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Hasen, Richard L.

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***SUPER PAC CONTRIBUTIONS, CORRUPTION,
AND THE PROXY WAR OVER COORDINATION***

Richard L. Hasen

rhasen@law.uci.edu

University of California, Irvine ~ School of Law

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SUPER PAC CONTRIBUTIONS, CORRUPTION, AND THE PROXY WAR OVER COORDINATION

RICHARD L. HASEN*

INTRODUCTION

In 1995, journalist and supply-side economics enthusiast Jude Wanniski wrote an op-ed in the *New York Times* noting an anomaly: Under the Supreme Court's campaign finance rulings,¹ billionaire Steve Forbes could spend \$25 million (or any amount) to support his own candidacy to be president, but he could donate only \$1000 to Jack Kemp's presidential campaign.² Forbes believed that Kemp would have been a more effective candidate to promote Forbes's views, and Wanniski suggested that Forbes should have been able to give \$25 million directly to Kemp to bankroll a Kemp candidacy.³ Wanniski saw nothing wrong with Forbes giving Kemp so much money: "Wouldn't we expect President Kemp, with his \$25 million

* Chancellor's Professor of Law and Political Science, UC Irvine School of Law. Thanks to Bob Bauer, Guy Charles, Jim Gardner, Larry Lessig, Justin Levitt, Rick Pildes, Brad Smith, and participants at the *Duke Journal of Constitutional Law and Public Policy* symposium for useful comments and suggestions.

1. The modern era begins with *Buckley v. Valeo*, 424 U.S. 1 (1976). On *Buckley*'s key holdings, see RICHARD L. HASEN, LEGISLATION, STATUTORY INTERPRETATION, AND ELECTION LAW: EXAMPLES AND EXPLANATIONS ch. 13 (forthcoming 2014); DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN & DANIEL P. TOKAJI, ELECTION LAW—CASES AND MATERIALS ch. 14 (5th ed. 2012).

2. Jude Wanniski, *Bowing for Dollars*, N.Y. TIMES, Sept. 29, 1995, at A31. For my response, see Richard L. Hasen, Letter to the Editor, *Let's Not Auction Off Political Access*, N.Y. TIMES, Oct. 4, 1995, at A20, available at <http://www.nytimes.com/1995/10/04/opinion/1-let-s-not-auction-off-political-access-037320.html>.

3. Wanniski, *supra* note 2. Wanniski further explained:

Why is . . . Steve Forbes leaving the comfort of his publishing empire for the rough-and-tumble of Presidential politics? Because his idol, Jack Kemp, decided he did not have the stomach to raise \$25 million at \$1,000 a pop, . . . [which] would require him to make a thousand promises he . . . could not keep. On CNN's 'Capital Gang' recently, Mr. Kemp acknowledged that he would be running if Mr. Forbes could supply \$25 million. On CNN's 'Evans and Novak' earlier the same day, Mr. Forbes acknowledged that he would not be running if Mr. Kemp were in the race.

Id.

check from Mr. Forbes, to take a call from him sooner than from, say, Mr. Business Week? But so what? His views are closer to Forbes's than to Business Week's, with or without campaign contributions.”⁴

Wanniski's views appear to be in the minority, at least judged by longstanding laws imposing individual contribution limitations in federal elections and in many state and local elections. The 2002 Bipartisan Campaign Reform Act (BCRA, more commonly known as McCain-Feingold) doubled the very modest \$1000 individual contribution limitation from the 1974 Federal Election Campaign Act Amendments to \$2000 and indexed the limits to inflation;⁵ in the 2014 election season the limit is \$2600 per election, meaning a person can give a congressional candidate \$5200 (once for the primary and once for the general election).⁶ That individual limit nonetheless still allows amply funded federal campaigns. In the 2012 election, for example, Democratic candidate Barack Obama and Republican candidate Mitt Romney (along with affiliated party committees) each raised above \$1 billion.⁷ Candidates are raising a lot of money in contributions of \$5200 or less.

Today, however, millions of dollars also are flowing into outside groups (including groups now dubbed “Super PACs”) that support presidential candidates much in the same way that Wanniski wanted Forbes to be able to support Kemp. I argue in this Article that these Super PAC contributions raise virtually the same risks as large contributions directly to candidates, that the Supreme Court's jurisprudence does not allow for regulating contributions to outside groups in the same way that it allows for regulation of direct contributions to candidates, that the Supreme Court's jurisprudence is wrong, and that we cannot get around the problem by redefining the technical definition of coordination to treat Super PAC contributions like contributions to a candidate.

4. *Id.*

5. Federal Election Campaign Act of 1971, 2 U.S.C.A. § 441a(a)(1)(A) (West 2014).

6. FED. ELECTION COMM'N, CONTRIBUTION LIMITS 2013-2014, available at <http://fec.gov/pages/brochures/contriblimitschart.htm>.

7. HASEN, *supra* note 1, ch. 16; *Presidential Campaign, National Party, and Joint Committee Fundraising Through December 31, 2012*, CAMPAIGN FINANCE INSTITUTE, http://www.cfinst.org/pdf/federal/president/2012/Presidential%20Fundraising%20byCommittee_2012.pdf (last visited Apr. 12, 2014); see FED. ELECTION COMM'N, *supra* note 6 (indicating that contributions to state and national political parties are subject to higher individual limits).

I start in Part I with the case against unlimited contributions directly to candidates and explain that virtually the same case applies against unlimited contributions to a reliable Super PAC—a single-candidate Super PAC that can be expected to further a candidate’s campaign. In Part II, I explain how the Supreme Court’s new narrow definition of corruption forecloses arguments for limiting contributions to these reliable Super PACs directly. Finally, in Part III, I argue that the attempt to regulate Super PAC contributions through enhanced “coordination” rules is likely to fail. The problem is with the Supreme Court’s definition of corruption, and it cannot be solved through better drafting of coordination or other rules.

