SUPER PACS AND THE ROLE OF “COORDINATION” IN

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Such claims can create a cynicism among the general public, which understands that Super PACs are clearly working to elect particular candidates, and therefore does not see them as "independent" in the sense of being "disinterested" or somehow unknown to the candidate. This is particularly true when these claims are combined with rhetoric that suggests that the conduct skirts the law or openly flouts it.3(.6(c)6(s)3.2(y fl)7.1(out BT /P/MCI >>BDC 0.218 Tw 11.521 Tw 9.96

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

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

It is worth noting that even such coordinated spending probably does not benefit a candidate as much as a direct contribution. Even where the candidate provides direct instruction and content to the spender, the coordinated spending still involves transaction and monitoring costs that are almost certainly higher than those involved in a direct contribution to the campaign. There is the possibility that the orders will be garbled or misinterpreted, or that the spender will decide to alter or adjust them in ways contrary to the preferences of the candidate. The candidate will lose the flexibility to rapidly reallocate spending and resources as conditions change daily in the campaign. If there is concern about quid pro quo dealing—the basic constitutional justification for regulation under *Buckley*—the candidate will face monitoring costs to assure that the spender carries out his end of the bargain, and those monitoring efforts themselves may well leave a trail that tips off the public to the quid pro quo nature of the transaction. In short, while an anti-coordination rule might help a regime based on contribution limite6( )1-4(a)6d3.9o.2(hi)-b9(nd)10.4(i)-t1-3.9(ons)9

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

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

B. The Meaning of Coordination in Buckley v. Valeo

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

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

19. Investigations into alleged coordination are particularly intrusive on the rights of political association. *See* Bradley A. Smith & Stephen M. Hoersting, *A Toothless Anaconda: Innovation, Impotence, and Overenforcement at the Federal Election Commission*, 1 ELECTION L.J. 145 (2002). A rule that excludes certain public communications from the definition of a coordinated communication can thus provide certaintycaovint

Amendment freedoms.'"[27] Having accepted the government's proffered anti-corruption rationale, the Court noted that spending their own money in an election did not corrupt candidates, and that they were equally uncorrupted by spending any money raised in

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

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

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

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

33. *Id.* at 26–27.

34. *Id.* at 26.

35. The Court would briefly accept this idea in *Austin v. Michigan Chamber of*

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

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

The insistence upon a quid pro quo exchange indicates that the Court is not allowing limitations on speech. Rather, it is allowing regulation of a particular type of conduct—the overt exchange of campaign contributions for legislative favors that may not extend to the level of bribery.[43]

corruption or the appearance of corruption[,]"[44] it was making a statement of constitutional law, not of the perceptions of some segment of the population. The Court was referencing a specific type of unethical behavior by su

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

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

50. *Id.*

51. *Id.* at 27.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

62. 424 U.S. at 29.

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

Buckley, then, rejects anything that directly limits speech. What

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

The FEC's efforts to comply with that BCRA mandate on Coordinated Communications have been, to put it mildly, less than a complete success. The Commission's first attempt at a new definition was struck down by a federal court as "arbitrary and capricious" in 2004.[77] A second effort met a similar fate in 2007.[78] The Commission has been unable to agree on new rules since. In the remainder of this section, I deal with some of the reasons why defining coordination has proven such a difficult task, and why many of the criticisms aimed at the FEC are incorrect.

B. Problems in Developing a Workable Rule

Recall that one reason *Buckley* allowed restraints on association going beyond the traditional definition of bribery was the difficulty of smoking out or proving bribery. Thus, the prophylactic of limiting contributions was upheld. Presumably, the Court might have upheld a much broader prophylactic. For example, at the extreme, it might have upheld limits on all expenditures, not as restric9(e)-3.9s13(i)-3.2(ons)3.6(on)1045( )

the burden of proof issues—that all expenditures were the result, at some point, of quid pro quo bargaining. Such a holding, however, would have been inconsistent with the general protection of free speech. Instead,

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

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

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

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

92. *Id.* at 92–93.

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

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

95. *Id.*

96. *Id.* at 92, 95.

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

be involved in campaigns will also have issues that they will wish to discuss with officeholders between campaigns, and further, that they will therefore have ample opportunities to become acquainted with officeholders and share ideas and advice. In fact, the FEC sought to include as evidence long ago acquaintances, social interactions, friendships, and passing conversations to prove coordination.[98] To have adopted a broad prophylactic prohibiting any conduct that might create an opportunity for quid pro quo bargaining—that is, most or any contact between an eventual speaker and the candidate or campaign—would have had the type of broad chilling effect on speech that *Buckley* sought to avoid.[99] *Buckley* v-3.3(y)10.5(for)10.1n <</MCID 17 >>BDC 0

Therefore, the FEC's post-BCRA rule on the conduct necessary to make an otherwise independent expenditure coordinated did away with the joint venture standard adopted after *Christian Coalition*. It specified instead that "agreement or formal collaboration" was not necessary to find coordination, but it continued to require "substantial discussions about the communication" to trigger a coordination finding.[104] While sTc -0.00.7( )10.(o) s-0.2T -0.00sc 0 Tw 10.56 -09.41 oa nonv"3.6(i)-3.3(oo)-3

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

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

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

These single-candidate Super PACs have, not surprisingly, drawn their support and often their staff from various associates of the candidate. For example, during the 2012 Presidential election, a Super PAC that supp

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

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

But to say that a committee is operating on "behalf" of a candidate creates a slippery target. To operate on behalf of someone may mean "as a representative of," but it more commonly means "in the interest of."[120] All independent expenditures in campaigns are, by definition, undertaken to support or oppose a c(e)-3.9(on)1 6a-1.125 Tn, t.4(3.2(on,)24(3.26)-3.9( )

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

it, that the men and women in their examples are actually meeting

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

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

IV. CONCLUSION

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

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

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

130. *See, e.g.*, Briffault, *Coordination Reconsidered*, *supra* note 16a5h 16/007 Tc 0.01]/(n)4(695(i)-3)-135(c)-1c 0 Tw 846h.9

independence that the Court demands. Super PACs that do not confer with candidates and campaigns are not coordinating, even if they have