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Abstract

This symposium piece tackles an important issue in campaign finance: the relationship between coordinated expenditures and corruption. Only one form of corruption, the quid pro quo, is constitutionally significant, and it has three logical elements: (1) an actor, such as an individual or corporation, conveys value to a politician, (2) the politician conveys value to the actor, and (3) a bargain links the two. Campaign finance regulations aim to deter quid pro quos by impeding the first or third element. Limits on contributions, for example, fight corruption by capping the value an actor can convey to a politician. What about limits on coordinated expenditures? By preventing coordination on large expenditures like television ads, the law turns very useful support into less useful support, reducing the value an actor can convey. But actors can surmount this with more money: $1 million spent on less useful ads can convey a lot of value, often more than smaller amounts spent on very useful ads or contributions. Limits on coordination may also inhibit bargaining, the third element of a quid pro quo, but again, sophisticated actors can surmount this: they can bargain without discussing the substance of any expenditures. So coordination regulations cannot deter much corruption, at least not when wealthy and sophisticated actors are involved, the very actors who cause the most concern. Consequently, coordination regulations may violate the Constitution. This is not because coordinated expenditures do not corrupt but because the regulations do not deter. Solving this problem requires more than a broader set of regulations. It requires confronting a fallacy at the heart of campaign finance: the belief that coordination relates in any operational way to corruption.

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Introduction

In *Citizens United v. Federal Election Commission*,[1] the Supreme Court concluded that independent political expenditures do not cause quid pro quo corruption.[2] Because preventing such corruption is the only permissible justification for restricting money in politics,[3] the Court held that the government cannot limit independent expenditures.[4] The case invalidated many rules on political spending, including spending by corporations on ads supporting candidates, and prompted sharp criticism. Politicians, scholars, and others worried that the decision would inject enormous sums into American politics.[5] As President Obama declared, the Court "open[ed] the floodgates for special interests . . . to spend without limit in our elections."[6]

Since the decision, and beneath the cacophonous debate about money in politics, a more technical, legal dispute has simmered. The government cannot limit independent political expenditures, but it can (and does) limit non-independent expenditures—known as coordinated expenditures—because those, in the Court's view, *can* cause corruption.

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[1] 558 U.S. 310 (2010).
[2] *Citizens United*, 558 U.S. at 357 ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.").
[3] *See Id.* at 359 ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption . . . , that interest was limited to *quid pro quo* corruption."); McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1441 (2014) ("Any regulation must instead target what we have called '*quid pro quo*' corruption or its appearance.").
[4] *See Citizens United*, 558 U.S. at 356-61.
[5] *See, e.g.*, *Id.* at 454 ("Corporations . . . have vastly more money with which to try to buy access and votes.") (Stevens, J., dissenting); Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 30 (2012) ("When . . . independent expenditures can be made without restriction in very large amounts, the risk of corruption may even be greater than the risk from capped contributions."); Trevor Potter & Bryson B. Morgan, *Campaign Finance: Remedies Beyond the Court*, 27 DEMOCRACY 38, 38 (Winter 2013) ("The immediate impact of *Citizens United* and subsequent cases was a dramatic increase in the amount that outside groups . . . could raise and spend in federal elections."); Associated Press, *John McCain Blasts Citizens United Ruling*, HUFFINGTON POST (Jan. 12, 2012, 8:35 AM) (John McCain: "I predict to you that there will be huge scandals associated with this huge flood of money."), *available at* http://www.huffingtonpost.com/2012/01/12/john-mccain-citizens-united-super-pac_n_1201425.html.
[6] President Barack Obama, *Remarks by the President in State of the Union Address*, The White House (Jan. 27, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-presidentstate-union-address.

This raises a question: how to distinguish the two?[7] Federal law draws the line by asking if the politician directed the expenditure, either by requesting it or dictating its content.[8] If the answer is yes, then the expenditure was coordinated.

Critics claim that this approach opens a loophole.[9] To illustrate, suppose the owner of an oil company gives money to a super PAC run by a politician's friend. The super PAC then uses the money to air television ads supporting the politician. Neither the company owner nor the friend consulted the politician, and so the politician did not direct the expenditure, and that makes the expenditure independent. But because the friend knows the politician and his electoral strategy, the expenditure benefits the politician as much as a coordinated ad—and can corrupt like one (think favorable oil regulations). This means politicians and their benefactors can coordinate as a matter of

[7] *See* Daniel P. Tokaji & Renata E. B. Strause, *The New Soft Money*, The Ohio State University Moritz College of Law, 63 (2014) ("Without a doubt, the questions about the current landscape that prompted the most animated responses concerned coordination between campaigns and outside groups. . . . The challenge in this critical area of campaign finance law is to grapple with the gap between the line the law draws and the line outside observers expect it to draw."). *See also* Eliza Newlin Carney, *The Citizens United Ruling In The Real World*, NAT'L J. (Jan. 25, 2010) ("The biggest unanswered question is what defines coordination between a corporation, union or other political player and a candidate."), http://www.nationaljournal.com/columns/rules-of-the-game/the-citizens-united-ruling-in-the-real-world-20100125.

[8] We discuss federal law in detail *infra* Part I.B.

[9] *See, e.g.*, Sam Stein, *Obama Will Appear At Two Super PAC Events*, HUFFINGTON POST (Mar. 14, 2014, 11:59 AM) (quoting David Donnelly, executive director of the Public Campaign Action Fund: "Right now our campaign finance system is more loophole than law, and nowhere is that more apparent than what constitutes 'coordination . . . .'"), http://www.huffingtonpost.com/2014/03/13/obama-super-pacs_n_4958485.html; Brief of United States Senators Sheldon Whitehouse & John McCain as Amici Curiae in Support of Respondents at 12, Am. Tradition P'ship v. Bullock, 132 S. Ct. 2490 (2012) (No. 11-1179) ("[S]uper PACs *are* coordinating with campaigns, and they are using methods the Court did not contemplate in its *Citizens United* decision."); *see also* Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 93-94 (May 2, 2013) (Observing that coordination rules "reflect naïve thinking about the way a candidate . . . and a supportive organization can coordinate" given the modern ease of communicating ideas through the press and social media); Richard Posner, *Unlimited Campaign Spending – A Good Thing?*, THE BECKER-POSNER BLOG (Apr. 8, 2012) (pointing out that allies of a candidate can run a Super PAC such that they can figure out what will be most helpful to the candidate "without even talking to the candidate or to party officials"), http://www.becker-posner-blog.com/2012/04/unlimited-campaign-spendinga-good-thing-posner.html.

fact without coordinating as a matter of law. As one observer put it, "noncoordination is a joke."[10]

Prominent voices have called for reform, advocating new and stricter approaches to regulating coordination.[11] Their proposals assume that the concept of coordination makes sense, it just needs broader reach. In other words, they accept that "whole, total, true" independence of expenditures and candidates would stymie corruption, just as the Supreme Court has said,[12] but they argue that existing coordination rules fail to achieve that level of independence.

We believe that this reasoning is faulty. Quid pro quo corruption has three necessary elements: (1) a conveyance of value from an individual to a politician, (2) a conveyance of value from a politician to an individual, and (3) a bargain linking the two. By putting distance between individuals and politicians, coordination rules make it harder for the former to determine what would be very valuable to the latter (perhaps a television ad during primetime) and what would be only a little bit valuable (perhaps a radio spot about the environment). This distance decreases the effectiveness of individuals' expenditures (they may run the radio spot), which reduces the value conveyed. In theory, this should deter corruption by stifling the first element of quid pro quo corruption – the value conveyed to the politician. In practice, however, deterrence is limited because one can offset a drop in effectiveness with more money. Spending $1

[10] Kyle Langvardt, *The Sorry Case for* Citizens United*: Remarks at the 2012 Charleston Law Review and Riley Institute of Law and Society Symposium*, 6 CHARLESTON L. REV. 569, 574 (Spring, 2012); *see also* Potter & Morgan, *supra* note 5, at 40 ("FEC regulations that govern whether a group is considered to "coordinate" its expenditures with a candidate or political party are so permissive that they have proven more apt as a source of comedic inspiration than anything else."); The Editorial Board, *The Line at the 'Super PAC' Trough*, N.Y. TIMES (Feb. 15, 2014) (calling single-candidate super PACs "a form of legalized bribery" and calling the prohibition on their contact with candidates "a joke"), http://www.nytimes.com/2014/02/16/opinion/sunday/the-line-at-the-super-pac-trough.html.

[11] *See infra* Part I.C.

[12] *See* Potter & Morgan, *supra* note 5, at 40.

million on a somewhat effective ad can convey a lot of value, more than a smaller amount spent on a very effective ad. Alternatively, coordination rules can, by putting distance between individuals and politicians, make it harder for them to communicate and negotiate. In theory, this should deter corruption by stifling the third element of quid pro quo corruption – the bargain. But again, this fails in practice. Coordination rules do not target bargaining effectively, and it is not clear that they could.