I. WHY LIMIT SUPER PAC CONTRIBUTIONS?

Consider four reasons why people may favor contribution limits and oppose Wanniski’s suggestion to allow an individual to give a candidate for public office \$25 million or more. First, individual contribution limits deter bribery and extortion (the antibribery interest). Though I believe that Jack Kemp would not have been bribable even for \$25 million, and that Forbes would not have been attempting a bribe even if he gave Kemp \$25 million, there are many unscrupulous politicians who could be bribed for much less. For example, a New York State Assembly Member was recently convicted for accepting a mere \$22,000 bribe in exchange for taking favorable actions related to an adult day care center.⁸ Bribery is already very difficult to detect because people who are bribed want to keep it a secret. But bribery would be even easier if very large campaign contributions were legal. As things stand now, unscrupulous individuals wanting to engage in a bribery transaction need to hide both the agreement and the payments. If unlimited contributions were allowed, the only thing that conspirators would need to hide is the agreement: “I will give you \$25 million and in exchange you will support legislation for a tax break that will save me \$1 billion.” By keeping individual contributions limits low, there is not enough money at stake in campaign contributions for a politician to be bought, and unscrupulous individuals need to take steps to hide money that cannot be provided through a campaign contribution.

8. John Herzfeld, *Jury Convicts N.Y. State Legislator on Charges of Trading Favors for Bribes*, BLOOMBERG BNA MONEY & POLITICS REPORT (Jan. 15, 2014), http://news.bna.com/mpdm/MPDMMWB/split_display.adp?fedfid=39901945&vname=mpebulallis&sues&fn=39901945&jd=39901945.

Relatedly, politicians cannot demand \$25 million in exchange for not retaliating against would-be wealthy donors because there is no way the potential donor could directly give that money.

Second, individual contribution limits prevent undue influence and conflicts of interest (the anti-undue influence interest). Some supporters of limits worry not just about outright bribery, but also that, thanks to human nature and feelings of reciprocity, candidates who receive extremely large contributions will feel grateful to large donors and will take legislative and other steps to favor the donors. This happens not through any quid pro quo exchange but instead through norms of reciprocity. The human mind being as it is, it is quite easy for people to rationalize taking actions consistent with their own self-interest. As Dan Lowenstein observed long ago, candidates who can take very large campaign contributions from those who have business before the candidate have an inherent conflict of interest.⁹ At the very least, large contributions can buy access, giving the large donor much more influence over an elected official's thinking and agenda than the typical voter.

Third, individual contribution limits promote political equality by limiting both the sale of access and disproportionate influence over election outcomes (the equality interest). Wanniski pooh-poohed the objection that Kemp would take Forbes's phone calls, reasoning that Kemp would have done that without the contribution and that, because Kemp's ideology lined up with Forbes's ideology, the extra access would make no difference in policy.¹⁰ That may well be true of the Kemp-Forbes relationship, but it may not be true for many large donors. To use the earlier example, a donor might give \$25 million to a candidate not because the donor agrees with the candidate's ideology, but because the donor hopes it will give the candidate the opportunity to make a pitch for a \$1 billion tax cut. To some, this access is unfair because only the large donor gets to make the pitch for the tax cut while those on the other side or with other interests are much less likely to get the same access. Further, there is a separate equality concern: The \$25 million contribution could make it more likely that the candidate gets elected, and that means that the large donor has a bigger say over the outcome of the election than others who feel just as passionately but lack the same funds to support the candidates of

9. Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 323–29 (1989).

10. Wanniski, *supra* note 2.

their choice.

Fourth, individual contribution limits could promote public confidence in the electoral process by reducing the appearance of corruption or the appearance of inequality (the public confidence interest). If the public believes that large donors are bribing candidates, large donors have undue influence over candidates/elected officials, large donors have unfair access to candidates/elected officials, or large donors have disproportionate influence over the outcome of elections, the public could lose confidence in the fairness of the electoral process.

Opponents of strong campaign regulation contest these points on empirical grounds, normative grounds, or both. Although virtually no one supports bribery of elected officials, some contend that outright bribery is rare, based on the number of prosecutions, and that bribery would not rise appreciably with very large legal campaign contributions.¹¹ Even though campaign contributions are valuable to candidates, they may not be nearly as valuable to unscrupulous politicians as piles of cash in the freezer¹² or a new yacht.¹³

Some believe undue influence or the sale of access should not count as corruption, and that all the law should do is prevent actual quid pro quo corruption or the appearance of quid pro quo corruption.¹⁴ Some reject political equality as a legitimate reason for limiting campaign contributions,¹⁵ and note that empirical evidence casts serious doubts on any relationship between campaign finance laws and public confidence in the government or the electoral

11. See Stephen A. Ansolabehere, *The Scope of Corruption: Lessons from Comparative Campaign Finance Disclosure*, 6 ELECTION L.J. 163, 175 (2006).

12. Jerry Markon, *Ex-Rep. Jefferson Gets 13 Years in Freezer Cash Case*, WASH. POST (Nov. 14, 2009), http://articles.washingtonpost.com/2009-11-14/news/36786791_1_william-j-jefferson-prison-term-robert-p-trout.

13. Bill Chappell, *Former Rep. 'Duke' Cunningham Freed After Bribery Conviction*, NPR NEWS (Jun. 4, 2013, 2:45 PM), <http://www.npr.org/blogs/thetwo-way/2013/06/04/188667106/former-rep-duke-cunningham-freed-after-bribery-sentence>. But it is important not to underestimate how much personal value candidates and elected officials can still get out of campaign contributions, including by taking luxury vacations with lobbyists and fundraisers. See Eric Lipton, *A Loophole Allows Lawmakers to Reel in Trips and Donations*, N.Y. TIMES (Jan. 19, 2014), <http://www.nytimes.com/2014/01/20/us/politics/a-loophole-allows-lawmakers-to-reel-in-trips-and-donations.html> (explaining how a statutory loophole allows lobbyists to mask contributions).

