424 U.S. 1 (1976).

²¹ See Herbert E. Alexander, *The Regulation of Election Finance in the United States and Proposals for Reform*, in *Comparative Issues in Party and Election Finance*, Vol. IV 6-8 (F. Leslie Seidle, ed. 1991).

²² 424 U.S. at 19.

²³ 424 U.S. 19-20.

scrutiny, which would be set at a high level.²⁴ It rejected as “wholly foreign to the First Amendment” any government claim that it could restrict the speech of some in order to equalize political speech and influence.²⁵ But it did find that the state had a compelling interest in preventing corruption or the appearance of corruption in government.²⁶ Working from these premises, the Court would ultimately uphold the constitutionality of limits on contributions, while striking down limitations on political expenditures.

Although *Buckley* begins with analysis of contribution limits, it is perhaps easier to understand the decision, and in particular its treatment of coordinated expenditures as contributions, by looking first at expenditure limits.

The Court began its analysis of expenditures by noting that limits on expenditures directly limited the total amount of speech. Such limits, therefore, “limit political expression ‘at the core of our electoral process and of the First Amendment freedoms.’”²⁷ Having accepted the government’s proffered anti-corruption rationale, the Court noted that candidates were not corrupted by spending their own money in an election, and further, that they were equally uncorrupted by spending any money raised in a non-corrupting fashion. Implicit in this is a rejection of the idea that speech can corrupt the democratic process. If it were the speech that were corrupting, even a candidate’s own spending from personal funds might be regulated. Further, the Court in *Buckley*, and in decisions since, has steadfastly rejected the idea that speech is potentially corrupting because it might persuade voters, or that it is corrupt if officeholders are grateful to supporters for their assistance, or after election might allocate more of their time and effort to satisfying supporters. Speech, and the reactions it might generate, are not the type of “corruption” that the Court feared. Thus speech, and the expenditures needed to fund it, may not be limited.

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

To be sure, contribution limits could indirectly limit speech by making it harder for candidates and political committees to assemble the resources to reach a broad audience. From the standpoint of candidates, the Court noted that their speech was limited to the extent that contribution limits indirectly reduced their available funds

²⁴ *Buckley* used the terms “sufficiently important interest” and “closely drawn.” 424 U.S. at 25. It later referred to the level of scrutiny as “exacting scrutiny.” 424 U.S. at 44-45.

²⁵ 424 U.S. at 49.

²⁶ *Id.* at 26

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

²⁸ *Id.* at 24.

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

for speaking. But it was not obvious that candidate speech would always or even usually be restricted. A candidate with, for example, a \$1 million campaign spending goal might be able to raise that \$1 million with or without limits. Absent limits, it might be easier, but unless campaign restrictions made it impossible to amass the funds needed for effective campaigning, the Court was prepared to uphold the restrictions as a marginal burden, rather than a limitation, on candidate speech. "There is no indication," said the Court, "that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations."³⁰

Of course, donors have speech interests, too. But the Court noted that the speech value of a contribution itself was relatively small – a contribution expresses support, but "does not communicate the underlying basis for the support."³¹ Continuing, the Court argued that, "[a] limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues."³²

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

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

In tolerating restrictions on contributions, *Buckley* was tolerating restraints on a form of associational conduct – not the conduct of spending money, as the Court of Appeals had decided, but the conduct of bargaining for favors. *Buckley* justified contribution limits because "[t]o the extent that large contributions are given to secure political quid pro quo's from current and potential office holders, the integrity of our system of representative democracy is undermined."³³ Such

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

³¹ 424 U.S. at 21.

³² *Id.*

³³ 424 U.S. at 26-27.

exchanges occurred within the context of "large contributions [being] given to secure a political *quid pro quo*."³⁴

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

The Court upheld limits on contributions because the process of contributing opened the possibility for explicit exchange bordering on bribery. *Buckley* rejected the idea that "corruption" was limited solely to malfeasance of the sort that would be illegal under bribery laws: "laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action."³⁷ But it demanded behavior of a similar type if not degree. Contributions to candidates and parties, *Buckley* held, posed a direct threat of corruption similar to bribery - donors might give to a candidate or officeholder with the understanding that in return, the officeholder (or candidate/future officeholder) would take some official action he would not otherwise take.³⁸

At no point does the Court deny that speech will influence races, or that it may create a sense of indebtedness on the part of the officeholder. Indeed, the Court specifically recognized that independent expenditures could be used by "unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office."³⁹

But it dismissed the constitutional importance of this concern. In doing so, it suggested that independent expenditures were likely to be of less value to a

³⁴ Id. at 26.

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

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

³⁷ Id. at 27-28.

³⁸ It is important to recognize that for "corruption" to have any meaning, it must be believed that the contribution will influence the officeholder to act in a particular way. If the officeholder would have acted in that fashion in any case, there has been no quid pro quo transaction and no apparently "corruption" of the process. Additionally, the *Buckley* Court argued that contributions had relatively little communicative value, being mere "proxy speech," so the imposition on First Amendment rights was not so severe. 424 U.S. at 16.

³⁹ Id. at 45.

candidate than direct contributions, and might even be counterproductive.⁴⁰ More importantly, however, it noted that the requirement of independence – the absence of “prearrangement and coordination” – “alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”⁴¹ This point re-emphasizes the Court’s focus on conduct resulting in the possibility of quid pro quo exchange as the type of corruption sufficient to justify government regulation of political contributions and spending. The Court was willing to give the government leeway to regulate activity that did not rise to the level of bribery,⁴² but it insisted upon an explicit quid pro quo exchange, as opposed to some tacit understanding between the parties.

The insistence upon a quid pro quo exchange indicates that the Court is not allowing limitations on speech. Rather, it is allowing regulation of a particular type of conduct, the overt exchange of campaign contributions for legislative favors that may not extend to the level of bribery.⁴³ Thus, when the Court in *Citizens United* proclaimed that “independent expenditures ... do not give rise to corruption or the appearance of corruption”⁴⁴ it was making a statement of constitutional law, not of the perceptions of some segment of the population. The Court was referencing a specific type or meaning of corruption by officeholders, not whatever some observers might call “corruption” from some norm.

