

# Beyond Coordination: Defining Indirect Campaign Contributions for the Super PAC Era

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## Introduction

Crucial to the holdings of *Buckley v. Valeo*,<sup>1</sup> the seminal campaign finance decision, was the distinction between direct campaign contributions to candidates and independent political spending. As is familiar by now, direct contributions may be constitutionally limited, but independent expenditures may barely be touched by law, and may not be limited in amount.<sup>2</sup> A less-discussed but equally clear holding of *Buckley* was that an expenditure may be treated as a contribution to a candidate if the spending was prearranged or coordinated with the candidate, or “placed in cooperation with or with the consent of a candidate.”<sup>3</sup> These *indirect*<sup>4</sup> contributions, more commonly known as “coordinated expenditures,” may be limited in the same way that direct contributions are limited.

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

2. *Id.* at 24–51.

3. *Id.* at 78.

4. This Article will use the term “indirect contribution” to refer to all expenditures that are not given directly to a candidate, but constitutionally may be regulated like contributions. See *McConnell v. FEC*, 540 U.S. 93, 219 (2003) (noting that coordinated expenditures “may be treated as indirect contributions” and subject to contribution limits). Typically, courts and commentators call indirect contributions “coordinated expenditures,” and refer to concomitant rules as “coordination” laws or regulations. As explained below, this Article argues that the common understanding of contributions should be broader, and that too much weight is given to the word “coordination.” While the term is used when necessary in this Article because of its ubiquity, “coordinated expenditure” is generally replaced by the term “indirect contribution.”

Arising from *Buckley*, case law and discussion of candidate-spender coordination has existed since 1976, but the topic has received relatively little attention compared to topics such as corporate involvement in campaigns. However, that has begun to change. Because of *Citizens United v. FEC*,<sup>5</sup> *SpeechNow v. FEC*,<sup>6</sup> and the rise of the Super PAC (a political committee that may accept unlimited contributions), outside spending has skyrocketed from groups that are perhaps only nominally independent from candidates (and increasingly focus their efforts on only one candidate), causing commentators, and sometimes regulators, to look more closely at whether these groups should still be treated as independent.

Courts and scholars attempting to draw a comprehensive constitutional line for defining indirect contributions have focused principally on answering one question: How much interaction between a candidate and a spender is necessary before regulators may constitutionally determine that the group's spending is an indirect contribution to the candidate?<sup>7</sup> Some contend that spending may only be treated as a contribution to a candidate if the candidate and the spender engage in significant discussion about the particular communication at issue.<sup>8</sup> Others advocate a broader role for regulators, arguing, for example, that if a candidate raises money for an outside group or the group is run by the candidate's former staffers, treating is constitutionally acceptable.<sup>9</sup>

This Article reexamines *Buckley* and subsequent case law and concludes that the jurisprudence allows governments to define indirect contributions in a fairly broad manner. *Buckley* based its contribution and independent expenditure distinction on the perceived value of each method of support, and sought to determine that value principally based on a candidate's actions.<sup>10</sup> While courts and commentators often use the word "coordination" to refer to the *Buckley* Court's discussion of candidate action that indicates a perception of value, the holding was not so narrow. In addition to describing "coordinated" expenditures, the Court defined indirect contributions as those made "in cooperation with or with the consent

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5. *Citizens United v. FEC*, 558 U.S. 310 (2010).

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

7. *See, e.g.*, *FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 92 (D.D.C. 1999).

8. *Id.*

9. *See, e.g.*, Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 97 (2013).

10. *See infra* Part IV.A.

of a candidate,”<sup>11</sup> while the Court characterized outside (and therefore unlimited) spending as that which was made “totally independently” of a candidate.<sup>12</sup> Consequently, candidate action providing a reliable indication that a candidate sees an expenditure as valuable is enough to treat that expenditure as a contribution, as long as the resulting definition does not impermissibly curtail the spender’s right to engage in discussion.<sup>13</sup>

Part I of this Article explains the principal jurisprudence on indirect contributions, drawing mainly on *Buckley* and other cases, including *FEC v. Christian Coalition*,<sup>14</sup> a district court case that included a comprehensive discussion of the constitutionality of regulating indirect contributions and has served as a basis for federal and state laws defining indirect contributions. Part I concludes by discussing the rules promulgated by the Federal Election Commission (“FEC”) that define indirect contributions and provides some examples of state regimes.

Part II looks at why rules defining indirect contributions have come into the spotlight. Since 2010, Super PACs and other outside groups have put millions into federal and state races across the country, exponentially increasing outside spending. Increasingly, these groups are focused on a sole candidate, and are often operated and/or funded by individuals or small groups of people with close ties to the candidate they support.<sup>15</sup> This raises concerns that such groups are either violating the law, or are following current law but are so useful to candidates that their expenditures create a corruption risk and should be treated as indirect contributions.

Part III gets deeper into the jurisprudential debate, addressing the impact of *Citizens United* and *McCutcheon v. FEC*, and responds to recent scholarly works that address the definition of indirect contributions.<sup>16</sup> It first reviews recent commentary by campaign finance experts Richard Briffault, Brad Smith, Rick Hasen, and Bob Bauer. Each has recently published work discussing how to define indirect contributions, all coming to at least slightly different conclusions about the permissible scope of regulation. After

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11. *Buckley*, 424 U.S. at 78.