14. See, e.g., Bradley A. Smith, *Super PACs and the Role of "Coordination" in Campaign Finance Law*, 49 WILLAMETTE L. REV. 603, 615 (2013).

15. See, e.g., BRADLEY A. SMITH, UNFREE SPEECH 195–96 (2003).

process.¹⁶ Admittedly, the relationship between money spent on elections and electoral outcomes is complicated; therefore it is difficult to define the proper scope of necessary regulation.¹⁷

I will return to these objections and related constitutional issues shortly, but first I want to contrast Wanniski's Forbes-Kemp scenario with two other relationships involving rich donors and presidential candidates. In 2004, liberal financier George Soros wanted to help defeat Republican President George W. Bush, who was running for reelection.¹⁸ Soros could give only a few thousand dollars directly to the campaign of Democrat John Kerry. But Soros gave approximately \$27 million to other organizations that promoted Kerry's candidacy.¹⁹ At the time, federal law provided that an individual could not give more than \$5000 to a political committee supporting candidates for federal office. But Soros gave millions to the "non-federal fund" (ostensibly not subject to the \$5000 limit) of Americans Coming Together (ACT),²⁰ a political organization organized under section 527 of the tax code. ACT claimed that even though it was running ads attacking Bush and supporting Kerry and others, and even though it was headed by Kerry's former campaign manager, it could pay for those ads mostly out of its non-federal fund and therefore was not bound by the \$5000 individual contribution limitation. There was no evidence the group coordinated with Kerry's campaign, but ACT did mimic the campaign's advertising strategy. A few years after the election, the Federal Election Commission (FEC) determined that ACT violated pre-*Citizens United* campaign finance law, imposed a \$775,000 fine, and decided ACT should have paid more from its federal political account (to be used for federal election activity and subject to the contribution limits applicable to federal political action committees) because its major purpose was to elect a federal candidate.²¹ In particular, ACT should not have accepted

16. Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 119–20 (2004).

17. For a summary, see LOWENSTEIN, HASEN & TOKAJI, *supra* note 1, at 676–80.

18. Thomas B. Edsall, *Soros-Backed Activist Group Disbands as Interest Fades*, WASH. POST (Aug. 3, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/02/AR2005080201849.html>.

19. George Soros, *Maintaining Political Interest*, NPR NEWS (June 10, 2006, 8:00 AM), <http://www.npr.org/templates/story/story.php?storyId=5476317>.

20. Edsall, *supra* note 18 ("Soros and his close associate . . . together put \$38.5 million into ACT and the Media Fund. With this seed money, the two organizations collected \$196.4 million, enough to . . . flood the airwaves with pro-Democratic commercials in the early spring of 2004 when Kerry's campaign was broke.").

21. FED. ELECTION COMM'N, CONCILIATION AGREEMENT IN THE MATTER OF AMERICA

contributions exceeding \$5000 from individuals to pay for these ads.²²

Those with serious concerns about Soros giving \$27 million directly to Kerry should have similar concerns about Soros giving the same amount to independent groups with close personal ties to Kerry. Again, though I have no reason to doubt the honesty of Kerry and Soros, unscrupulous donors and candidates could agree to a bribe, with the money going to a group committed to doing everything to elect the candidate. That committee need not even know about the bribe; it is certainly not required that there be “bargaining opportunities” involving the outside group.²³ The other interests noted for limiting contributions to candidates are in play as well: A large donor to an independent group could well have undue influence over the candidate, even if the financial support is marginally attenuated; the large donor to the independent group is likely to get special access to the candidate and the large contribution could have an outsized influence on the election campaign; and the public’s confidence could be shaken by a large contribution to an independent group with close ties to the candidate. All of these arguments are somewhat lessened by the independence of the outside group, but they are still present.

The second scenario concerns the 2012 presidential election, and the campaign contributions of conservative casino magnate Sheldon Adelson. By the time of the 2012 election, court decisions had begun to transform the campaign finance landscape in favor of major donors: The Supreme Court had decided *Citizens United v. FEC*,²⁴ allowing independent corporate spending in elections, and the United States Court of Appeals for the District of Columbia Circuit had decided *SpeechNow.Org v. FEC*,²⁵ allowing individuals to give unlimited sums to political committees that make only independent expenditures supporting or opposing candidates. On the regulatory front, the FEC had issued two advisory opinions allowing corporate and labor union contributions to these independent expenditure-only

COMING TOGETHER 1 (2007), available at <http://eqs.fec.gov/eqsdocs/000061A1.pdf>.

22. *FEC to Collect \$775,000 Civil Penalty from Americans Coming Together*, FED. ELECTION COMM’N (Aug. 29, 2007), <http://www.fec.gov/press/press2007/20070829act.shtml>; Kenneth P. Vogel, *Soros-Linked Group Hit with Huge Fine*, POLITICO (Aug. 29, 2007, 5:51 PM), <http://www.politico.com/news/stories/0807/5555.html>. ACT did not admit wrongdoing in agreeing to settle the case. FED. ELECTION COMM’N, *supra* note 21.

23. *Cf.* Smith, *supra* note 14, at 632 (“No bargaining opportunities arise unless [the Super PAC employee] has contact with the campaign or candidate post-Super PAC employment.”).

24. 558 U.S. 310, 319 (2010).

25. 599 F.3d 686, 689 (D.C. Cir. 2010).

committees,²⁶ which became known as Super PACs. In the 2012 elections, all of the serious presidential candidates had single-candidate Super PACs supporting them, with many headed by friends or former campaign associates.²⁷ Some Super PACs even took campaign contributions from the candidate's family members.²⁸ In essence, these Super PACs were the legal version of what ACT was trying to do back in 2004.