These observations lead us to a tentative conclusion: coordination rules simply cannot deter much corruption, at least not when wealthy and sophisticated actors—the very actors who cause the most concern—are involved. As a result, coordination rules may violate the Constitution. This is not because coordinated expenditures do not corrupt but because the coordination rules do not deter. They interfere with political speech without combating much corruption.

This problem cannot be resolved with a broader set of regulations, or even with a broader definition of corruption. Instead, it requires confronting a fallacy of the Supreme Court's making at the heart of campaign finance: the belief that coordination relates in an operational way to corruption.

I. Background: The Coordination Controversy

Corruption comes in many forms,[13] but only one, according to today's Supreme Court, has constitutional significance: the quid pro quo.[14] The quid pro quo—in a typical case, money for votes—has a long history in American politics. George

[13] *See generally*, Yasmin Dawood, *Classifying Corruption*, 9 DUKE J. CONST. L. & PUB. POL'Y 103 (2014).
[14] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 359 (2010) ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption."); McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1441 (2014) ("Any regulation must instead target what we have called '*quid pro quo*' corruption or its appearance.").

Washington bought votes with liquor,[15] and Spiro Agnew accepted hundreds of thousands of dollars in bribes.[16] More recently, Congressman Randy Cunningham traded defense contracts for a Rolls Royce,[17] and the FBI found $90,000 of dirty money in Congressman William Jefferson's freezer.[18]

Federal bribery law prohibits quid pro quo corruption,[19] but many consider that insufficient on its own because the crime is difficult to prove. As the Supreme Court wrote in *Buckley*, bribery laws "deal with only the most blatant and specific attempts of those with money to influence governmental action."[20] Congress has responded to this problem with campaign finance regulations, which serve as "prophylactic controls," meaning they do not punish corruption ex post but aim to prevent it ex ante.[21] They do so by limiting the flow of corruptive money to politicians. Of course, they also limit the flow of *un*-corruptive money, meaning they prevent some lawful political speech.[22] The Court in *Citizens United* gestured to the tradeoff when it stated that contribution limits

[15] *See* TRACY CAMPBELL, DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD, AN AMERICAN POLITICAL TRADITION—1742-2004 5 (2005).
[16] *The Ten Most Corrupt Politicians in U.S. History*, REALCLEARPOLITICS (Jan. 28, 2009), http://www.realclearpolitics.com/lists/most_corrupt_politicians/spiro-agnew.html.
[17] *See* Charles R. Babcock & Jonathan Weisman, *Congressman Admits Taking Bribes, Resigns*, WASH. POST (Nov. 29, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/11/28/AR2005112801827.html.
[18] *See* John Bresnahan, *William Jefferson convicted in freezer cash case*, POLITICO (Aug. 5, 2009), http://www.politico.com/news/stories/0809/25850.html.
[19] *See* 18 U.S.C.A. § 201(b) (West) (The statute applies to whoever "directly or indirectly, corruptly gives, offers or promises anything of value" to a public official with intent to influence an official act, or to a public official who "directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value" in return for being influenced regarding an official act.).
[20] Buckley v. Valeo, 424 U.S. 1, 28 (1976).
[21] *See, e.g.*, McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1458 (2014) ("It is worth keeping in mind that the *base [contribution] limits* themselves are a prophylactic measure.") (emphasis in original). The prophylactic nature of the regulations may make these types of offenses easier to prove by describing them in relatively broad terms.
[22] Of the speech that gets limited, the relative shares of corruptive and un-corruptive speech depend, of course, on one's definition of corruption.

"are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements."[23]

Recognizing that Congress designs campaign finance regulations to act as prophylactics sharpens the analysis. Before explaining why, we examine some other legal details.

A. Basics of Campaign Finance

The law distinguishes contributions and expenditures. In brief, a contribution refers to money given to a campaign,[24] while an expenditure refers to other money spent to influence an election.[25] The law divides expenditures into two types, independent and coordinated. The next section examines this distinction, but for now an example will suffice. If an individual runs a newspaper ad without any input from the politician it supports, then that individual makes an independent expenditure. If an individual runs the ad at the request of the politician, or if the politician dictates the ad's content, then the individual makes a coordinated expenditure.

Congress has long imposed limits on both contributions and expenditures,[26] and litigants have long challenged those limits on constitutional grounds.[27] The government

[23] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 357 (2010).
[24] *See* 52 U.S.C.A. § 30101(8) (West); 11 C.F.R. § 100.51–100.57; Federal Election Commission, *Citizens' Guide*, at 4 (updated April 2014) *available at* http://www.fec.gov/pages/brochures/citizens_guide_brochure.pdf.
[25] *See* 52 U.S.C.A. § 30101(9) (West); 11 C.F.R. § 100.110–100.114 (West); Kang, *supra* note 5, at 5 n.11 (2012). To illustrate, donating $2,000 to a candidate would constitute a contribution, and spending $2,000 on a newspaper ad supporting the candidate would constitute an expenditure.
[26] *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1444-45 (reciting the *Buckley* Court's evaluation of "the constitutionality of the original contribution and expenditure limits set forth in FECA").
[27] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976). The Supreme Court sympathizes with challengers' claims, stating in *Buckley*: "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Id.* at 14.

has defended the limits by arguing that it has an interest in combating corruption.[28] In general, the Supreme Court has sided with the government on contributions[29] and coordinated expenditures[30] and the challengers on independent expenditures.[31]

What explains the Court's decisions? The answer lies in its understanding of corruption.[32] The Court has recognized that states have an interest in preventing corruption and the appearance of corruption,[33] where "corruption" means quid pro quos.[34] Contributions, which involve the direct conveyance of money to campaigns, raise a substantial risk of quid pro quo corruption.[35] Likewise with coordinated expenditures, which, because of the coordination, can "amount[ ] to disguised contributions."[36] In

[28] *See, e.g.*, *Id.* at 26-27.
[29] *See Id.* at 26-27, 29 (upholding contribution limits); Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 395 (2000) (same). *But see* Randall v. Sorrell, 548 U.S. 230, 236-37 (2006) (invalidating Vermont's individual contribution limits); *McCutcheon*, 134 S. Ct. at 1462 (invalidating federal aggregate contribution limits).
[30] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 356-58 (2010); *Buckley*, 424 U.S. at 47 ("The absence of prearrangement and coordination of an expenditure . . . alleviates the danger that expenditures will be given as a *quid pro quo* . . . .").
[31] *See Buckley*, 424 U.S. at 45 (invalidating limits on independent expenditures); *Citizens United*, 558 U.S. at 357 (same).
[32] It also lies in the Court's conclusion that independent expenditures are a purer form of political speech and merit greater protection. The *Buckley* Court "explained that expenditure limits 'represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech,' while contribution limits 'entai[l] only a marginal restriction upon the contributor's ability to engage in free communication.'" Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 413 (2000) (Thomas, J., dissenting) (quoting *Buckley*, 424 U.S. at 19, 20-21) (internal citations omitted).
[33] *See Citizens United*, 558 U.S. at 345 ("The *Buckley* Court recognized a 'sufficiently important' governmental interest in 'the prevention of corruption and the appearance of corruption.'") (quoting *Buckley*, 424 U.S. at 25). We focus on actual corruption but briefly address the appearance of corruption *infra*, Part III.
[34] *See Citizens United*, 558 U.S. at 359 ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.").
[35] *See Buckley*, 424 U.S. at 26-27 ("[A] candidate lacking immense . . . wealth must depend on financial contributions . . . . To the extent that large contributions are given to secure a political quid pro quo . . . the integrity of our system of representative democracy is undermined."); McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434,1460 (2014) ("[T]he risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself.").
[36] *Buckley*, 424 U.S. at 47.

contrast, independent expenditures do not have such potential for corruption.[37] As the Court wrote in *Buckley*:

> Unlike contributions [and coordinated expenditures], such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.[38]

The Court doubled down on this reasoning in *Citizens United*. There the Court declared that "independent expenditures . . . do not give rise to corruption."[39] Because such expenditures do not corrupt, the government cannot limit them on anti-corruption grounds.[40] Hence the state of the law today: limits on contributions and coordinated expenditures exist at the federal level and in many states, but limits on independent expenditures—whether by individuals or corporations—do not and cannot exist because they violate the First Amendment.[41]

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[37] The Court's view of the corruptive value of these forms of speech is intertwined with its view of their expressive value. Professor Ortiz describes the "dual hydraulics" at work in this area, "a hydraulics of expression . . . and a hydraulics of influence." *See* Daniel R. Ortiz, *Water, Water Everywhere*, 77 TEX. L. REV. 1739, 1744 (1999). The shift from contributions to independent expenditures represents an "increasingly less efficient means of influence," while "the Court believes the hydraulic efficiency of expression works in the opposite direction." *Id.* at 1745.

[38] *Buckley*, 424 U.S. at 47.