Among other things, the Court has not accepted what might be termed the “gratitude” theory of corruption. Merely because an officeholder might be grateful to those who supported him, and thus inclined to listen more sympathetically to their requests or consider more generously their desires for government policy, is not corruption.⁴⁵ Candidates may be aware of a supporter’s spending, and may accordingly be inclined to reward supporters, but mere speaking is not a form of conduct by supporters that can be regulated.⁴⁶ Similarly, the Court has rejected the idea that mere “access” to a politician is itself a form of corruption that justifies

⁴⁰ Id. at 47. For examples of the inefficiency and ineffectiveness of independent expenditures, see <http://opinionator.blogs.nytimes.com/2013/04/10/in-political-campaigns-do-you-get-what-you-pay-for>. In fact, independent expenditures are often a nuisance or hindrance to candidates they are ostensibly intended to help. See e.g., Ian Vadewalker, *The Campaign Finance Law of Unintended Consequences*, Brennan Center for Justice at New York University School of Law (June 1, 2012), <http://www.brennancenter.org/blog/campaign-finance-law-unintended-consequences>

⁴¹ 424 U.S. at 47.

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

⁴³ McCoy, *supra* n. 16 at 1053.

⁴⁴ 558 U.S. at 357.

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

⁴⁶ McCoy, *supra* n. 16 at 1054.

restrictions on political contributions and spending.⁴⁷ And the Court rejects the idea that an effort to make one's speech effective, by, for example, developing media to compliment the candidate's own efforts, hiring persons familiar with the candidate's views to help develop independent messages, or working with persons familiar with the race, constitutes conduct that can be regulated.⁴⁸

One final element of *Buckley's* reasoning merits review. In addition to the prevention of "corruption," *Buckley* recognizes limiting "the appearance of corruption resulting from large individual financial contributions" as an important state interest sufficient to justify restrictions.⁴⁹ This, however, is not an expansive license to find "corruption" in everything that the public may not like about politics, or distrust in officeholders. The Court discusses the "appearance of corruption" in the same breadth and sentence as actual "corruption," as "the extent that large contributions are given to secure political quid pro quo's from current and potential office holders."⁵⁰ It further describes the "appearance of corruption" as "public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."⁵¹ The "abuse" described immediately prior, is, of course, that of quid pro quo exchange.

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

⁴⁷ *Citizens United*, 558 U.S. at 359; *See McConnell*, 540 U.S. at 302 (Kennedy, J. dissenting).

⁴⁸ McCoy, *supra* n. 16 at 1053.

⁴⁹ 424 U.S. at 26.

⁵⁰ *Id.*

⁵¹ *Id.* at 27.

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

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

“appearance of corruption” is firmly tied to the actual corruption found by the Court – quid pro quo exchange.⁵⁴

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

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

⁵⁴ As noted above, *supra* at n. 35, the Court has at times waived from this, primarily in *Austin*. However, *Citizens United* clearly restricts the type of “corruption” or “appearance of corruption” sufficient to justify First Amendment restrictions to quid pro quo exchange. 558 U.S. at 663 (“For the reasons above, it must be concluded that *Austin* was not well reasoned. The Government defends *Austin*, relying almost entirely on “the quid pro quo interest, the corruption interest or the shareholder interest,” and not *Austin*’s expressed anti-distortion rationale. When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished. *Austin* abandoned First Amendment principles, furthermore, by relying on language in some of our precedents that traces back to the *Automobile Workers* Court’s flawed historical account of campaign finance laws.”).

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

⁵⁶ 519 F.2d 821, 840 (D.C. Cir. 1975).

⁵⁷ 424 U.S. at 16 (emphasis added).

⁵⁸ *Id.* at 17 (emphasis added).

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

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

Buckley is thus best be understood not as allowing the suppression of some speech that might be corrupting, but rather as allowing the suppression of certain associational activities because they allow the opportunity for corruption. The Court doesn’t see speech as corrupting at all, and it doesn’t see spending money to amplify one’s speech as corrupting, either. The corruption is in the bargain. The bargain can take place in the context of contributions or expenditures. Contributions are by definition coordinated with the candidate, and so subject to some limitations across the board. Expenditures are not inherently coordinated with the candidate, and so can only be limited as an incidental result if such coordination occurs.⁶¹

With this understanding, the Court’s ruling on the overbreadth challenge comes to clarity. The *Buckley* plaintiffs argued that the law was impossibly overbroad because the vast majority of campaign contributors do not wish to engage in any inappropriate quid pro quo dealing.⁶² But the Court could dismiss that because the conduct – the direct dealing with the officeholder or his agents while offering something of value, provided unique opportunities for corruption to occur. And some prophylactic was justified because “it difficult to isolate suspect contributions but, more importantly, Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated.”⁶³

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

⁶⁰ See *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 447 (2001) (*Colorado Republican II*) (coordinated expenditures are the “functional equivalent” of contributions.)

⁶¹ See *Colorado Republican I*, 518 U.S. at 610 (1996) (“The provisions that the [*Buckley*] Court found constitutional mostly imposed *contribution* limits—limits that apply both when an individual or political committee contributes money directly to a candidate and also when they indirectly contribute by making expenditures that they coordinate with the candidate.”)

⁶² 424 U.S. at 29.

⁶³ *Id.* at 30.

⁶⁴ *McCoy*, *supra* n. 16 at 1052.