Adelson gave unprecedented sums to Super PACs—first \$20 million to Winning Our Future, the Super PAC supporting Republican Newt Gingrich in the Republican primaries, and then \$30 million to Restore Our Future, the Super PAC supporting Mitt Romney's general election campaign against President Obama.²⁹ Restore Our Future was headed by Charlie Spies, a close associate of Mitt Romney.³⁰ There was no evidence Restore Our Future violated the rules on coordinating with the Romney campaign. But, consistent with FEC rulings, Romney was allowed to solicit funds (of no more than \$5000) for the independent group.³¹ (President Obama apparently did the same thing, soliciting funds for Priorities USA, a pro-Obama Super PAC headed by Bill Burton, a former close associate of Obama.³²) Restore Our Future complemented the Romney campaign's strategy, and generally mimicked the campaign's

26. Club for Growth, Inc., FEC Adv. Op. 2010-09 (July 22, 2010), <http://saos.fec.gov/aodocs/AO%202010-09.pdf>; Commonsense Ten, FEC Adv. Op. 2010-11 (July 22, 2010), <http://saos.fec.gov/aodocs/AO2010-11.pdf>.

27. See Nicholas Confessore & Michael Luo, *G.O.P. Donors Show Thirst to Oust Obama in November*, N.Y. TIMES (Jan. 31, 2012), http://www.nytimes.com/2012/02/01/us/politics/campaign-finance-reports-show-super-pac-donors.html?pagewanted=all&_r=0; Dan Eggen, *The Influence Industry: 'Candidate Super PACs' Surge Ahead in 2012 Money Race*, WASH. POST (Aug. 24, 2011), http://www.washingtonpost.com/politics/the-influence-industry-candidate-super-pacs-surge-ahead-in-the-2012-money-race/2011/08/24/gIQA5qBcJ_story.html.

28. See, e.g., Nicholas Confessore, *Huntsman's Father Gave \$1.9 Million to Super PAC*, N.Y. TIMES CAUCUS BLOG (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/>.

29. Theodor Meyer, *How Much Did Sheldon Adelson Really Spend on Campaign 2012?*, PROPUBLICA (Dec. 20, 2012), <http://www.propublica.org/article/how-much-did-sheldon-adelson-really-spend-on-campaign-2012>.

30. *Restore Our Future*, FACTCHECK.ORG (July 25, 2012), <http://www.factcheck.org/2011/09/restore-our-future/>.

31. Ryan J. Reilly, *FEC: Politicians Can Solicit Donations for 'Super PACs,' But Only up to 5K*, TALKING POINTS MEMO (June 30, 2011, 8:05 PM), <http://talkingpointsmemo.com/muckraker/fec-politicians-can-solicit-donations-for-super-pacs-but-only-up-to-5k>.

32. *Priorities U.S.A./Priorities USA Action*, FACTCHECK.ORG (Aug. 6, 2012), <http://www.factcheck.org/2011/09/priorities-usa/priorities-usa-action/>; Amanda Terkel & Sam Stein, *Obama Broke Super PAC Pledge During Campaign*, HUFFINGTON POST (Nov. 4, 2013), http://www.huffingtonpost.com/2013/11/04/obama-super-pac_n_4214466.html.

message.³³ Adelson's contributions to Restore Our Future and Winning Our Future were part of the \$98 million to \$150 million (or more) that Adelson and his wife contributed in the 2012 elections³⁴—making Wanniski's plea for \$25 million to Kemp in 1996 seem quaint.

As with the Soros-Kerry connection, the Adelson-Romney connection raised concerns similar to those that would have been raised had Adelson made a multi-million dollar contribution directly to Romney. To repeat, though I have no reason to doubt the honesty of Romney and Adelson, unscrupulous donors and candidates could agree to a bribe with the money going to a group committed to doing everything to elect the candidate. Once again, there need be no bargaining involving the Super PAC directly. The anti-undue influence, political equality, and public confidence arguments are the same as in Soros-Kerry. The independence of the Super PAC may somewhat alleviate, but does not eliminate, those concerns.

One additional concern about undue influence arises from Super PACs that does not arise from direct contributions to candidates (at least in a world where individual contributions are limited): A wealthy individual or entity could threaten to bankroll a large Super PAC working against an elected official up for reelection in the event that official acts inconsistently with the wealthy individual or entity's interests.³⁵ Even without an explicit threat or quid pro quo, an elected official could be influenced out of fear that the wealthy individuals or entities will bankroll her opposition. This threat is much more credible when the individual or entity can give unlimited contributions to a Super PAC, as opposed to simply giving the maximum individual contribution amount to an opposing candidate.

These three examples demonstrate that the case for contribution limits to individual candidates resembles the case for contribution limits to independent groups, or at least to groups that are closely aligned with the candidates. Though some small differences remain

33. In fact, at one point during the 2012 campaign, Restore Our Future ran the same ad, word for word, as Romney himself ran in the 2008 presidential election. Domenico Montanaro, *Pro Romney Super PAC Recycles Romney 2007 Ad*, NBC NEWS (Feb. 23, 2012), http://firstread.nbcnews.com/_news/2012/02/23/10488670-pro-romney-super-pac-recycles-2007-romney-campaign-ad?lite.

34. Meyer, *supra* note 29. As Meyer explains, certain groups, such as those organized under section 501(c)(4) of the Internal Revenue Code, need not publicly disclose details regarding the contributions they receive. *Id.*

35. Richard L. Hasen, *The Biggest Danger of Super PACs*, CNN OPINION (Jan. 9, 2012), <http://www.cnn.com/2012/01/09/opinion/hasen-super-pacs/index.html>.

between contributing directly to the candidate and giving to a supportive Super PAC, in general, the concerns about large contributions are parallel. If one believes it is desirable to limit contributions directly to candidates, one should favor limits on contributions to single-candidate Super PACs as well.

II. SUPER PAC CONTRIBUTION LIMITS AND THE FIGHT OVER “CORRUPTION”

In Part I, I listed four different interests that could justify individual contribution limitations applied directly to candidates as well as to single-issue reliable Super PACs supporting candidates: the antibribery interest, the anti-undue influence interest, the political equality interest, and the public confidence interest. Whether these interests or others motivate those who support contribution interests, and the relative importance of each interest, is hard to say. Nonetheless, the Supreme Court has limited the types of interests that may be weighed against the First Amendment rights of those who contribute and want to accept contributions.³⁶ The Court also has required application of “exacting scrutiny” as the balancing test for judging the constitutionality of contribution limits.³⁷ Thus, only some arguments to sustain individual contribution limits will pass judicial muster.