[39] *Citizens United*, 558 U.S. at 357. Many people reject this conclusion. *See, e.g.*, W. Tradition P'ship, Inc. v. Attorney Gen. of Mont., 363 Mont. 220, 274 (2011), *rev'd*, 132 S. Ct. 2490 (2012) ("I absolutely do not agree that corporate money in the form of 'independent expenditures' . . . cannot give rise to corruption or the appearance of corruption.") (Nelson, J., dissenting); Briffault, *Coordination Reconsidered*, *supra* note 9, at 100 ("The Supreme Court's insistence that independent spending does not pose dangers of corruption or the appearance of corruption has been doubtful from the start . . . ."); Michael McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 412, 417 (2013) ("I find the majority's sunny dismissal of the corrupting influence of independent expenditures wholly unpersuasive.").

[40] Some believe the Court's conclusion is legal rather than factual, rendering empirical evidence moot. *See* Douglas M. Spencer & Abby K. Wood, Citizens United, *States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L.J. 315, 360-61 (2014) ("the Court admitted that it did not care whether independent expenditures actually corrupt the political process because, in the Court's eyes, independent expenditures cannot corrupt as a matter of law, any evidence to the contrary notwithstanding.").

[41] Limits on independent expenditures do exist in some narrow cases. *See, e.g.*, 52 U.S.C.A. § 30121(a)(1)(C) (West) (prohibiting independent expenditures by foreign nationals); *see also* Bluman v.

This overview uncovers a tension. Many actors spending money on elections prefer to make independent expenditures, as they are unlimited. But they also like to coordinate, as that increases the value of their spending to the politicians they support (they run the primetime television ad and not the radio spot). This tension has led to expenditures that toe the line between independent and coordinated and focused attention on where that line falls.

B. Coordination Defined

What counts as coordination?[42] The question has "long stymied Congress and the FEC"[43] and just about everyone else.[44] Part of the problem is that the question has two parts. The first involves the Constitution. Following *Citizens United*, Congress can limit only one type of expenditure, a coordinated one. The constitutional question, then, is: what counts as coordinated for purposes of determining the scope of congressional authority?[45] The second part involves existing federal regulations: assuming they are constitutional, what exactly do they mean? We focus on the second part, but eventually we will return to the first.

Fed. Election Comm'n, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012) (rejecting a challenge to the ban on expenditures by foreign nationals).

[42] We focus on current law. For a brief and helpful overview of the development of the law on coordination, see Meredith A. Johnston, *Stopping "Winks and Nods": Limits on Coordination as a Means of Regulating 527 Organizations*, 81 N.Y.U. L. REV. 1166, 1175-1179 (June 2006).

[43] Carney, *supra* note 7.

[44] *See, e.g.*, Bradley A. Smith, *Super PACs and the Role of "Coordination" in Campaign Finance Law*, 49 WILLAMETTE L. REV. 603, 606 (Summer 2013) ("There is, indeed, a great deal of confusion about what coordination prohibits and why."); Posner, *supra* note 9 (observing that "the notion of 'coordination' is vague").

[45] We await an answer from the Supreme Court. *See* O'Keefe v. Chisholm, 2014 U.S. App. LEXIS 18356 (7th Cir. Sept. 24, 2014) (opinion of Easterbrook, J.) ("The Supreme Court has yet to determine what 'coordination' means. Is the scope of permissible regulation limited to groups that advocate the election of particular candidates, or can government also regulate coordination of contributions and speech about political issues, when the speakers do not expressly advocate any person's election? What if the speech implies, rather than expresses, a preference for a particular candidate's election? If regulation of coordination about pure issue advocacy is permissible, how tight must the link be between the politician's committee and the advocacy group?").

The Code of Federal Regulations defines a coordinated expenditure as one "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee."[46] The FEC operationalizes this definition with a three-prong test: payment, content, and conduct.[47] The "conduct" prong, which is the source of controversy, involves the relationship between spender and candidate.[48]

The FEC identifies five situations that, individually or together, satisfy the conduct prong. [49] We summarize them. Consistent with the FEC, we refer to the expenditure in question as a communication.

1. The communication is created, produced, or distributed at the request or suggestion of the candidate.
2. The candidate is materially involved in decisions about a communication's content, intended audience, specific media outlet, timing, frequency, size, prominence, or duration.
3. The communication is created after substantial discussions about the communication between the actor funding it and the candidate.

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[46] 11 C.F.R. § 109.20. *See* § 109.21 (defining "coordinated communication"); Trevor Potter & Matthew T. Sanderson, Political Activity, Lobbying Laws & Gifts Rules, 3d § 10:19 (2014). *Cf.* 52 U.S.C.A. § 30101(17) (West) (defining an independent expenditure as one that is "not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents").

[47] 11 C.F.R. § 109.21(a); Federal Election Commission, *Coordinated Communications and Independent Expenditures*, at 2-3 (updated April 2014), *available at* http://www.fec.gov/pages/brochures/ie_brochure.pdf. The first prong addresses payment: the expenditure must be funded by someone "other than a candidate, a candidate's authorized committee, a political party committee or an agent of the above." *Id*. *See* 11 C.F.R. § 109.21(a)(1). The second prong addresses content: "the expenditure must be either express advocacy, an electioneering communication, or the republication of the candidate's own materials." Briffault, *Coordination Reconsidered*, *supra* note 9, at 96 n.47.

[48] Briffault, *Coordination Reconsidered*, *supra* note 9, at 96 n.47 ("The real issue for single-candidate Super PACs is the conduct standard.").

[49] *See* 11 C.F.R. § 109.21(d)(1)-(5); Federal Election Commission, *Coordinated Communications and Independent Expenditures*, *supra* note 47, at 3-4.

4. The actor funding the communication hires a commercial vendor (i.e., pollster or media consultant) who provided services to the candidate in the prior 120 days and the vendor either uses or conveys to the actor information about the campaign material to the communication.

5. A person who worked for the candidate's campaign in the prior 120 days conveys information about the plans or needs of the candidate to the actor funding the communication that are material to the communication.

The FEC qualifies these situations in two ways.[50] First, "agreement or formal collaboration between the person paying for the communication and the candidate . . . is not required" to satisfy the conduct prong.[51] Second, except for when the candidate requests an expenditure (situation one above), the conduct prong is not satisfied if the communication relies only on publicly-available information.[52]

An example may clarify.[53] If an individual runs a newspaper ad without any interaction with or input from the candidate, then that constitutes an independent expenditure. That is true even if the ad includes a photo taken by the candidate's staff, as long at the photo was publicly available. If the candidate requested or dictated the content of the ad, even without a formal agreement, then the ad constitutes a coordinated expenditure.

[50] The FEC has other qualifications and safe harbors as well, *see* Federal Election Commission, *Coordinated Communications and Independent Expenditures*, *supra* note 47, at 4-7, but in the text we only mention those most relevant to this paper.
[51] 11 C.F.R. § 109.21(e). *See* Federal Election Commission, *Coordinated Communications and Independent Expenditures*, *supra* note 47, at 4.
[52] Federal Election Commission, *Coordinated Communications and Independent Expenditures*, *supra* note 47, at 5.
[53] All examples assume that the payment and content prongs of the FEC's test are satisfied. The action, as is the case in reality, involves prong 3: conduct.

C. Controversy and Reform

In the newspaper example, the law may resonate with intuitions. The independent ad probably has less corruptive potential than the coordinated one, so it may seem sensible to impose limits only on the latter. But now consider the scenario from the introduction. An oil baron gives money to a super PAC run by a politician's friend who, up until 121 days ago, worked for the politician. The super PAC runs a supportive ad. The politician did not request the ad, nor did she have any input on it, so the ad is not a coordinated expenditure. But because the friend knows the politician and her strategy, the ad benefits the politician like a coordinated expenditure. Now the law clashes with intuitions. The actual ad has the same corruptive potential as a coordinated ad, but the law classifies it as an independent expenditure that, according to the Supreme Court, does not and cannot corrupt.

This scenario is hypothetical, but it captures the flavor of real events. During the 2012 presidential election, Mitt Romney and top advisors to Barack Obama appeared at fundraisers for supportive super PACs.[54] Those super PACs were run by former aids to those candidates.[55] In 2010, the National Republican Congressional Committee publicly revealed its ad buy strategy, allowing outside groups to fill gaps in the schedule.[56]

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[54] *See* Alexander Burns, *Mitt Romney addressing super PAC fundraisers*, POLITICO (July 28, 2010, 12:35 PM), http://www.politico.com/news/stories/0711/60143.html; Michael Luo & Nicholas Confessore, *Top Obama Adviser to Appear at 'Super PAC' Meeting*, N.Y. TIMES (Mar. 2, 2012, 6:37 PM), http://thecaucus.blogs.nytimes.com/2012/03/02/top-obama-adviser-to-appear-at-super-pac-meeting/?_php=true&_type=blogs&_r=2. Also, note that in 2014 President Obama himself appeared at events organized by pro-Democratic super PACs, not to fundraise directly but to "draw an audience to their cause." *See* Stein, *supra* note 9.