In all of the arguments that I have summarized above, *Buckley* has been criticized. It has been criticized for its dichotomy between contributions and expenditures;⁶⁵ it has been criticized for its supposedly cramped definition of "corruption,"⁶⁶ and alternately for allowing in the mere "appearance of corruption."⁶⁷ It has been criticized from the political right,⁶⁸ and from the political left.⁶⁹ I have criticized some of these arguments of *Buckley*.⁷⁰ But criticisms notwithstanding, *Buckley*'s distinctions, findings, and holdings are not non-sensical. In particular, there are reasons for treating contributions and expenditures differently;⁷¹ and for rejecting the idea that independent expenditures are corrupting in a manner that justifies restrictions on core protected speech. My goal is not to re-litigate these issues, but to point out that *Buckley* and its progeny have attempted to seriously address these issues in a manner that allows some regulation of the worst potential excesses of government corruption, while broadly protecting the ability of Americans to operate in the political system.

IV. COORDINATION RULES UNDER THE BUCKLEY REGIME

A. Trying to Get a Rule

Developing coordination rules that comport with *Buckley* and make sense as a matter of policy has proven, like so many things, more difficult in practice than in theory.

For many years, for example, the FEC's coordination regulations included a non-rebuttable presumption that any spending by a political party mentioning a

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

⁶⁶ Robert E. Mutch, *On the Origins of Campaign Finance Regulation*, 7 Elec. L. J. 145-47 (2008).
⁶⁷;

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

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

⁷⁰ Bradley A. Smith, *Unfree Speech: The Folly of Campaign Finance Reform* (2001).

⁷¹ See Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment after Austin*, 21 Cap. U. L. 381, 404 (1992).

candidate, or the candidate’s opponent from a different party, was coordinated. The idea was that parties were inherently engaged in with their candidates, so their expenditures must be coordinated. The Supreme Court struck down this regulation in 1996, in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*.⁷²

In 1999, another FEC approach to policing coordination fell when the Federal District Court for the District of Columbia rejected the FEC’s interpretation of “coordination” to cover an “insider trading” scenario.⁷³

Responding to the *Christian Coalition* decision, the FEC revised its coordination rules in 2000, with the Commissioners disagreeing almost immediately on precisely what the new rules meant – in particular, what types of communications were covered by the rules.⁷⁴ Whatever those rules meant, they were harshly criticized by the campaign finance reform community,⁷⁵ and so supporters of the 2002 Bipartisan Campaign Reform Act (“BCRA”) sought to use the Act as a vehicle for amending the rules. But when supporters actually tried to write a new rule, they quickly found the task almost insurmountable. In the end, therefore, BCRA simply repealed the existing FEC rule and instructed the FEC to write a new one, with some broad guidelines on what the FEC should not require.⁷⁶

The FEC’s efforts to comply with that BCRA mandate on Coordinated Communications have been less than a complete success. The Commission’s first attempt at a new definition was struck down as “arbitrary and capricious” in 2004.⁷⁷ A second effort met a similar fate in 2007.⁷⁸ The Commission has been unable to agree on new rules since. In the remainder of this section, I deal with some of the

⁷² 518 U.S. 604 (1996).

⁷³ *Federal Election Commission v. Christian Coalition*, 52 F. Supp. 2d 45 (D. D.C. 1999).

⁷⁴ *Compare* Karl J. Sandstrom, Letter to the Editor, 33 National Journal 604 (Mar. 3, 2001) (FEC Commissioner Sandstrom writing, “absent from the [FEC’s Coordination rule] is any requirement that the public political communication contain express advocacy as a threshold requirement for regulation”) with Bradley A. Smith, Letter to the Editor, 33 National J. 758 (Mar. 17, 2001) (Commissioner Smith responding that “Commissioner Sandstrom’s words may mislead the community into thinking that the commission has, in fact, made a determination that the new coordination regulations apply to issue advocacy. In fact, the regulations do not address the issue one way or the other.”).

⁷⁵ *See, e.g.*, The Brennan Center for Justice at NY School of Law, *Letter to FEC Re: Proposed Rules on General Public Communications Coordinated with Candidates: Comments of Brennan Center for Justice at NYU Law School* (February 22, 2000) <http://www.brennancenter.org/analysis/letter-fec-re-proposed-rules-general-public-communications-coordinated-candidates-comments> (“The standard fails to cover expenditures that are plainly not independent and that are of real value to campaigns. The test is thus inconsistent with the purposes of the Federal Election Campaign Act (“FECA”), which seeks to reduce the potential for real and perceived corruption.”);

⁷⁶ *See* BCRA, Pub. L. No. 107-155, Section 214(c)

⁷⁷ *Shays v. Federal Election Commission*, 337 F. Supp. 2d 28 (D. D.C. 2004), *aff’d* 414 F. 3d 76 (D.C. Cir. 2005).

⁷⁸ *Shays v. Federal Election Commission*, 508 F. Supp. 2d 10 (D. D.C. 2007), *aff’d* 528 F. 3d 914 (D.C. Cir. 2008).

reasons why defining coordination has proven such a difficult task, and why many of the criticisms aimed at the Federal Election Commission are incorrect.

B. Problems in Developing a Workable Rule

Recall that one reason *Buckley* allowed restraints on association going beyond the traditional definition of bribery was the difficulty of smoking out or proving bribery. Thus the prophylactic of limiting contributions was upheld. Presumably, the Court might have upheld a much broader prophylactic. For example, at the extreme, it might have upheld limits on all expenditures not as restrictions on expenditures, but on the presumption – arguably necessary because of the burden of proof issues – that all expenditures were the result, at some point, of quid pro quo bargaining. Obviously such a holding would have been inconsistent with the general protection of free speech. Instead, *Buckley* upheld targeted contributions limits because they were “focuse[d] precisely on the problem of large campaign contributions -- the narrow aspect of political association where the actuality and potential for corruption have been identified -- while leaving persons free to engage in independent political expression.”⁷⁹ “Significantly,” the Court added, “the Act’s contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues.”⁸⁰

In fact, in its sole foray into the question of what constitutes “coordination,” the Court made clear that coordination could not be presumed, but had to be proven through certain acts giving rising to the opportunity for corrupt bargaining. In *Colorado Republican Federal Campaign Committee v. Federal Election Commission* (“*Colorado I*”), the Court rejected an FEC regulation that presumed coordination in any spending by a political party in support of its candidates.⁸¹ In finding that the expenditure was independent of the candidate, the Court noted that the expenditure was not requested by the candidate and “that all relevant discussions took place at meetings attended only by Party staff.”⁸²

Beyond *Colorado I*, the Supreme Court has not undertaken any analysis of what type of conduct is sufficient or necessary to establish “coordination,” and lower court decisions have been sparse, with only two giving the issue much thought.