To sum up the matter briefly,³⁸ the Supreme Court has accepted only the interest in preventing corruption and the appearance of corruption to justify contribution limitations to candidates—although the definition of “corruption” has shifted over time.³⁹ Under an exacting scrutiny standard, the Supreme Court has repeatedly upheld contribution limitations applied in candidate elections, except in one instance when the Court held a limit was so low as to prevent a candidate from being able to engage in effective advocacy.⁴⁰

36. See HASEN, *supra* note 1, chs. 14–15.

37. *Id.*

38. For more detailed analysis, see *id.*; LOWENSTEIN, HASEN & TOKAJI, *supra* note 1, chs. 12–14.

39. For a clear and useful taxonomy, see Yasmin Dawood, *Classifying Corruption*, 9 DUKE J. CONST. L. & PUB. POL’Y (forthcoming 2014).

40. *Randall v. Sorrell*, 548 U.S. 230, 262 (2006); see generally Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After Randall v. Sorrell*, 68 OHIO ST. L.J. 849 (2007).

The Supreme Court has not directly weighed the constitutionality of contribution limits to independent groups such as Super PACs.⁴¹ However, in the context of spending limits, to which the Supreme Court has applied strict scrutiny, *Citizens United* held that spending by independent groups cannot corrupt or create the appearance of corruption.⁴² Thereafter, the D.C. Circuit in *SpeechNow* held that if

41. Before *Citizens United*, there was some question whether the Court in a 1981 case, *Cal. Med. Ass'n v. FEC*, 453 U.S. 182 (1981), had endorsed limitations on campaign contributions to independent expenditure committees and then reaffirmed the constitutionality of limits in *McConnell v. FEC* in its footnote 48. See 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, 69 (2004).

42. *Citizens United v. FEC*, 558 U.S. 310, 359–61 (2010). Here is the key portion of that analysis:

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. The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt:

Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness. [*McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part)].

Reliance on a “generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.”

The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse to take part in democratic governance because of additional political speech made by a corporation or any other speaker. . . .

The *McConnell* record was “over 100,000 pages” long, yet it “does not have any direct examples of votes being exchanged for . . . expenditures.” This confirms *Buckley*’s reasoning that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption. In fact, there is only scant evidence that independent expenditures even ingratiate. Ingratiation and access, in any event, are not corruption. The BCRA record establishes that certain donations to political parties, called “soft money,” were made to gain access to elected officials. This case, however, is about independent expenditures, not soft money. When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put

independent spending cannot corrupt, then contributions to fund independent spending cannot corrupt either.⁴³ How can we square this analysis with the analysis in Part I, which showed that similar interests support individual contribution limits and limits on contributions to Super PACs and other independent groups? Why reach divergent constitutional outcomes in the two cases?

To begin with, we can take the third interest, political equality, off the table. Even if equalization does motivate supporters of contribution limitations, the Court in *Buckley v. Valeo*,⁴⁴ *FEC v. Davis*,⁴⁵ and *Citizens United* has rejected the interest.⁴⁶ The rejection is all the clearer after *Citizens United* overturned cases obliquely embracing a political equality rationale in the context of corporate spending and labor union spending.⁴⁷ Indeed, following the Court's recent opinion in *Arizona Free Enterprise Club's Freedom PAC v. Bennett*,⁴⁸ striking down the matching funds portion of Arizona's public financing law, if political equality is even *part* of a law's motivation, the law may violate the First Amendment.⁴⁹

As to the three other interests—antibribery, anti-undue influence, and public confidence—the Court's treatment of contribution and spending limits has diverged for empirical and conceptual reasons. Admittedly, the Supreme Court has said that the prevention of corruption or the appearance of corruption can justify contribution limits. But the problem becomes what the Court means by "corruption," a concept that has shifted over time.⁵⁰ Empirically,

expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption.

Id. (citations omitted) (internal quotation marks omitted).

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

44. 424 U.S. 1 (1976).

45. 554 U.S. 724 (2008).

46. *Citizens United*, 558 U.S. at 379–84 (Roberts, C.J., concurring); *Davis*, 554 U.S. 724, 741–42; *Buckley*, 424 U.S. 48–49.

47. See generally Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011) (explaining the change in the doctrine).

48. 131 S. Ct. 2806 (2011).

49. *Id.* at 2825–26; see also *id.* at 2843–44 (Kagan, J., dissenting) ("This Court, after all, has never said that a law restricting speech (or any other constitutional right) demands *two* compelling interests. One is enough. And this statute has one: preventing corruption. So it does not matter that equalizing campaign speech is an insufficient interest.").

50. See HASEN, *supra* note 1, chs. 13–14 (summarizing the shifts in the doctrine).

Citizens United appears to establish—as an uncontested fact—that independent spending cannot corrupt or create the appearance of corruption.

I have been quite critical of this determination, because it does not allow factfinders to consider a contrary conclusion based upon actual evidence.⁵¹ As Part I demonstrated, the potential for quid pro quo bribery appears nearly as strong when it comes to large contributions flowing to a reliable single-candidate Super PAC—understood as one staffed by close associates of the candidate and backed by the candidate’s friends and family—as with contributions flowing to the candidate directly. When the Super PAC is reliable, the money is just as valuable as in the campaign coffers (except for those candidates who would use the money in the coffers for personal, not political, benefits).

Citizens United appears to exclude the possible bribery role of contributions to reliable Super PACs,⁵² and if the Court ever considers the issue it could well agree with the *SpeechNow.Org* court that contributions to fund independent spending cannot cause quid pro quo corruption any more than independent spending can.