[55] *See* Fredreka Schouten, *Super PACs, candidates blur lines ahead of Nov. 6*, USA TODAY (Feb. 29, 2012, 11:22 PM), http://usatoday30.usatoday.com/news/politics/story/2012-02-29/super-pac-candidates-coordination/53307020/1.

[56] *See* Jeanne Cummings, *Republican groups coordinated financial firepower*, POLITICO, (Nov. 3, 2010, 12:54 PM), http://www.politico.com/news/stories/1110/44651.html.

Recently, politicians used anonymous Twitter accounts to provide polling information to outside groups running ads.[57] In 2012, the independent group supporting Jon Huntsman raised $2.8 million, $1.9 million of which came from Huntsman's father.[58] Similarly, Space PAC, which supported Congressional candidate Gabriel Rothblatt, raised $225,000, all of it from Rothblatt's parent.[59] Rothblatt claimed that he had "taken pains" not to communicate with his parent, stating, "You don't want to, in a casual conversation, cross a [coordination] line that can turn around and bite you."[60] A recent report concluded that hundreds of millions of dollars spent by outside groups in 2012 involved a "high degree of cooperation" between candidates and those groups.[61]

These activities and spending do not run afoul of the coordination limits.[62] The candidates (apparently) have not requested expenditures, nor (apparently) have they provided input on them. This leaves many observers incredulous.[63] They argue that candidates and outside groups routinely coordinate—and may corrupt—as a matter of

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[57] *See* Chris Moody, *How the GOP used Twitter to stretch election laws*, CNN (Nov. 17, 2014, 10:55 AM), http://www.cnn.com/2014/11/17/politics/twitter-republicans-outside-groups/.

[58] *See* Nicholas Confessore, *Huntsman's Father Gave $1.9 Million to Super PAC*, N.Y. TIMES, (Jan. 31, 2012, 11:44 AM), http://thecaucus.blogs.nytimes.com/2012/01/31/huntsman-sr-gave-1-9-million-to-pro-huntsman-super-pac/.

[59] *See* The Editorial Board, *The Custom-Made 'Super PAC'*, New York Times, (Aug. 3, 2014), http://www.nytimes.com/2014/08/04/opinion/the-custom-made-super-pac-.html?_r=2.

[60] Fredreka Schouten & Christopher Schnaars, *Some candidates' super PACs are a family affair*, USA TODAY (July 18, 2014, 11:23 AM), http://www.usatoday.com/story/news/nation/2014/07/18/relatives-fund-candidate-super-pacs-rothblatt/12824361/.

[61] Tokaji & Strause, *supra* note 7, at 2.

[62] The practice of posting polling information via anonymous Twitter accounts may be an exception. *See* Moody, *supra* note 57 (noting that the practice "raises questions about whether [Republicans and outside groups] violated campaign finance laws that prohibit coordination").

[63] *See* Bob Bauer, *Coordinating with a Super PAC, Raising Money for It, and the Difference Between the Two*, MORESOFTMONEYHARDLAW (Jan. 27, 2014), http://www.moresoftmoneyhardlaw.com/2014/01/coordinating-super-pac-raising-money-difference-two/. Bauer explains:

> To many unhappy observers of the state of contemporary campaign finance doctrine, the latitude of the Super PAC to operate with the support of allies of the candidate, former staff and friends, and to benefit from the candidate's endorsement or fundraising, seems intolerably silly. So they say that the committee having this connection to the candidate cannot be "truly" independent. In *Buckley*'s terms, though, it is, and any complaints should be directed there.

Id.

fact, even if they do not coordinate as a matter of law.[64] As Senator Kent Conrad stated, "[T]his whole idea well, oh, they don't coordinate, therefore it's really independent is just nonsense."[65]

Many observers have advocated reforms. Professor Richard Briffault argues that expenditures by groups who focus their support on only one candidate or a very small number of candidates and who have tight links to the candidate(s) should be considered coordinated.[66] The American Anti-Corruption Act, drafted by former FEC Chairman Trevor Potter and promoted by Professor Larry Lessig, would broaden coordination rules.[67] Minnesota's Campaign Finance and Public Disclosure Board has concluded that

[64] For example, in response to an assertion about Space PAC's independence, the Editorial Board of the New York Times wrote, "Sorry, but that's preposterous." The Editorial Board, *The Custom-Made 'Super PAC'*, *supra* note 59. *See also*, Brief of United States Senators Sheldon Whitehouse & John McCain as Amici Curiae in Support of Respondents at 12, Am. Tradition P'ship v. Bullock, 132 S. Ct. 2490 (2012) (No. 11-1179) ("In sum, super PACs *are* coordinating with campaigns, and they are using methods the Court did not contemplate in its *Citizens United* decision."); Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1681 (May, 2012) (describing several ways that a candidate and a candidate-specific Super PAC can "establish a successful working relationship without formal coordination"); Langvardt, *supra* note 10, at 574 ("Everybody knows the big super PACs coordinate with candidates."); TAYLOR LINCOLN, PUBLIC CITIZEN, SUPER CONNECTED 13 (updated March 2013) ("There is a possibility (as was shown in the 2012 elections) for expenditures that are legally categorized as 'independent' to be other than independent in practice."), *available at* http://www.citizen.org/documents/super-connected-march-2013-update-candidate-super-pacs-not-independent-report.pdf; The Editorial Board, *A Trickle-Down Effect of* Citizens United, N.Y. TIMES (Oct. 13, 2014) ("The Supreme Court's central rationale for allowing unlimited independent spending in support of a candidate is based on the unrealistic notion that the money and the candidate's campaign are, in fact, separate."), http://www.nytimes.com/2014/10/14/opinion/a-trickle-down-effect-of-citizens-united.html; Anna Palmer & Jim Vandehei, *A new way to buy real influence*, POLITICO (Oct. 24, 2011, 10:11 PM) ("[A]s Rep. Tom Cole (R-Okla.) explained, the distance between outside groups and candidates is mostly on paper."), http://www.politico.com/news/stories/1011/66673.html.

[65] Tokaji & Strause, *supra* note 7, at 65.

[66] *See* Briffault, *Coordination Reconsidered*, *supra* note 9, at 97-98. This position is one aspect of Professor Briffault's proposal. Interested readers should consult *Coordination Reconsidered* for the full proposal.

[67] *See* The American Anti-Corruption Act, http://anticorruptionact.org (last visited Jan. 3, 2015). *See* Briffault, *Coordination Reconsidered*, *supra* note 9, at 97 n.50 ("The American Anti-Corruption Act . . . presents a similar, albeit somewhat broader, proposal for redefining coordination."); Richard L. Hasen, *Super PAC Contributions, Corruption, and the Proxy War Over Coordination*, 9 DUKE J. CONST. L. & PUB. POL'Y 1, 15-21 (2014) (examining and critiquing the proposals by Briffault, Potter, and Lessig, and arguing that some of the proposals might be unconstitutional).

candidates cannot solicit funds for supportive super PACs without crossing the coordination line.[68] The list goes on.[69]

These proposals assume that the theory of coordination makes sense, it just needs broader reach. In other words, they assume that classifying more expenditures as coordinated, and therefore limited by law, would combat quid pro quo corruption. For that logic to hold, coordination and corruption must be meaningfully linked. But are they?

II. Coordination and Corruption

Consider again the three necessary, logical elements of quid pro quo corruption.[70] First, an actor must convey value to a politician (the "quid"). The value could come in many forms, including a campaign contribution, a briefcase full of cash, or a favor.

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[68] *See* Caleb P. Burns & Eric Wang, *Minnesota Campaign Finance Board Adopts Stricter Position on Super PAC Coordination*, Election Law News, Wiley Rein LLP (March 2014), http://www.wileyrein.com/publications.cfm?sp=articles&newsletter=8&id=9537. *See also* Bob Bauer, *Minnesota on Candidate Fundraising for Independent Committees: Round Two and Still Struggling*, MORESOFTMONEYHARDLAW (Feb. 6, 2014), http://www.moresoftmoneyhardlaw.com/2014/02/minnesota-candidate-fundraising-independent-committees-round-two-still-struggling/.

[69] *See* Chisun Lee, Brent Ferguson, & David Earley, AFTER *CITIZENS UNITED*: THE STORY IN THE STATES, Brennan Center for Justice (Oct. 9, 2014), *available at* http://www.brennancenter.org/publication/after-citizens-united-story-states; Note, *Working Together for an Independent Expenditure: Candidate Assistance with Super PAC Fundraising*, 128 HARV. L. REV. 1478, 1480 (2015) (proposing a redefinition of coordination "to include candidate-assisted Super PAC fundraising activities"); *Summary of H.R. 270, the Empowering Citizens Act*, DEMOCRACY 21 (Aug. 1, 2014) (describing an act that would, among other things, propose "to strengthen and override the ineffectual coordination regulations adopted by the FEC"); The Editorial Board, *The Line at the 'Super PAC' Trough*, *supra* note 10 (calling the Empowering Citizens Act "the best chance for ridding politics of special-interest cash and preventing another era of scandal"); Paul S. Ryan, *New Report Highlights Need for "Coordination" Reform Post-Citizens United*, ROLL CALL (June 18, 2014, 5:00 AM) ("It is time for the FEC to tighten up its 'coordination' regulations—to bring the legal definition of coordination in better alignment with the common sense meaning of the word."), http://www.rollcall.com/news/new_report_highlights_need_for_coordination_reform_post_citizens_united-233970-1.html.