In *Clifton v. Federal Election Commission*, the Court of Appeals for the First Circuit rejected on statutory grounds an FEC regulation that prohibited any oral communication between a candidate/candidate’s campaign and an organization preparing a voter scorecard, listing, rating or analyzing the legislator’s votes.⁸³ The Court suggested that if the regulation were a valid interpretation of the statute, it

⁷⁹ 424 U.S. at 28.

⁸⁰ Id. at 28-29.

⁸¹ 518 U.S. 604 (1996).

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

⁸³ 114 F. 3d 1309 (1st Cir. 1998).

would raise serious constitutional questions under the "unconstitutional conditions" doctrine.⁸⁴ The Court believed that the scorecard producer, Maine Right to Life, could not be prevented from publishing a scorecard merely because it had discussed a candidate's position orally with the campaign, in order to assure a correct scorecard. The FEC regulation did allow Maine Right to Life to contact candidates in writing to ascertain their position on issue, but not orally. Of course, a written communication, lacking the give and take of oral exchange, might seem inadequate or at least cumbersome as a means for pinning down or understanding a candidate's position. But if we view coordination restrictions as restrictions on conduct raising the possibility of quid pro quo corruption, as I have suggested we should, then the FEC's regulation may be a very reasonable compromise, allowing the speaker to ascertain correct information but limiting the opportunity for the offending bargaining conduct.⁸⁵ The majority's position, then, becomes one of deciding how far the prophylactic can stretch.

Maine Right to Life is like many political players, both individuals and organizations. in that it is interested in both elections and in issues. Indeed, it is interested in the former because it is interested in the latter. Persons – individuals or organizations – that are active in issues will typically be active in elections as well. *Buckley* seems to anticipate that the conduct that would be limited by the FECA would have only a rather minimal, incidental effect on speech, since speakers could still make independent expenditures. But if the coordination rule is so broad as to demand that speakers make a choice between effective lobbying and communication with officeholders, and engaging in independent speech, then the law's effect on speech would be far from incidental. Organizations such as the NAACP, the NRA, the Sierra Club, and other fixtures of American political life would be forced to choose – lobbying, or campaign activity. Driving such a wedge between the two would not only limit large amounts of speech (or lobbying), but ignore *Buckley's* understanding that issues and elections are intimately bound.⁸⁶ Thus we are left with the notion that some consultation may be limited because it poses the threat of quid pro quo bargaining, but probably not all such consultation. But *Buckley* provides no guidance

⁸⁴ 114 F.3d at 1315, citing *Regan v. Taxation With Representation*, 461 U.S. 540 (1983). The doctrine of unconstitutional conditions is usually interpreted as holding that while the government may withhold a benefit altogether, if it chooses to grant the benefit it may not condition that benefit on the waiver of a constitutional right. Cass Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech and Abortion)*, 70 B. U. L. Rev. 593, 621 (1990). The *Clifton* Court extended it to the notion that the exercise of one constitutional right could not be made contingent on waiving another constitutional right. *Clifton* raises another interesting question in that, in publishing a scorecard such as that of Maine Right to Life, it will often not be clear which candidate, if either, gains a benefit. Yet such a scorecard would almost certainly meet the statutory definition for "expenditure," unless the coordination statute is interpreted to exclude communications based on some content safe harbor, a controversial subject in and of itself. See *Christian Coalition v. FEC*, 52 F. Supp. 2d at 86-89; Bopp & Abegg, *supra* n. 16; Scott Thomas & Jeffrey Bowman, *Coordinated Expenditure Limits: Can They be Saved?*, 45 Cath. U. L. Rev. 133 (1999).

⁸⁵ The dissent analyzed the case in much this manner. See 114 F.3d at 1317, 1320 (Bownes, C.J., *dissenting*).

⁸⁶ 424 U.S. at 42.

on where that line might be drawn, beyond its holding that direct contributions can be limited. *Clifton* offers us the only real guidance to date from a federal appellate court, and it is minimal guidance indeed.

Similarly, only one federal district court decision has examined coordination in depth. In *Federal Election Commission v. Christian Coalition*, the district court, rejected an insider trading theory of "coordination," in which any use of non-public information by a speaker constituted "coordination."⁸⁷ Instead, the Court held that an expenditure would be deemed "coordinated" only if the speaker acted at the campaign's suggestion or consent to the expenditure, if candidate or campaign control over the expenditure, or if there were "substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) 'volume' (e.g., number of copies of printed materials or frequency of media spots)."⁸⁸ The Court's opinion recognized the lack of guidance in *Buckley* but, noting that a broad prohibition on any contact would have substantial impact on speech, concluded, "I take from *Buckley* and its progeny the directive to tread carefully, ... the spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some consultations or coordination with a federal candidate."⁸⁹ The result is a decision that requires relatively intense consultation between a candidate and a spender to be considered coordination.

Applying the standard, the *Christian Coalition* Court argued that discussion over which issues to include in a voter guide or scorecard, and how those issues were phrased (the Court used the example "'homosexual rights' versus 'human rights'") would be coordination.⁹⁰ For conversations about a candidate's position on issues to be deemed "coordinated" – the issue discussed in *Clifton* as well – "the conversation ... must go well beyond inquiry into negotiation."⁹¹ Similarly, "discussions of the timing, location of distribution, or volume of voter guide distribution also must transgress mere inquiry."⁹² The Court applied similar standards to determining if a speaker's consultations on its "get-out-the-vote" efforts rose to the level of prohibited coordination.⁹³ Tough in theory, the Court's standard proved even tougher when applied to the particular facts of the case. Recognizing substantial contact between the Christian Coalition and various campaigns, the Court

⁸⁷ 52 F. Supp. 2d 45, 90-91.