The parallel empirical issue arises with respect to the fourth interest, the public confidence interest. As discussed in Part I, the potential for the public to lose confidence in our system of government or the electoral process appears nearly as strong when it comes to large contributions flowing to a reliable single-candidate Super PAC as with contributions flowing to the candidate directly. But once again, *Citizens United* appears to exclude the possibility of demonstrating that large contributions to a candidate’s reliable Super PAC can cause the public to lose confidence in government.⁵³

This leaves the second interest, the undue influence interest. Recall the concern here is elected officials who are too compliant with the interests of donors, and too willing to grant an audience to those donors. Indeed, in the case of potential Super PAC donors, the undue influence concern may be greater because elected officials may fear potential donors may donate not to the candidate or a supportive Super PAC but to an opposing Super PAC, *against* the candidate. This

51. Hasen, *supra* note 47.

52. See *Citizens United*, 558 U.S. at 356–61 (rejecting arguments that money spent independent of candidates can corrupt or create the appearance of corruption). If independent spending can never corrupt, then contributions to fund independent spending can never corrupt.

53. See *id.*

(sometimes implicit) threat could give those potential donors improper access, providing a strong anticorruption basis for limiting contributions to Super PACs.

The problem with using undue influence as a form of corruption is not only empirical but also conceptual. In a series of earlier contributions cases, most notably *Nixon v. Shrink Missouri Government PAC*,⁵⁴ the Supreme Court endorsed an undue influence theory of corruption, and relatedly an appearance of undue influence theory of corruption.⁵⁵ These cases, however, are in considerable tension with *Citizens United* and the Supreme Court's most recent campaign finance case, *McCutcheon v. FEC*.⁵⁶ Although the *Citizens United* Court was careful to note that it was not deciding the constitutionality of contribution limits,⁵⁷ it rejected these earlier cases' broad theory of corruption—at least in evaluating spending limits—by concluding that ingratiation and access are not corruption.⁵⁸ If neither undue influence nor the appearance of undue influence are valid theories of corruption then it is hard to see the path toward sustaining contribution limits to Super PACs.

If there was any doubt before over whether the Court's narrow definition of corruption and the appearance of corruption applies to contribution limitations, there is no longer. As this Article went to press, the Supreme Court decided *McCutcheon*, striking down federal limits on the total (or "aggregate") amount that a donor may give in a two-year election cycle to all candidates, federal political parties, and PACs that make direct contributions to candidates.⁵⁹ Although a full analysis of this case is beyond the scope of this Article, *McCutcheon* makes three moves of doctrinal significance that make it even less likely that courts will accept limitations on contributions to Super

54. 528 U.S. 377 (2000).

55. *Id.* at 382–83, 397–96; see generally Richard L. Hasen, *Shrink Missouri, Campaign Finance, and "The Thing That Wouldn't Leave"*, 17 CONST. COMMENTARY 483 (2000); Hasen, *supra* note 35.

56. 134 S. Ct. 1434 (2014).

57. *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) ("Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.").

58. The Court did suggest that the analysis might be different for large, soft money contributions: "The BCRA record establishes that certain donations to political parties, called 'soft money,' were made to gain access to elected officials. This case, however, is about independent expenditures, not soft money." *Id.* at 360. It is not clear how to reconcile this part of *Citizens United* with the rest of the opinion.

59. *McCutcheon*, 134 S. Ct. at 1442.

PACs.⁶⁰

First, the Court incorporated the narrow definition of corruption from *Citizens United* into the contributions context, ignoring the much broader definition in *Shrink Missouri*.⁶¹ Second, the Court made a similar move reading the appearance of corruption to apply only to an “appearance of quid pro quo corruption,”⁶² severely constricting *Buckley*’s broader concern about an “appearance of improper influence.”⁶³ Finally, the Court, again ignoring *Shrink Missouri*, severely ratcheted up the meaning of “exacting scrutiny” to a much more “rigorous” test.⁶⁴ Taken as a whole, *McCutcheon* calls the constitutionality of *all* contribution limits into question.

In sum, although the arguments for individual contribution limits applied to candidate campaign accounts and to single-candidate reliable Super PACs appear to be very close to each other and roughly similar in strength, current Supreme Court doctrine makes it extremely unlikely that possible arguments for contribution limits will be successfully applied to Super PACs. Part of the problem is empirical (rejection of the potential for quid pro quo corruption for contributions funding independent spending); part is conceptual (rejection of undue influence as a legitimate form of corruption); and part is normative (rejection of the political equality interest for limiting contributions). In short, it may take a change in Supreme Court personnel to sustain contribution limits in this area.

III. THE COORDINATION PROXY WAR

Savvy campaign finance reformers understand that the *Citizens United*, *McCutcheon*, and *SpeechNow.Org* reading of the meaning of corruption makes it difficult under current doctrine to sustain contribution limitations for Super PACs and other independent expenditure committees. This roadblock has caused some supporters

60. I explain these three moves in greater detail in Richard L. Hasen, *Die Another Day: The Supreme Court Takes a Big Step Closer to Gutting the Last Bits of Campaign Finance Reform*, SLATE (Apr. 2, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/04/the_subtle_awfulness_of_the_mccutcheon_v_fec_campaign_finance_decision_the.html.

61. See *McCutcheon*, 134 S. Ct. at 1441, 1450–51.

62. *Id.*

63. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976); see also Richard L. Hasen, *Opening the Political Money Chutes*, REUTERS (Apr. 7, 2014), <http://blogs.reuters.com/great-debate/2014/04/07/opening-the-political-money-chutes/>.

64. See *McCutcheon*, 134 S. Ct. at 1446 (“[I]f a law that restricts political speech does not ‘avoid unnecessary abridgement’ of First Amendment rights, it cannot survive ‘rigorous’ review.” (citing *Buckley*, 424 U.S. at 25)).

to seek an alternative route to cover such conduct: the coordination rules. Federal law treats coordinated expenditures as contributions,⁶⁵ and therefore if Super PACs “coordinate” their activity with candidates, they can no longer raise unlimited contributions. If the Super PAC and candidate sit down and discuss strategy, for example, the two entities are coordinating and the coordination rules apply. Unfortunately for those of us who support Super PAC contribution limits, the coordination route appears even less promising than the anticorruption argument for sustaining such limits.