[70] These elements are necessary, but not necessarily sufficient, for quid pro quo corruption. Federal bribery law requires proof of another element: the exchange of value between an actor and a candidate must be "corrupt," where the meaning of corrupt is not clear. *See* Eric J. Tamashasky, *The Lewis Carroll Offense: The Ever-Changing Meaning of 'Corruptly' Within the Federal Criminal Law*, 31 J. LEGIS. 129, 129-30, 139-41 (2004) (describing the use of the term "corruptly" in 18 U.S.C. § 201, and in other statutes). This and other, additional elements in bribery laws do not matter for this article.

Second, the politician must convey value to the actor (the "quo"). This could include a vote on favorable legislation, a helpful call to a regulator, assistance promoting the actor's product,[71] and so forth. Third, a bargain must link the two (the "pro"). The actor's conveyance must *cause* the politician's conveyance and vice versa. The money buys the vote, and the vote buys the money.

Bribery laws punish the satisfaction of these elements: if they are met (or attempted), then the actor and politician go to prison.[72] Campaign finance regulations *impede* the satisfaction of these elements. This follows from their prophylactic character. The regulations do not punish the crime of bribery but aim to prevent it by blocking one or more steps necessary for its consummation.

To illustrate, consider limits on campaign contributions. They do not impede politicians from conveying value to contributors, and nor do they make it harder for individuals and politicians to bargain.[73] Contribution limits do not address these activities (the quo and the pro) in any way. Instead, they limit the value contributors can convey to politicians. By prohibiting donations beyond a certain size—no big quid—they frustrate corruption.

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[71] *See, e.g.*, Katie Glueck, *McDonnells convicted of corruption*, POLITICO (Sept. 4, 2014, 11:02 PM) (describing former Virginia Governor Bob McDonnell's conviction for corrupt practices around the promotion of a dietary supplement), http://www.politico.com/story/2014/09/bob-mcdonnell-trial-verdict-110602.html.

[72] Satisfaction of any one of the three elements may result in a violation of the federal bribery statute. *See* 18 U.S.C. § 201(b) (West).

[73] Professor Brad Smith argues otherwise. He states that "corruption is in the bargain" and contributions "are by definition coordinated with the candidate." Limits on such contributions, then, are justified as a method for "limiting contact between speakers and the candidate or his agents." Smith, *supra* note 44, at 618-19. We respectfully disagree. Most contributions, particularly in the Internet age, come with no contact whatsoever between donor and candidate. More importantly, contribution limits do not and cannot impede bargaining because they are easily sidestepped. A corrupt donor can, without violating the limits, contribute $1 every day, each time meeting with the candidate to bargain. Alternatively, a corrupt donor can make a single, lawful contribution today and meet with the politician every day thereafter to bargain. Indeed, a donor and politician can meet any time they wish, and contribution limits cannot prevent that.

Now consider limits on coordinated expenditures. They do not impede politicians from casting favorable votes, awarding lucrative contracts, making helpful calls, employing supporters' relatives, or promoting products. Nor could they impede most of these activities, as most are fundamental to politicians' jobs. The limits do deter politicians from providing direct input on expenditures. However, that involvement is not independently valuable to the makers of those expenditures in the corruption context. For bad actors, using politicians' input to increase the effectiveness of their expenditures is just a means to an end. It seems clear, then, that limits on coordinated expenditures do not aim to prevent corruption by limiting the value that politicians can convey.

If the limits do not target the quo, they must target the quid or the pro. The Supreme Court thinks they do both. Recall *Buckley*, where the Court wrote, "The absence of . . . coordination of an expenditure . . . undermines the value of the expenditure to the candidate."[74] This implies that a coordinated expenditure conveys value. Limits on coordinated expenditures then, like limits on contributions, limit quids. The Court also wrote that the absence of coordination "alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."[75] This implies that coordination facilitates bargaining—the pro—and limits on coordination prevent it. We consider these possibilities in turn. Before doing so, we note that discussions of coordination often blur the line between value (quid) and bargain (pro).[76] Part of our objective is to sharpen that line.

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[74] Buckley v. Valeo, 424 U.S. 1, 47 (1976).
[75] *Id.*
[76] For example, Hasen seems to offer a value theory, observing that a "candidate who raises funds for a group by definition is coordinating fundraising strategy with that group; the candidate is taking time to raise funds for the group rather than for his campaign." Hasen, *supra* note 67, at 20. Presumably, the candidate is raising funds for the group because he expects the group's expenditures to convey value. Smith seems to offer a bargain theory, stating that "corruption is in the bargain." Smith, *supra* note 44, at

A. Coordination and Quids

In general, politicians have better information about their campaigns than outsiders, meaning they can spend money in support of their campaigns more efficiently. This makes contributions especially valuable, as politicians can use them to maximal effect. So too with coordinated expenditures, which politicians can direct or influence to suit their needs. This explains why contributions and coordinated expenditures can act as quids—they convey value to politicians—and why campaign finance law limits them. Now consider independent expenditures. Without input from the relevant politician, who has superior information, such expenditures will be less effective.[77] A supporter running an independent ad may say the wrong thing, or say it at the wrong time with the wrong images.[78] Instead of conveying a lot of value, the expenditure conveys only a little.

618-19; *see also* Thomas R. McCoy, *Understanding* McConnell v. FEC *and its Implications for the Constitutional Protection of Corporate Speech*, 54 DEPAUL L. REV. 1043, 1052 (Summer 2005) ("[A] restriction on coordinated expenditures . . . must be understood not as a restriction on the expenditures, but rather as a restriction on the action of 'coordinating' the speech with the candidate."). Bauer seems to focus on both value and coordination. *See* Bauer, *Coordinating with a Super PAC, Raising Money for It, and the Difference Between the Two*, *supra* note 63 (arguing that for an interaction between speaker and candidate to constitute coordination, it "must involve a matter of strategic significance . . . the core organizational strategy for persuading voters."). Briffault seems to focus on value. See Briffault, *Coordination Reconsidered*, *supra* note 9, at 91, 94 (arguing that single-candidate super PACs are essentially "alter egos for the official campaign committees of the candidates whom they exist[] to serve" and thus it is "unnecessary to establish coordination," which we interpret to mean that value is conveyed even absent a bargain). Richard Hasen criticizes Briffault's analysis for "apparently conflat[ing] coordination with common purpose." Hasen, *supra* note 67, at 19.

[77] The Court's analysis assumes that independent expenditures often do not convey much value, and may even take away value. *See Buckley*, 424 U.S. at 47 ("Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive."); Bauer, *Coordinating with a Super PAC, Raising Money for It, and the Difference Between the Two*, *supra* note 63 ("Hence the difference between the contribution and the independent expenditure: the independent expenditure is fraught with the risk of failure, or worse, in advancing the candidate's prospects."). We will show that the logic behind that assumption is not strong.

[78] *See, e.g.*, Lee Drutman, *Five takeaways from a new campaign finance report*, SUNLIGHT FOUND. (June 18, 2014, 10:00 AM) (summarizing takeaways from a recent report, one of which being that campaigns "don't like all the outside money," as it sometimes causes candidates to lose control of their message or makes their campaign look "dumber and sillier"), http://sunlightfoundation.com/blog/2014/06/18/new-soft-money/; James Hohmann & Burgess Everett, *Rick Weiland escalates feud with Harry Reid*, POLITICO (Oct. 31, 2014, 11:56 AM) (A Democratic Senate candidate said that the Democratic Senatorial Campaign

This conventional account works in theory. To work in practice, the law must do a good job of sorting. Put differently, for coordination regulations to suppress the conveyance of value, expenditures designed with "inside" information from campaigns must properly be classified as "coordinated" and therefore limited. Does the law properly sort? Consider again, briefly, the five situations in which an expenditure satisfies the conduct prong of the coordination test.[79] The first arises when the expenditure is "created, produced, or distributed at the request or suggestion of the candidate."[80] The other four arise when a politician or someone else connected to a campaign directly provides information to an outsider who uses that information when crafting an ad.

These situations capture many expenditures designed with inside information, but they do not capture all. The rules permit outsiders to use any inside information that politicians make public. They can listen to candidates' speeches, check their websites, read their Facebook posts, follow their Tweets,[81] or use statements, strategies, images, or videos that politicians have made publicly available.[82] This means that outsiders can, without coordinating, get much of the information they need to make their expenditures effective. This is what prompts observers to state that "there's always coordination—the media is the coordination," which makes non-coordination a "farce."[83]

Committee's expenditures "hurt more than they helped"), http://www.politico.com/story/2014/10/rick-weiland-harry-reid-feud-112375.html; Daniel Lippman, *Year of the 'regular folk'*, POLITICO (Sept. 13, 2014, 7:00 AM) (observing that sometimes campaign ads backfire when the "average Joes" featured on the commercial are not properly vetted and embarrassing information is later revealed about them), http://www.politico.com/story/2014/09/year-of-the-regular-folk-110912.html.