⁸⁸ Id. at 92.

⁸⁹ Id. at 91.

⁹⁰ Id. at 92-93.

⁹¹ Id. at 93. "For example, if the [speaker's] interpretation of the candidate's prior statements or votes would lead it to say he "opposes" the issue, and the campaign tries to persuade the corporation to use "supports" on the guide, that is coordination." Id.

⁹² Id. "A [speaker's] mere announcement to the campaign that it plans to distribute thousands of voter guides in select churches on the Sunday before election day, even if that information is not yet public, is not enough to be coordination. Coordination requires some to-and-fro between corporation and campaign on these subjects." Id.

⁹³ Id.

nonetheless found no legal coordination absent "discussion and negotiation" sufficient to establish the speaker and the candidate or campaign as "partner[s]" or "joint venture[r]s."⁹⁴

The *Christian Coalition* ruling seemed to require consultation that went beyond creating the mere "appearance of corruption" - the opportunity for corrupt quid pro quo bargaining - to requiring conduct that would actually be corrupt, or at least create a very heightened appearance of corruption. Whether the *Buckley* Court, had it considered the issue, would have required such a high standard is not certain. But the approach taken in *Christian Coalition* fits quite comfortably into the *Buckley* paradigm. The Court implicitly rejected the idea that the Coalition's effort to instill a sense of gratitude in the various campaigns it assisted constituted corruption, or that the mere efforts to make one's spending as effective as possible converted that spending from independent to coordinated.⁹⁵

The Court's interpretation demonstrates a practical approach to elections in which it is to be anticipated that those citizens and groups most likely to be involved in campaigns will also have issues that they will wish to discuss with officeholders between campaigns, and further, that they will therefore have ample opportunities to become acquainted with officeholders and share ideas and advice. In fact, the FEC sought to include as evidence long ago acquaintances, social interactions, friendships, and passing conversations to prove coordination.⁹⁶ To have adopted a broad prophylactic prohibiting any conduct that might create an opportunity for quid pro quo bargaining - that is, most or any contact between an eventual speaker and the candidate or campaign - would have had the type of broad chilling effect on speech that *Buckley* sought to avoid.⁹⁷ *Buckley* was substantially based on the idea that some limits were acceptable because the speaker retained ample substitutes for political activity.⁹⁸ The broad prophylactic approach toward coordination urged by the FEC would have effectively stripped those substitutes away for the most politically involved citizens. The Supreme Court's decision in *Colorado Republican I* had made clear that the Court believes that a spender may make contributions and coordinated expenditures, and separately make independent expenditures.⁹⁹ Or, to put it another way, the fact that there has been some contact with the candidate or campaign does not deprive the speaker of all ability to undertake substantial activities independently of the campaign.

⁹⁴ Id at 92, 95.

⁹⁵ See Id. at 93-95. "It may have been recognized by both the campaign and the Coalition that the targeted distribution of its voter guides would assist the ... campaign." Id. at 95

⁹⁶ See Id. at 66-81.

⁹⁷ See Joel M. Gora, *Campaign Finance Reform: Still Searching for a Better Way*, 6 J. L. & Pol'y 137, 167 (1997)

⁹⁸ Aziz L. Huq, *Preserving Political Speech From Ourselves and Others*, 112 Colum. L. Rev. Sidebar 16, 28 (2012).

⁹⁹ *McConnell v. Federal Election Commission*, 540 U.S. 93, 219 (2003), decided a few years later, specifically so held. *McConnell* probably marks the high-water point of judicial deference to regulation of campaign finance, so its decision on this point is made all the more emphatic.

The FEC responded to the *Christian Coalition* by adopting new regulations based on the decision’s “joint venture” criteria.¹⁰⁰ “Reform” advocates, viewing those regulations as too confining, sought a broader definition as part of the Bipartisan Campaign Reform Act of 2002, but were unable to agree upon a different definition. They settled merely for congressional repeal of those regulations and an order that the FEC develop new ones, with a particular emphasis on the use of third party common vendors and former employees to coordinate activity.¹⁰¹

Therefore, the FEC’s post-BCRA rule on the conduct necessary to make an otherwise independent expenditure “coordinated” did away with the joint venture standard adopted after *Christian Coalition*. It specified instead that “agreement or formal collaboration” was not necessary to find coordination, but it continued to require “substantial discussions about the communication” was necessary to trigger a coordination finding.¹⁰² While somewhat less protective of associational conduct than the *Christian Coalition* standard, this rule fits within a reasonable interpretation of *Buckley* in that it addresses situations in which the parties are in communication over the particular expenditure. Such consultation presents an opportunity for quid pro quo bargaining similar to that that might occur in discussing a direct contribution. But the rule still allows substantial leeway for political association that does not collaterally limit speech rights.¹⁰³

One element of the post-BCRA rule, however, raises more serious questions about the conduct necessary to trigger restrictions on the ability to make expenditures.¹⁰⁴

¹⁰⁰ 65 Fed. Reg. 76146; 11 C.F.R. § 100.23 (2001)

¹⁰¹ Pub. L. 107-155 (2002). BCRA specifically provided that:

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

(1) payments for the republication of campaign materials; (2) payments for the use of a common vendor;

(3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and

(4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.

¹⁰² See *Shays v. Federal Election Commission*, 528 F. 3d 914, 920 (D.C. Cir. 2008); 11 C.F.R. § 109.21(d).

¹⁰³ It is an interesting point whether the FEC’s 2003 rule, passed under the mandate of BCRA, was defensible under *Christian Coalition*. *Christian Coalition* was a constitutional decision, and binding on the FEC, which had not appealed. See *Christian Coalition*, 52 F. Supp. 2d at 90-92. However, the Court of Appeals decisions in *Shays I & III* overruled *Christian Coalition sub silentio* before this claim was ever brought. See *Shays III*, 528 F. 3d 914.