Advocates of reforming coordination rules posit that the overlapping personal and personnel connections between a candidate’s committee and a single-candidate reliable Super PAC justify treating contributions to the Super PAC as coordinated with the candidate’s committee, and therefore subject to the individual contribution limits. For example, the proposed American Anti-Corruption Act (AACA),⁶⁶ which has been promoted by former FEC Chairman Trevor Potter, Professor Larry Lessig, and others,⁶⁷ provides the following coordination approach:

PROVISION 7: REVISE THE FEC’S COORDINATION REGULATIONS

The FEC’s current coordination regulations, located at 11 C.F.R. § 109.21, permit extensive collaboration between candidates and supposedly “independent” Super PACs.

Amend the Federal Election Campaign Act, by adding at § 431(17)(C), the following:

In order for an expenditure to be considered an independent expenditure, the organization paying for the expenditure must act totally independently of any candidate or political party. This includes, but is not limited to, requirements that the person making the expenditure may not employ or retain any individual or accept any assistance, including the solicitation of funds, from any

65. Federal law defines “contributions” to include “expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate.” Bipartisan Campaign Reform Act, 2 U.S.C.A. § 441a(a)(7)(B)(i) (West 2014); *see also* Shays v. FEC, 528 F.3d 914, 919–20 (D.C. Cir. 2008); 11 C.F.R. § 109.21; Smith, *supra* note 13, at 607–08.

66. *See* AMERICAN ANTI-CORRUPTION ACT, anticorruptionact.org (last visited Jan. 19, 2014). The text of the Act is posted at https://s3.amazonaws.com/s3.unitedrepublic.org/docs/AACA_Full_Provisions.pdf.

67. Richard Painter, *Lawrence Lessig, Trevor Potter, Theodore Roosevelt IV, Josh Silver et al. Push for Sweeping Anti-Corruption Legislation*, LEGAL ETHICS FORUM (Nov. 14, 2012), <http://www.legalethicsforum.com/blog/2012/11/lawrence-lessig-trevor-potter-theodore-roosevelt-iv-josh-silver-et-al-push-for-sweeping-anti-corrupt.html>.

individual who is the candidate benefited by such expenditure, or who has, with respect to the candidate benefited by such expenditure, within the last 5 years (1) raised funds for the candidate; (2) been employed or retained by the candidate or candidate's campaign(s) or the congressional office or committee staff of a Member of Congress or the Executive office of the President; (3) been employed or retained by a national political party committee of the political party of the candidate; (4) been employed or retained by a vendor employed or retained by the candidate, candidate's campaign(s), or candidate's party committee of that candidate to act in a fundraising, polling, media consultant, or campaign management capacity; or is (5) a spouse, partner, or relative of the candidate (father, mother, sister, brother, child, first cousin, aunt, uncle) (6) a current or former business partner or colleague of the candidate or of an employee of the candidate's campaign. Additionally, if a candidate publicly or privately endorses or approves of an organization's expenditure benefiting that candidate or any of the organization's activities, then the expenditures of such organization shall be deemed coordinated with such candidate.

Professor Richard Briffault offers a coordination proposal that addresses regulation of reliable Super PACs:

I propose that for any organization that (i) focuses all of its electioneering expenditures on one or a very small number of candidates, and (ii) either is staffed by individuals who used to work for the candidate, the candidate's campaign committee, or a political party in the current or past election cycle; has received fundraising support from a candidate, the candidate's campaign, or staff; or has been publicly endorsed by the candidate as a vehicle for supporting that candidate, that organization is to be treated as a coordinated organization with that candidate or candidates, and its spending treated as coordinated spending with that of the candidate or candidates it supports.⁶⁸

The AACA and the Briffault proposals, however, reach much more broadly than actual coordination. For example, the AACA targets Super PACs that employ anyone who is politically active or any relative, former colleague, or former donor of a candidate. The AACA would effectively bar Super PACs from employing *anyone* who has worked for *any* member of Congress (not just the supported

68. See Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 97 (2013), available at <http://www.columbialawreview.org/wp-content/uploads/2013/05/Briffault-113-Colum.-L.-Rev.-88-2013.pdf>.

candidate) for the last five years. This definition has nothing to do with coordination and is instead simply a way to put single-candidate (and many other) Super PACs out of business. Briffault's proposal targets those individuals who had a close relationship with the candidate before forming the Super PAC.

Supporters of the AACA might defend the broad coordination standard as a prophylactic means to prevent those with close personal relationships to a candidate from using those connections to surreptitiously coordinate on strategy. But actual coordination is unnecessary to achieve the aims of supporting a candidate and there is no need for those with a personal relationship to a candidate to risk a felony. The information that a Super PAC needs to be an effective proxy for a campaign is all public, and nothing depends on the personal relationship. As election lawyer Bob Bauer notes, "why do [candidates and Super PAC employees] have to have known each other when they can read websites and tweets?"⁶⁹

Briffault's proposal is narrower than the AACA's proposal, and much more defensible than the AACA's blunderbuss approach. Further, there is no question Briffault is right that a single-candidate Super PAC will share a common purpose with a candidate's campaign. He explains the basis for his proposal:

The thrust of the first factor is that if a committee is devoting all of its election spending to promoting a specific candidate—whether with affirmative ads or attacks on that candidate's opponent—then donations to that committee are effectively donations to the candidate. 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, although the organization's spending may benefit certain candidates, the link between a particular donor and a particular candidate is attenuated. But where the organization is a single-candidate committee, the connection between donor and ultimate beneficiary is much stronger, and the donation begins to resemble *Buckley's* "disguised contribution." . . .