[79] *See supra* Part I.B.

[80] *See* 11 C.F.R. § 109.21(d)(1); *see also supra* Part I.B.

[81] *See* Briffault, *Coordination Reconsidered*, *supra* note 9, at 94 ("Why do they have to meet when they can tweet?").

[82] *See* Shane Goldmacher, *The Actual Intention Behind That Awkward Mitch McConnell Video*, NAT'L J. (Mar. 12, 2014), http://www.nationaljournal.com/politics/the-actual-intention-behind-that-awkward-mitch-mcconnell-video-20140312.

[83] Tokaji & Strause, *supra* note 7, at 65.

To make this observation concrete, suppose that the value conveyed to a politician by political spending depends on the product of two numbers: the amount spent, and the Efficiency Factor, or "EF" for short. EF takes a value between -1 and 1, where higher values indicate greater efficiency.[84] For contributions and coordinated expenditures, which have maximal effect, EF equals 1. Thus, a contribution of $2,000 conveys $2,000 in value. What about independent expenditures? An outsider with little knowledge of a campaign's needs and strategies may spend $2,000 on a clunky, independent ad. That expenditure may have an EF of just 0.1, meaning it conveys $200 in value, or even a negative EF, meaning it *takes* value from the candidate. Here the Supreme Court is right: the absence of coordination undermines the value of the expenditure, reducing the risk of corruption. But now suppose the outsider has a lot of knowledge, all acquired from public sources, of the campaign's needs and strategies. The outsider spends $2,000 on a helpful ad with an EF of 0.9, and the ad conveys $1,800 in value. That independent ad, which the Court tells us by definition cannot corrupt, looks suspiciously like a coordinated ad that can.

Much of the controversy over coordination reduces to a dispute about EF. Critics argue that outsiders can, without violating the regulations, collect enough information to run valuable ads.[85] This means EF is large. We can understand reforms in the same terms. Proposals to broaden coordination rules by putting more distance between

[84] To simplify, we assume that the maximum value an expenditure can convey to a politician is the face value of the money spent (in other words, EF cannot exceed 1). Likewise, we assume the most harm an expenditure can cause is the negative face value of the money spent (the smallest value of EF is -1).
[85] *See, e.g.*, Briffault, *Coordination Reconsidered*, *supra* note 9, at 93-94 (One of the several reasons offered by Briffault is that "[c]andidates and committees don't have to talk; they can communicate through the press."); Cummings, *supra* note 56 (describing how a congressional committee publicly revealed its ad buy strategy, allowing independent groups to use the information to the candidates' benefit without violating coordination rules).

politicians and outsiders would make it harder for outsiders to acquire campaign information.[86] This would reduce EF.

Suppose critics are right, EF is too large.[87] This means the law classifies some expenditures that are effectively coordinated—they use campaign information and thus convey a lot of value to politicians—as independent expenditures that do not and cannot corrupt. Can the law do better? Stricter coordination rules could further separate outsiders and politicians, but practical and constitutional hurdles limit this possibility. Unless the law prohibits candidates from publicizing their platforms and strategies, and outsiders from paying attention, then outsiders will always have enough information to make expenditures that convey at least *some* value. Stricter rules might drop EF to 0.6 or 0.3, but they almost certainly cannot drop it below zero.[88]

This leads to a deep flaw in the coordination-rules-suppress-quids logic. Recall that the value conveyed by an expenditure equals the amount spent multiplied by EF. Reforms may shrink EF, but they cannot shrink the amount spent. *Citizens United* holds that independent expenditures cannot be capped.[89] As a result, outsiders who want to convey value to politicians can always do so by simply spending more. Suppose a politician, as part of a corrupt exchange, demands $50,000 in value. If EF equals 0.9, the

[86] The American Anti-Corruption Act, for example, would count as coordinated, and therefore limited, *any* expenditure that was crafted with input from a family member or former colleague of the politician. The American Anti-Corruption Act, Part 2, Provision 7: Revise the FEC's Coordination Regulations, at 7 (Nov. 13, 2012), *available at* https://s3.amazonaws.com/s3.unitedrepublic.org/docs/AACA_Full_Provisions.pdf.
[87] We mean the EF of the average or typical expenditure is too large. For sophisticated outsiders, the EF associated with their expenditures might be very high while for less-sophisticated outsiders it might be relatively low.
[88] As discussed, EF might drop below zero for any given expenditure. However, we conceptualize EF as an average. The claim is not that, if EF exceeds zero, all independent expenditures convey value. Rather, the claim is that the *average* independent expenditure conveys value.
[89] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 356-61 (2010).

outsider can convey that amount by spending about $56,000 on independent ads.[90] If EF equals 0.5, the outsider must spend $100,000. As long as EF exceeds zero—as long as independent expenditures benefit politicians, even if just a tiny amount—then outsiders can convey the value necessary for a corrupt transaction.

EF almost certainly exceeds zero. The Supreme Court seems to recognize as much. In *McCutcheon v. FEC*,[91] the Court stated, the absence of coordination "undermines the value of the expenditure to the candidate . . . . *But probably not by 95 percent*."[92] EF almost certainly will continue to exceed zero following any tightening of coordination rules. This means the law, now and always, sorts imperfectly. Some effectively-coordinated ads will get treated as independent ads. Those ads, like contributions and coordinated expenditures, convey value and can serve as quids. In fact, because they are unlimited, they make better quids.[93] When EF equals just 0.1, an independent expenditure of $100,000—chump change in American politics[94]—conveys $10,000 in value, much more than any lawful contribution.[95]

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[90] *Cf.* Brendan Fischer, *What Corruption?* McCutcheon *Reveals Absurdity of Citizens United*, PR WATCH (Apr. 03, 2014), http://www.prwatch.org/news/2014/04/12438/mccutcheon (noting James Simon's $5 million contribution to the super PAC supporting President Obama and stating, "Assuming just 5% of that total was of 'value' to Obama it would still result in a $250,000 donation.").

[91] 134 S. Ct. 1434 (2014).

[92] *McCutcheon*, 134 S. Ct. at 1454 (quotation marks and citations omitted, emphasis added).

[93] *See* Kang, *supra* note 5, at 30 ("When . . . independent expenditures can be made without restriction in very large amounts, the risk of corruption may even be greater than the risk from capped contributions.").

[94] During the 2012 presidential election, the super PACs Restore our Future and American Crossroads had spent over $142 million and $91 million, respectively, while Priorities USA Action had spent over $66 million. *Independent Spending Totals*, N.Y. TIMES (Nov. 30, 2012), http://elections.nytimes.com/2012/campaign-finance/independent-expenditures/totals. In 2012, Sheldon Adelson gave $10 million to one super PAC, and in 2004, George Soros gave $23.7 million in total to several PACs. Will Oremus, *The Biggest Political Donations of All Time*, SLATE (Jan. 27, 2012, 4:30 PM), http://www.slate.com/articles/news_and_politics/politics/2012/01/sheldon_adelson_newt_gingrich_and_the_largest_campaign_donations_in_u_s_history_.html.

[95] At the federal level in the 2013-2014 campaign cycle, contributions by individuals to candidates were limited to $2,600. During the same cycle, contributions by multicandidate PACs were limited to $5,000. 52 U.S.C.A. § 30116; Federal Election Commission, *Contributions*, at 2 (updated April 2014), http://www.fec.gov/pages/brochures/contributions_brochure.pdf.

One might respond that this argument goes too far. If coordination rules are effective enough and EF is small—say, 0.2—then conveying $1 million in value requires $5 million in expenditures, thereby providing some deterrent effect. In theory, outsiders can, whatever the (positive) value of EF, convey value by spending enough money. But in practice, many outsiders cannot afford large amounts, or if they can, the quo they expect in return will not justify the expense. In other words, coordination rules, even if they do not limit all valuable expenditures, limit some. Better to stop some corruption than none.[96]

The response is valid, but note two points. As EF grows, the objection dissipates. Even after a tightening of coordination rules, EF might be large. More fundamentally, to make this argument is to concede an irony of coordination: the law focuses on the least harmful targets. Coordination regulations make it harder for relatively poor outsiders to engage in corruption. They make it harder for outsiders whose corrupt acts will not benefit them much (such acts probably do relatively little harm to society). They do *not* deter outsiders with lots of money from engaging in very lucrative—and presumably very harmful—corruption.