¹⁰⁴ My focus in this article is on conduct only. The FEC also included in its post-BCRA regulations “content” standards, which aimed to remove certain types of speech from the scope of coordination. See 11 C.F.R. 109.21 (c). Effectively, content standards aim to classify particular types of speech as outside the definition of “contribution.” Content restrictions recognize that those who speak on candidate elections will frequently wish to consult with officeholders, and speak publicly, on issues. The goal is to protect speakers from the chilling effect of FEC investigations by suggesting that certain types of speech will be defined as non-electoral regardless of the level of consultation. An example might be an ad campaign by supporters of the Affordable Care Act, Pub. L. 111-148 (2010), often referred to as “Obamacare,” urging voters to “support President Obama’s effort to bring health

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

In *Shays v. Federal Election Commission (Shays III)*, the Court of Appeals struck the 120 day limitation down as arbitrary and capricious under the Administrative Procedures Act.¹⁰⁵ The Court's analysis was cursory, holding that the FEC had not explained why a vendor or former employee's knowledge lost value after 120 days away from the candidate campaign.¹⁰⁶ Unlike the requirement that there be no "agreement or formal collaboration," however, the specific limitation on the use of vendors and former employees is indefensible under *Buckley*. The theory needed to support such a prophylactic is that common vendors and former employees serve as go-betweens or agents, representing the parties in the type of quid pro quo bargaining *Buckley* held could be limited. In fact, there is no evidence that vendors or former employees are particularly utilized as agents to negotiate quid pro quo arrangements. To the extent they might be, actions by agents are already included in determining what conduct is prohibited for coordination purposes.¹⁰⁷ A bribe is a bribe whether negotiated directly by the parties or by agents representing their interests, so there is no reason to single out vendors and former employees for special treatment. Indeed, vendors are particularly poor choices for such a role, given that campaign disbursements to a vendor must be disclosed pursuant to the Act.¹⁰⁸ The trail to the vendor is immediately obvious. A former employee of the candidate currently in the open employ of the independent speaker would seem only a marginally less disastrous choice as the go-between for a corrupt bargain.

care to all Americans." Such groups might have met with the President and discussed the value of such a campaign to passing the legislation. The FEC's content standards were struck down by the courts as arbitrary and capricious under the Administrative Procedures Act, *see Shays III*, 528 F. 3d at 920-28. The reviewing court did accept that some content standard would be an acceptable interpretation of the Act. *Id.* at 924. For a discussion of the costs and chilling effects that coordination investigations can create, *see Bopp & Abegg, supra* n. 16.

¹⁰⁵ 528 F. 3d 914 (2008).

¹⁰⁶ 528 F. 3d at 928-29.

¹⁰⁷ 11 C.F.R. 109.20(a).

¹⁰⁸ *See* 2 U.S.C. § 434.

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

A per se restrictions on common vendors and former employees can only be justified by holding that a speaker may not employ or contract with an individual who is also currently an agent or employee of the candidate, or who has been one in the very recent past, the idea being that it creates those opportunities for quid pro quo bargaining that concerned the *Buckley* court. Whether such a blanket prohibition on the use of current agents would go too far in restricting conduct under *Buckley* might be debated. But the idea that speaker may not hire or contract with a party who was at any previous time an agent or former employee of a campaign or candidate goes well beyond the type of prophylactic restraint on conduct supported by *Buckley*.¹⁰⁹

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

In summary, *Buckley's* rationale might, in theory, allow for very broad prophylactic measures aimed at cutting off any possibility of quid pro quo bargaining between candidates and spenders. In practice, those few courts that have considered the issue have concluded, correctly in my view, that such broad readings would be incompatible with *Buckley*, effectively moving the bar far from a solution that *Buckley* had emphasized was "focus[ed] precisely on the problem ... while leaving persons free to engage in independent political expression."¹¹⁰ The precise boundary lines may be debated, but restrictions on coordinated conduct must be tied to a reasonable concern of quid pro quo bargaining, and must not extend so far as to create broad restrictions on independent speech by speakers who are not, in fact, engaged in such bargaining.

C. Super PACs and the Problems With "Common Sense" Coordination

The current interest in coordination has been driven by the arrival on the scene of so-called "Super PACs." The ability of Super PACs to raise large sums quickly has made them a preferred device for interest groups, political operatives, and simply concerned citizens who want to get into a race quickly with significant impact.¹¹¹

¹⁰⁹ The FEC's 120 day rule might have been justified by arguing that such a public "cooling off" period removed further any "appearance of corruption." However, the "value" of the information known to such a vendor or former employee is irrelevant to the analysis.

¹¹⁰ 424 U.S. at 28.

¹¹¹ In fact, nothing in the law prohibits a traditional PAC from operating to support a single-candidate. However, the restrictions on fund raising – no individual may contribute more than \$5000 to a traditional PAC – had kept PACs largely out of the independent expenditure field, preferring to

What has particularly shaped concerns about Super PAC coordination, however, is the rise of single candidate Super PACs, a PAC that is dedicated to offering independent support to only one candidate.

These single-candidate Super PACs have, not surprisingly, drawn their support and often their staff from various associates of the candidate. For example, during the 2012 Presidential election, a Super PAC that supported Rick Perry was managed by his former campaign aides.¹¹² Entitled "Make Us Great Again," the Super PAC's sole purpose was to promote Rick Perry's candidacy for President. "Making Us Great Again" was formed by former staff members of Governor Perry, both from his Gubernatorial and campaign staffs. Supporters of the PAC were also substantial donors to Mr. Perry's campaign for the Republican nomination for presidency.¹¹³ Another candidate in the 2012 presidential election, Rick Santorum, enjoyed the support of a Super PAC heavily funded by a prominent supporter of and donor to Santorum's campaign, Foster Friess.¹¹⁴ After Santorum ended his bid for the Republican nomination for President, he took on an active role in the Super PAC, using it as a vehicle for his future political aspirations.¹¹⁵ Richard Briffault offers a typical summary indictment:

The single-candidate Super PACs were frequently organized and directed by former staffers of that candidate. For example, [pro-Mitt Romney Super PAC] Restore Our Future was founded on the eve of the 2011-12 election cycle by several former Romney aides, including treasurer Charles R. Spies, general counsel to Romney's unsuccessful run for the 2008 Republican presidential nomination, and board member Carl Forti, the 2008 Romney campaign's political director; [Pro-President Obama Super PAC] Priorities USA Action was set up by two of Obama's former White House aides, Bill Burton and Sean Sweeny; Winning Our Future [supporting Newt Gingrich] was founded by Becky Burkett, who also worked for American Solutions

make direct contributions to candidates. *Cf.* Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480 (1985). Additionally, prior to the blessing given to independent expenditure committees, as Super PACs are known officially, by the U.S. Court of Appeals for the D.C. Circuit in *SpeechNow.org*, 559 F.3d 686 (D.C. Cir. 2010), it is probably fair to say that a single-candidate PAC limiting its activity to independent expenditures in support of a single candidate would have drawn the regulatory eye of the FEC as probable coordination.

¹¹² See Michael Isikoff, "Independent" super PAC heavily backs Rick Perry, NBC NEWS (Aug. 17, 2011), http://www.nbcnews.com/id/44177667/ns/politics-decision_2012/t/independent-maybe-super-pac-heavily-backs-perry/#.Ub-cSud5YY

¹¹³ Ross Ramsey, *If Their Names Aren't on the Campaign Reports, Take a Look at the Super PAC*, NY TIMES (Feb. 4, 2012), <http://www.nytimes.com/2012/02/05/us/politics/to-find-some-rick-perry-supporters-look-at-super-pac.html>

¹¹⁴ Shushannah Walshe, *Santorum and His Super PAC: Just Friends, Not Coordination*, ABC NEWS (Feb. 6, 2012, 8:31 PM), <http://abcnews.go.com/blogs/politics/2012/02/santorum-and-his-super-pac-just-friends-not-coordination/>

¹¹⁵ Alexander Burns, *Santorum's New Platform: The Red White and Blue Fund*, POLITICO (May 3, 2012, 5:16 PM), <http://www.politico.com/blogs/burns-haberman/2012/05/santorums-new-platform-the-red-white-and-blue-fund-122409.html>

for Winning the Future, a group Gingrich used to run, and Rick Tyler, a senior advisor for the Super PAC, had also worked as a press secretary and spokesman for Gingrich. In many cases, the candidate's campaign committee and the supportive Super PAC relied on the same campaign vendors, such as pollsters, media buyers, television ad producers, and fundraisers, as the candidates they aided. Candidates raised funds for the Super PACs backing them, and representatives of the candidates met with the staffs of and donors to their supportive Super PACs. Republican presidential contender Rick Perry even used footage from his Super PAC's ad for his own campaign ads, and Foster Friess, the principal donor to Santorum's Super PAC, appeared on stage with Santorum as the two celebrated Santorum's victory in the Missouri presidential primary.¹¹⁶

Professor Briffault undoubtedly speaks for many when he suggests that "such contacts establish that the Committee is actually operating on behalf of the candidate."¹¹⁷ Under a "common sense" definition of "coordination," such reasoning might do.

But to say that a committee is operating on "behalf" of a candidate leaves a slippery target. To operate "on behalf" of someone may mean "as a representative of," but it more commonly means simply "in the interest of."¹¹⁸ All independent expenditures in campaigns are, by definition, undertaken to support or oppose a candidate, and thus can be said to be on the behalf of that candidate (or his opponent). But that is a very different meaning from suggesting that they are undertaken as an agent or representative of a candidate. In the former case, the candidate may feel gratitude,¹¹⁹ but *Buckley* and its legitimate offspring reject the idea that gratitude for political support is corrupting in a democracy. There must be more: the opportunity for quid pro quo bargaining. Absent actual coordination – that is, actual discussions and dealings between the parties – that crucial link is missing.

It cannot be said that the mere presence of the candidate's former associates, staff, or current supporters working with a Super PAC creates an opportunity for bargaining the quid pro quo. To use Professor Briffault's example, Mr. Spies working for Restore Our Future is no more bargaining with the candidate or his agents than

¹¹⁶ Briffault, *Coordination Reconsidered*, *supra* n. 16 at 90-91 (citations omitted).

¹¹⁷ *Id.* at 93.

¹¹⁸ Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/behalf> (last accessed June 28, 2013). *See also* The Free Dictionary (Farlex) <http://www.thefreedictionary.com/behalf>, (last accessed June 28, 2013) (suggesting primary meaning "for the benefit of," and secondary meaning "as the agent of"); Dictionary.com, <http://dictionary.reference.com/browse/behalf> (last accessed June 28, 2013).

¹¹⁹ Briffault, *Coordination Reconsidered*, *supra* n. 16 at 92 ("By giving to a single-candidate Super PAC, these donors were able to provide financial support to their preferred candidates at many times the legal limit and, presumably, enjoy greatly increased gratitude from the candidates who benefited from the Super PAC's spending.")

Mr. Spies working for a different Super PAC that spends nothing to support Mr. Romney. No bargaining opportunities arise unless he has contact with the campaign or candidate post-Super PAC employment. It is his present conduct, not his past position or conduct, that can be regulated in the interest of preventing corruption. It is possible, of course, that a candidate may issue instructions to a former aide – “please establish a Super PAC and make expenditures on my behalf. You will be rewarded with government favors and subsidies for your clients.” And one might find such a prophylactic tempting. But the candidate can equally do that with someone he has never met, or at least someone who has never worked closely with the candidate. While some leeway may be allowed for “the appearance of corruption,” the system cannot operate on the assumption that all prior contact with a candidate is suspicious, and therefore disqualifies a would be speaker from the right to make expenditures. Such a presumption would allow the exception granted by *Buckley* to regulated coordinated activity to swallow the rule protecting independent speech. It would be, in the words of one commentator, an “impermissible kind of gag order by association.”¹²⁰

As a practical matter, most independent speech will come from persons who have some contact with the candidate, if only having contributed to the campaign. Those who spend the most will frequently be the most enthusiastic supporters, and thus those most likely to be close to the candidate. And because the universe of persons with the requisite skills and desire to operate a Super PAC is relatively small and almost entirely limited to those active in political life, most Super PACs (like most ordinary PACs) will have a variety of social, political, and legal connections to the candidates supported. *Of course* Super PACs will be started and run by friends, associates, and former staffers of candidates; *of course* they will be funded by supporters, who are likely to have also donated to the campaign, as clearly permitted by the Supreme Court.¹²¹ *Of course* Super PACs will use well-known vendors, and those vendors will likely serve other like-minded clients; *of course* Super PACs will attempt to harmonize their strategy with that of their favored candidates, for maximum effect. This is what they do. This is what *Buckley* specifically protected in striking limits on expenditures.