The second factor addresses the concern that it is possible for a committee to be formed by a truly independent group of concerned citizens to advance just one candidate, but also to stress

69. Robert F. Bauer, *Professor Briffault on Super PACs and the Question of "Coordination"*, MORE SOFT MONEY HARD LAW (May 8, 2013), <http://www.moresoftmoneyhardlaw.com/2013/05/professor-briffault-on-super-pacs-and-the-question-of-coordination/>.

particular issues, concerns, or campaign themes that differ from those of the supported candidate. Even though focused solely on a single candidate in a specific election, such a group might still fit the model the Supreme Court sought to protect in *Buckley*. But the involvement in the committee of individuals with recent ties to the candidate or the endorsement of the committee's work by the candidate or his staff indicates that the committee is very likely to act consistently with the preferred strategies, tactics, messages, and themes of the candidate and to act as an alter ego for the candidate's official campaign even without the explicit interactions that the law currently looks for.⁷⁰

Briffault's analysis, however, apparently conflates coordination with common purpose. As Professor Bradley Smith persuasively argues, *Buckley*'s understanding of coordination focuses on *coordination of campaign strategy*, and not simply the closeness of the prior or current relationship among different individuals or groups.⁷¹ A rule that would equate common goals and common histories with coordination of campaign strategy would go well beyond the goal of barring disguised contributions. In other words, to show coordination, it is not enough to prove that the Super PAC acts "consistently" with the candidate's views or even "as an alter ego"; coordination requires

70. Briffault, *supra* note 68, at 97–99. Briffault continues:

The ties that indicate that a committee is not truly independent of a candidate would include having staff who recently worked for the candidate, either on her campaign or in her government office; who recently worked for a committee of that candidate's party; who raised funds for a current or recent campaign of that candidate; or who recently worked for a vendor who provides campaign services to the candidate. A committee that exists solely to promote one or a very small number of candidates and is organized and operated by individuals with recent strong political ties to that candidate or candidates is very likely to be viewed by the candidate or candidates aided as providing integral support to their campaigns even in the absence of express current interaction between the independent committee and the candidate. Under those circumstances, it would be fair to say that donations to that committee should be treated as disguised contributions to the candidate.

Similarly, even without the use of overlapping staff, if the candidate or his committee endorses or approves of an organization's campaign activities on his behalf, calls on donors to give to that committee, participates in fundraising activities for it, or otherwise signals support for the organization's campaign work, that, too, indicates that the candidate considers the committee to be a part of his campaign. Even in the absence of substantive discussions about campaign strategy, involvement in decisions about advertising messages, or transmission of inside information, the candidate's endorsement of the organization's work indicates that the candidate and committee are acting in concert to promote the candidate's election.

Id.

71. Smith, *supra* note 14, at 630–35.

proof of “the explicit interactions that the law currently looks for.”⁷² A coordination rule that does not require explicit interactions appears to violate the First Amendment.⁷³

Briffault is on stronger grounds when he argues for a rule that treats candidates who urge donors to give to the Super PAC as coordinating with that Super PAC. 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. Even Smith seems to agree that treating this activity as coordination would be constitutional under existing doctrine, at least when it involves a candidate soliciting funds for a single-candidate Super PAC.⁷⁴ That fundraising lets would-be donors and the world know that a donation to the Super PAC is just as good (or better, given the lack of contribution limits) as a donation to the candidate’s campaign. After all, Mitt Romney was probably a lot happier with Sheldon Adelson’s \$30 million contribution to Restore Our Future than he would have been with \$5200 from Adelson to his campaign committee.

And it is no doubt true that Super PACs with close personal or personnel ties to the candidate can create a public perception of undue influence over that candidate. Briffault is surely right that committees that exist solely to support specific candidates and are “either . . . organized and directed by individuals with close political ties to the candidate or . . . recognized as a supporter by the candidate . . . pose the same dangers of corruption and the appearance of corruption as donations to the candidate’s official campaign committee.”⁷⁵ Indeed, I would argue that reliable Super PACs create nearly the identical *actual* undue influence problem that arises when a donor makes a large campaign contribution directly to a candidate. But, as we have seen, this idea of creating undue influence through

72. Briffault, *supra* note 68, at 98.

73. Smith, *supra* note 14, at 630–35.

74. See *id.* at 635; see also Bauer, *supra* note 69 (arguing that fundraising alone does not allow for treating activity as coordinated). As Bradley Smith has noted:

[T]his type of event, when the soliciting candidate knows that funds raised will be spent on behalf of his election, probably falls within the constitutional scope of ‘coordination.’ In this case, it is not so much the solicitation per se but the appearance of the candidate at the event, and the fact that it is known that the PACs sole purpose is to elect this single candidate.

Bradley A. Smith, *Solicitation and Coordination*, CTR. FOR COMPETITIVE POLITICS (Feb. 13, 2014), <http://www.campaignfreedom.org/2014/02/13/solicitation-and-coordination/>.

75. Briffault, *supra* note 68, at 99.

outside groups is in tension with the crabbed definition of corruption and the appearance of corruption under *Citizens United* and *McCutcheon*. Indeed, the problem may be deeper than *Citizens United*, and go instead to *Buckley*'s understanding of the non-corruptive nature of independent spending.⁷⁶ Regardless, undue influence, as bad as it may be, is *not* coordination. They are analytically distinct concepts.

CONCLUSION

The doctrinal move to an expanded definition of coordination to deal with the problem of Super PACs is completely understandable. But under current doctrine, courts would likely reject a broad coordination rule as infringing on the First Amendment rights of those involved with independent Super PACs.

Instead, coordination is the sideshow and the fight over the meaning of corruption is the main event. Reformers must convince the Supreme Court to return to the broader definition of corruption (or accept some version of the political equality rationale), which would permit arguments in favor of not just the prevention of bribery but also the prevention of undue influence. That day may not come until the Supreme Court personnel changes, but it is the linchpin for the successful resuscitation of meaningful campaign finance regulation in the United States.

76. See *Buckley v. Valeo*, 424 U.S. 1, 47 (1976). As *Buckley* explains:

Unlike contributions, 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.

Id.