B. Coordination and Pros

Corruption, at least the kind modern campaign finance law focuses on, requires a bargain. Someone must convey value to a politician in exchange for a favor and vice versa. The bargain could be explicit, as when conspirators agree to terms over dinner, or

[96] *See* Smith, *supra* note 44, at 609 ("[N]o system will address every potential source of corruption, and . . . a regulatory regime can be effective without being even close to perfect.").

implicit, as when a "wink or nod" closes the deal.[97] Coordination limits can deter corruption by frustrating bargaining. The Supreme Court believes they do exactly this, or aspire to, and others feel the same. Professor Brad Smith uses the term "coordination" synonymously with "discussions and dealings between the parties."[98] Professor Larry Lessig explains the Court's understanding of independent expenditures as follows: "There may be a quid. There may be a quo. But because the two are independent, there is no pro."[99]

Do existing coordination rules frustrate bargaining? In theory, maybe a little. In practice, almost certainly not. Recall, this time in reverse order, the situations in which an expenditure satisfies the conduct prong of the coordination test.[100] The fifth and fourth situations arise when someone (not the politician) recently connected to a campaign provides information to an outsider that is material to that outsider's ad or other expenditure. These situations have nothing to do with bargaining. They do not prevent an outsider from hiring someone recently connected to a campaign—the kind of person who could negotiate a deal—nor do they prevent outsiders from talking directly to politicians. The third and second situations arise when the politician provides input on the contents or form of an expenditure. These situations cannot block much bargaining. For one thing, enforcement presents a challenge. Imagine a bad actor and a crooked politician prepared to engage in an illegal deal. All they need is a chance to bargain over

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[97] *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 221 (2003) ("[E]xpenditures made after a 'wink or nod' often will be 'as useful to the candidate as cash.'"), *overruled in part on other grounds by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010). As stated above, *supra* Part I.B., "agreement or formal collaboration . . . is not required" to find coordination. 11 C.F.R. § 109.21(e). *See* Federal Election Commission, *Coordinated Communications and Independent Expenditures*, *supra* note 47, at 4.

[98] *See* Smith, *supra* note 44, at 632.

[99] Lawrence Lessig, *Democracy After Citizens United*, BOSTON REV. (Sept. 4, 2010), http://bostonreview.net/lessig-democracy-after-citizens-united. We understand Lessig to be explaining the Court's reasoning, not accepting it.

[100] *See supra*, Part I.B.

details, like the exact contents of the ad that will serve as a quid. Will coordination rules cause them to pull back, or will they violate the rules under the safe assumption that not every conversation gets monitored? We suspect the latter. But suppose we are wrong, and would-be criminals, for whatever reason, respect this particular rule and do not discuss the substance of the quid. As far as the coordination rules are concerned, they can *still* bargain, they just cannot discuss the substance of the expenditure.

To illustrate, suppose an outsider and a politician agree to a corrupt exchange. The outsider gets a favorable vote on a bill, and the politician gets expenditures worth $100,000 to her. How can the outsider convey the $100,000? The parties could coordinate on the contents of an ad. The ad would have an EF of 1, or close to it, and the outsider could fulfill his end of the bargain by spending $100,000, or only slightly more. Of course, that ad would violate the limit on coordinated expenditures. Alternatively, the parties could *not* coordinate on the contents of the ad. Instead, they could agree that the outsider would contribute money to a third-party group—say, a super PAC—that supports the candidate. [101] The super PAC need not know about the illegal exchange; the parties surely would prefer that it not. The higher the super PAC's EF, the less the outsider would have to contribute to convey $100,000. This exchange, though illegal, would not violate the coordination rules. Even if perfectly enforced, the rules mentioned so far would not address this kind of bargaining.

[101] Professor Rick Hasen makes these arguments: "unscrupulous donors and candidates could agree to a bribe, with the money going to a[n outside] group committed to doing everything to elect the candidate. That [group] need not even know about the bribe[.]" Hasen, *Super PAC Contributions, Corruption, and the Proxy War Over Coordination*, *supra* note 67, at 7. Disclosure requirements can facilitate this kind of illegal bargaining. The politician can confirm that the outsider contributed the money as promised by checking the FEC's website. *See generally* Michael D. Gilbert & Benjamin Aiken, *Disclosure and Corruption*, 14 ELECTION L.J. (Forthcoming 2015).

However, we are left with the first prong, which arises when the expenditure is "created, produced, or distributed at the request or suggestion of the candidate."[102] Although the fifth, fourth, third, and second situations in which an expenditure becomes coordinated would not capture the scenario just described, the first one would. Nonetheless, the first prong also has limitations. Enforcement again presents a challenge: can we monitor politicians' utterances? Can we be sure Rothblatt and his parent, while barbequing in the family's backyard, do not exchange a few words about expenditures? Setting that aside, bad actors could avoid this situation by not discussing expenditures. In the example, the outsider and politician could agree to the corrupt exchange while leaving the nature of the quid open-ended. Instead of agreeing to convey expenditures worth $100,000, they could agree that the outsider would convey $100,000 in value. The outsider could then opt to convey the value with expenditures. The coordination rules do not address this kind of corrupt bargaining.

Could tighter coordination rules make it harder for outsiders and politicians to bargain? Probably not, as practical and constitutional hurdles stand in the way. Bargaining proceeds through communication, and the First Amendment takes a dim view of limitations on communication. The law can forbid bargaining over expenditures and campaign strategy, but it cannot forbid discussions generally. Outsiders, politicians, and their low-profile agents can talk on the phone, exchange emails or texts, chat on the subway, exchange a few words at a fundraiser, or meet for drinks in a private backyard. These are settings in which corrupt bargaining may take place, and these are modes of communication that the law probably cannot—and for political reasons, almost certainly will not—reach.

[102] *See supra*, Part I.B.

III. Coordination and the Constitution

Recall that the constitutionality of campaign finance regulations turns on their potential to fight corruption. Recall also that the regulations serve as prophylactics. They supplement bribery laws, not by punishing corruption but by stifling one or more of its necessary elements. This means that courts, in assessing the constitutionality of such regulations, must consider their marginal effect on corruption. The question is not how much corruption the combination of bribery laws and campaign finance regulations prevents. The question is, how much corruption does the combination prevent *above and beyond* bribery laws alone?

Answering this question requires an omniscience that we sadly lack. But we can, as courts do, make headway with intuitions. Existing coordination rules cannot stifle a lot of quids. As discussed, the rules allow outsiders to gather information about campaign needs and strategies from public sources. This means their expenditures, even without any campaign contact, can be effective (EF is positive). Effectiveness plus the ability to make unlimited independent expenditures means outsiders can convey value to politicians. Candidates appreciate $1 million spent on somewhat useful (independent) ads, perhaps more than they appreciate smaller amounts spent on very useful (coordinated) ads.

Just as existing rules cannot suppress many quids, or many big ones, they cannot prevent much bargaining. As discussed, most of the provisions do not target bargaining, and bad actors can sidestep the provisions that do. They can bargain without discussing the details of an expenditure or without raising the possibility of an expenditure at all.

These intuitions suggest that existing coordination rules do not prevent much corruption, as bad actors can easily evade the limits. As a result, in the balance that determines the constitutionality of coordination rules, the weight on the "permissible" side of the scale may be light. Meanwhile, the weight on the "impermissible" side remains the same as always. Some non-corrupt outside groups, hoping to exercise their First Amendment rights, would like to coordinate with politicians, and coordination limits stymie them. How to weigh these pros and cons? We do not believe the Constitution provides a clear answer. Our point is simply that the constitutional argument for existing coordination limits may be weaker than commonly supposed. The problem is not that the limits chill a lot of speech (though they might) but that they deter little corruption.[103]

One might respond that this reasoning, whatever its implications for existing coordination limits, can be disarmed with stricter rules. Broader regulations that reclassify many independent expenditures as coordinated would do a better job of combating corruption, which would in turn strengthen the argument for their constitutionality. Suppose, for example, that the government adopted Professor Briffault's proposal to classify as coordinated, and therefore limited, all expenditures by groups who focus their support on only one candidate or a very small number of candidates and who have tight links to the candidate(s).[104] To spend freely and corruptly, groups would have to support more candidates and loosen their ties to them—no more former campaign managers on the super PAC staff. This might reduce the effectiveness

[103] Recall that our analysis focuses on actual corruption. We briefly address the appearance of corruption below.

[104] Briffault, *Coordination Reconsidered*, *supra* note 9, at 97-100. Again, we do not describe the proposal in full, and interested readers should consult Professor Briffault's paper.

of the group's expenditures. Rather than relying on the former campaign manager's insights about the politician's needs, the group would have to resort to public sources. Of course, those sources are plentiful and easily accessible, so perhaps their effectiveness would not suffer much. EF may dwindle, but only by a little.

Rather than focusing on ties, one might focus on numbers. Requiring a group to support multiple candidates might make it harder to convey value. Giving $50,000 to a super PAC that supports one candidate benefits that candidate, or is likely to, in a way that giving the money to a super PAC that supports dozens of candidates may not.[105] But this reasoning has a limit, too. If a politician sees an uptick in support from a group following a contribution to that group, he or she may reasonably infer that the support traces to the contributor.[106] Even if not, this problem resolves with the usual antidote: more money. A politician who seeks $50,000 in value from a corrupt actor may not be satisfied by a contribution of $100,000 to a group that supports him and many other candidates. He might, however, be satisfied by a contribution of $500,000.