It is particularly discouraging, then, when legally trained experts such as Professor Langvardt casually announce that “noncoordination is a joke.”¹²² Professors Langvardt and Briffault do not argue, I take it, that the men and women in their examples are actually meeting with the candidate or holding discussion or even communicating in writing with the candidate, all measures that might provide an opportunity to bargain expenditures for official favors. Indeed, the whole point of their argument seems to be that Super PACs don’t have to communicate with

¹²⁰ Joel M. Gora, *Campaign Finance Reform: Still Searching for a Better Way*, 6 J. L. & Pol’y 137, 167 (1997).

¹²¹ See *supra* n. 16 and text.

¹²² See *supra* n. 16 and text.

candidates or campaigns in order to have influence and create gratitude.¹²³ But it is the meeting and discussion, not the mere gratitude of the candidate, that provides the opportunity for the quid pro quo. Broad statements suggesting that coordination rules are being violated are out-of-context uses of the legal term that, if followed, would prohibit speakers from attempting to make their speech as effective as possible,¹²⁴ and in many cases from speaking at all. It may be that *Buckley's* decision on expenditures, and particularly independent expenditures, should be reconsidered. Certainly that has been argued ad nauseum.¹²⁵ But “coordination” should not become a back-door means overruling *Buckley*.

Professor Briffault is correct when he argues that the FEC’s coordination regulations are based on “an older model of independent committee,”¹²⁶ and there may be deserved tweaks to FEC regulations to update those regulations to new political tactics and realities. For example, the FEC allows candidates to personally appeal for contributions of up to \$5000 for Super PACs. When thinking of PACs that support many candidates, allowing officeholders and candidates to raise money for PACs seemed like an appropriate way to accommodate the broader political interests of a politician in the election of other candidates and the support of issues. Since no one could contribute more than \$5000 to the PAC, and since the PACs receipts would be spread over many recipients in regulated campaign contributions, such a rule posed little threat of corrupt activity, in accord with *Buckley's* concern about the quid pro quo possibilities in large dollar fundraising. To have the candidate solicit funds that he knows will be spent to support his election, however, raises the same type of quid pro quo bargaining opportunities that constitute the “appearance of corruption” that concerned the *Buckley* court.¹²⁷

But many of the broader suggestions bandied about – such as treating expenditures as coordinated if the Super PAC focuses its expenditures on one or a small number of candidates and is staffed by individuals who previously worked for the candidate or the candidate’s campaign, or has been publicly endorsed by the candidate,¹²⁸

¹²³ See Briffault, *Coordination Reconsidered*, *supra* n. 16 at 94.

¹²⁴ McCoy, *supra* n. 16 at 1053.

¹²⁵ See, e.g. Richard Briffault, *The 527 Problem . . . And The Buckley Problem*, 73 Geo. Wash. L. Rev. 949, 996 (2005) (Buckley falls short as a basis for constitutional doctrine because it frames the constitutionality of campaign finance regulation largely in terms of the implications for free speech, and it found in the danger of corruption the principal constitutional basis for limiting campaign speech. This is much too limited a view of the concerns at stake in campaign funding.”); see also D. Bruce La Pierre, *Raising a New First Amendment Hurdle for Campaign Finance Reform*, 76 Wash. U. L. Q. 217, 225 (1998) (“In short, the Court permitted Congress to limit political contributions without any evidence that contributions in any particular amounts in excess of \$1000 caused the harms, corruption, or the appearance of corruption, that inspired the restriction.”); see also Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 Colum. L. Rev. 1390, 1400 (1994) (“Insofar as Buckley rejects political equality as a legitimate constitutional goal, it should be overruled.”).

¹²⁶ Briffault, *Coordination Reconsidered*, *supra* n. 16 at 92.

¹²⁷ Whether a suitable definition could be developed, I am less certain.

¹²⁸ See e.g. Briffault, *Coordination Reconsidered*, *supra* n. 16 at 97. Professor Briffault is one of the few to actually make thoughtful, concrete suggestions for changing coordination rules.

cannot be sustained. Such activity does not frustrate *Buckley's* rule on expenditures, but fulfills it.

V. CONCLUSION

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

Super PACs that actually confer with candidates and their campaigns violate the law. But there is no evidence that this is occurring on a wide scale in the case of Super PACs. We should expect Super PACs to have ties to candidates and campaigns – the absence of such ties is not the type of independence that Court demands. Super PACs that do not confer with candidates and campaigns are not coordinating, even if they have many connections and relationships with those running for office.

It may be that *Buckley* is wrong about the constitutional permissibility and the benefits of limiting expenditures. But independent expenditures by Super PACs are no more threatening to democracy than independent expenditures were before the Super PAC revolution of *Citizens United* and *SpeechNow.org*.¹²⁹ Coordination rules should not become an attempt to end run *Buckley's* ruling on expenditures.

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¹²⁹ See Michael Luo and Jeff Zeleny, *Many Big Donors to Democrats Cut Support*, N. Y. Times, Sep. 29, 2010, <http://www.nytimes.com/2010/09/30/us/politics/30dems.html> (noting independent spending of \$20 million each by George Soros and Peter Lewis in the 2004 presidential election).