Dilemmas like these will infect any reform proposal that targets quids. As discussed, unless the government prevents politicians from broadcasting information, and outsiders from listening, those outsiders, or at least the wealthy ones capable of causing the greatest social harm, will have what they need to convey value. Stricter coordination rules cannot do much to suppress bargains either. No plausible, constitutional set of rules will prevent outsiders and politicians from conversing.

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[105] *Id.* at 97 ("If an organization is involved in multiple election contests, then donations to the organization cannot be said to go to the aid of a specific candidate. In that case . . . the link between a particular donor and a particular candidate is attenuated.").

[106] Imagine, for example, a group required to support at least 10 candidates. A donor could give the group $100,000, and the group could then spend one thousand dollars supporting each of the first nine candidates, saving the remaining $91,000 for the 10th candidate.

This suggests that the constitutional case for stricter coordination rules may not be so strong. Such rules cannot frustrate bargaining, and though they might make it harder to convey value, that effect, given the workarounds, could be small. Meanwhile, stricter rules would chill more speech. Depending on the magnitudes of these effects (and the weights one gives them on the First Amendment balance) the constitutional case for stricter rules might be weaker than that for existing rules.

The preceding arguments may look different if we shift focus from actual corruption to the appearance of corruption. Recall that states have an interest in preventing quid pro quos *and* the appearance of quid pro quos.[107] Given the widespread dissatisfaction with the existing coordination rules, we doubt that they reduce the appearance of corruption in a meaningful way. If we are wrong, then the constitutional case for such rules is stronger than we have suggested. Similarly, if new, stricter coordination rules would reduce the appearance of corruption, then the constitutional case for those rules would also grow stronger.

Before carrying these ideas too far, however, consider the mechanisms through which coordination rules might improve appearances. One possibility is that the appearance of corruption correlates with actual corruption, so that as actual corruption declines appearances improve and vice versa. If that is the mechanism, and given the doubts expressed above about the ability of coordination rules to dampen corruption, it seems unlikely that coordination rules, however strict, can improve appearances in a meaningful way. Another possible mechanism is more instinctual: politics just *seems* less corrupt with coordination rules in place. If that is the mechanism, then things get complicated— and possibly paradoxical. If coordination rules improve the appearance of

[107] *See supra*, Part I.A.

corruption, and if improving appearances reduce vigilance and enforcement, then coordination rules can improve appearances while making actual corruption worse.[108]

Conclusion: Coordination as the Wrong Path

The foregoing analysis does not square with Supreme Court doctrine. Since *Buckley*, the Court has made clear that Congress can limit coordinated expenditures.[109] Consequently, there must be a way to define "coordinated" in a constitutional way. Likewise, there must be a way to distinguish "independent" expenditures, which the government cannot limit, from the rest. But the Court has never tried to do this work, perhaps because the challenge is too great.

Consider the Court's declaration in *Citizens United*: "independent expenditures . . . do not give rise to corruption,"[110] where corruption means quid pro quos. The term "independent" cannot mean "non-corrupt" or the reasoning becomes tautological. Instead, independent must mean an expenditure that does not convey a quid, involve a pro, or both.[111] Now the logic works, but the operational problem looms. The law cannot sort expenditures into the "independent" category based on whether the spender and politician actually bargained. We almost never know if they bargained, and if we know they did, then the government can prosecute them under bribery laws,

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[108] This point relates to one developed by Gilbert and a coauthor in a separate paper. *See* Gilbert & Aiken, *supra* note 101 (suggesting laws requiring disclosure of campaign finance information can improve appearance of corruption while worsening actual corruption).
[109] *See* Buckley v. Valeo, 424 U.S. 1, 46-47, 78 (1976); Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431, 447 (2001); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 202-03, 219-23 (2003), *overruled in part on other grounds by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
[110] *Citizens United*, 558 U.S. at 357.
[111] It could also mean an expenditure that does not involve a quo, but as discussed that does not work in practice or seem to be the target of the law.

rendering proper categorization of the expenditure moot.[112] Likewise, the law cannot sort them on the basis of whether there was an opportunity to bargain. While discussing the contents of an expenditure, an outsider and politician have an opportunity to bargain illegally. But that opportunity is one of many; they can bargain illegally just about any time. Expenditures that come after x+1 bargaining opportunities cannot raise significantly greater corruption concerns than expenditures that come after x bargaining opportunities when x is a half-dozen, twenty, or a hundred.

To see the depth of the problem in another way, consider what it would take for coordination rules targeting illegal bargaining to serve as a prophylactic, that is, to deter bargaining that would not be deterred by bribery laws alone. An outsider and a politician would have to be prepared to negotiate a quid pro quo in violation of bribery laws but *not* prepared to discuss details of an expenditure in violation of coordination limits.[113]

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[112] Federal bribery law only requires an offer of a favor. 18 U.S.C.A. § 201(b)(1) (West).

[113] If a violation of coordination rules were easier for the government to detect than bribery, or carried a severer sanction, or both, then an outsider and politician might behave as the sentence in the text states. Perhaps these conditions could be satisfied, but it is hard to see how. The government can prosecute a person for bribery if they simply offer illegal favors. 18 U.S.C.A. § 201(b) (West). We see no reason to believe that observing a conversation about coordination could be easier than observing a conversation involving an offer of illegal favors. Likewise, the sanction for coordination violations probably will not exceed the sanction for bribery. The sanction for bribery may include imprisonment for up to 15 years, a fine the greater of three times the value of the bribe or the statutory maximum of $250,000, or both. *See* 18 U.S.C.A. § 201(b) (West); Logan Dwyer, Kaitlyn Golden, & Samuel Lehman, *Public Corruption*, 51 Am. Crim. L. Rev. 1549, 1564-65 (Fall 2014). For coordination violations, civil penalties shall not exceed the greater of $7,500 or the amount of the contribution or expenditure in question, or the greater of $16,000 or 200% of the amount involved for knowing and willful violations. *See* 11 C.F.R. § 111.24(a) (West). Criminal sanctions for coordination violations are only appropriate if the violations were committed "knowingly and willfully, " and such sanctions may include prison sentences. *See* 52 U.S.C.A. § 30109(d) (West); Amelia Bell & Sarah Bell, *Election Law Violations*, 51 Am. Crim. L. Rev. 963, 979 (Fall 2014). However, the sanction for coordination violations is usually derived through a conciliation process, 11 C.F.R. § 111.18 (West), and most often leads to civil penalties, Federal Election Commission, *Quick Answers to Compliance Questions*, http://www.fec.gov/ans/answers_compliance.shtml#penalties. Punishment for coordination violations is "up to the six-member FEC – split evenly between Republicans and Democrats." Rachel Marcus & John Dunbar, *Rules against coordination between super PACs, candidates, tough to enforce*, THE CENTER FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), http://www.publicintegrity.org/2012/01/13/7866/rules-against-coordination-between-super-pacs-candidates-tough-enforce.

The law also performs poorly when sorting expenditures into the independent category by focusing on value. Here there are two choices: focus on EF, or focus on amount spent. By definition, coordination focuses on EF, which creates the problems discussed. Even broad definitions of coordination will not keep outsiders from gathering what they need, and this plus unlimited spending means they can reliably convey value. This dilemma worsens as technologies change and politicians get better at publicizing, and outsiders at absorbing, key information.

One might respond that we have misdiagnosed the problem. The trouble is not with coordination rules per se but with coordination rules in a world where the only relevant form of corruption is quid pro quo corruption. Perhaps such rules would make more sense if the government had an interest in combating quid pro quos and also "the broader threat from politicians too compliant with the wishes of large contributors."[114] That was the state of the law before the Roberts Court. But we do not believe this is right. However corruption is defined, it presumably worsens when individuals can convey value to politicians and meet with them or their representatives for quiet conversations. As explained, coordination rules can do little to prevent these activities, at least when wealthy and sophisticated actors are involved. The flaws with coordination do not depend on precise definitions of corruption.

Perhaps all of these observations, troubling though they may be, just support the usual maxim that rules are under and over-inclusive. We have shown that coordination limits cannot capture some behaviors they should (corrupt speech) and capture others they should not (non-corrupt speech). Those deficiencies reduce but do not eliminate the

[114] Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 389 (2000) (articulating this broader conception of corruption and tracing it to *Buckley*).

value of the limits: surely they stop *some* corruption. But that argument implies that the Court, when it drew the line between coordinated and independent expenditures, understood those deficiencies and nevertheless concluded that this distinction would work best—or at least that the Court, had it understood the deficiencies, would nevertheless have drawn the line it did.

That may be true, but there is another possibility. Perhaps the Court, had it considered all of the above, would have determined that the coordinated/independent distinction led down the wrong path, one that could not reduce corruption by much and therefore made the constitutional structure it designed unsound. Perhaps the Court would have selected the other choice, ignoring EF and permitting the government to limit the amount one could spend, whether that spending was in some sense coordinated or not. That may have chilled more speech, but it would have related much more logically to the problem of corruption.