12. *Id.* at 47.

13. *Buckley* provided additional qualifications, such as the fact that volume of outside spending may not be one such indication. The proper considerations are discussed in more detail in *infra* Part IV.

14. *Christian Coal.*, 52 F. Supp. 2d 45.

15. See *infra* Part II.

16. *Citizens United*, 558 U.S. 310; *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

summarizing their writing, Part III addresses and disputes the bases for parts of these theories that would call for a narrow definition of indirect contributions.

Based on the discussion in Part III, Part IV advocates for a broader definition of indirect contributions, relying on language used in *Buckley*, subsequent cases, and the Court's reasons for allowing contribution limits, to demonstrate the definition's constitutionality. With some caveats, Part IV argues that expenditures may be defined as contributions as long as some candidate action provides a reliable indication of perceived value. Further, it maintains that the *Buckley* Court's language shows that a fairly expansive definition of indicia of perceived candidate value is proper. Finally, Part IV applies that framework to proposed rules that would capture some of the activity in which Super PACs and candidates have engaged.

## I. Case Law and Rules Defining Indirect Contributions

### A. *Buckley*: The Constitutional Foundation

The significance of the project of defining contributions arises because of the *Buckley* Court's distinction between contributions and expenditures. The Court held that contributions to candidates could be limited because of the concern that large contributions could "secure a political quid pro quo" from candidates or create the appearance of corruption, which could erode "confidence in the system of representative Government."<sup>17</sup> The Court noted that contribution limits did not prevent unlimited political expression and did not undermine effective political discourse.<sup>18</sup> Importantly, the Court rejected the plaintiffs' argument that the contribution limits were overbroad because most large contributors do not seek improper influence.<sup>19</sup> The Court reasoned that "it [is] difficult to isolate suspect contributions" and "Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated."<sup>20</sup>

Conversely, for expenditures, the *Buckley* Court concluded that "independent advocacy restricted by [the Federal Election Campaign Act ("FECA")] does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large

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17. *Buckley*, 424 U.S. at 26–27.

18. *Id.* at 28–29.

19. *Id.* at 29–30.

20. *Id.* at 30.

campaign contributions.”<sup>21</sup> The government sought to justify expenditure limits<sup>22</sup> by arguing that spenders could coordinate with candidates to circumvent contribution limits.<sup>23</sup> The Court rejected this claim, noting that the law “prevent[s] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions,” and that the spending limit “limits expenditures for express advocacy of candidates made *totally independently* of the candidate and his campaign.”<sup>24</sup> Significantly, the Court explained that such “totally independent[]” spending might “provide little assistance to the candidate’s campaign and indeed may prove counterproductive,” and that without prearrangement and coordination, (1) the value of the expenditure is undermined, and (2) the danger of a quid pro quo is “alleviate[d].”<sup>25</sup>

One point often overlooked is that the Court’s discussion of “prearranged or coordinated expenditures” was based on the language of FECA, and did not purport to set a constitutional standard on how indirect contributions could be defined. Reading FECA, the Court noted that contribution limits, unlike expenditure limits, applied to spending that was “controlled or coordinated” by a candidate.<sup>26</sup> Under FECA, expenditures made on behalf of a candidate included those made by a person “authorized or requested” by the candidate to make the expenditure.<sup>27</sup> In a footnote, the Court discussed legislative history that provided a basis for concluding that certain expenditures were to be treated as contributions.<sup>28</sup> It cited a Senate report stating that if an “advertisement was placed in cooperation with the candidate’s campaign organization,” it would be treated as a contribution.<sup>29</sup> The Court concluded that based on the

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21. *Id.* at 46. Though this Article relies on the *Buckley* Court’s contribution/expenditure distinction, recognition of the distinction does not amount to an endorsement of the accuracy of the Court’s conclusion about the risks of corruption created by independent spending.

22. In this Article, the terms “expenditure limits” and “spending limits” are generally used to refer to restrictions on money spent by non-candidates. *Buckley* separately struck down limits on candidate spending. *See Buckley*, 424 U.S. at 54–58.

23. *Buckley*, 424 U.S. at 46.

24. *Id.* at 47 (emphasis added). Most regulations discussed in this Article restrict collaboration between an outside spender and a candidate, her agent, or her campaign. This Article generally uses “candidate” as shorthand for all entities that may be treated as identical to the candidate for legal purposes.

25. *Id.*

26. *Id.* at 46.

27. Federal Election Campaign Act § 608(b)(2)(B)(ii).

28. *Buckley*, 424 U.S. at 46, n.53.

29. *Id.*

legislative history and the purposes of the law, “all expenditures placed in cooperation with or with the consent of a candidate” should be treated as contributions.<sup>30</sup>

The conclusions to be drawn from *Buckley* are in dispute, and that dispute is discussed further in Parts III and IV. While *Buckley* certainly did not provide lower courts and regulators with an abundance of specifics on what actions may elicit a finding of coordination, its language and its logical foundations provide a general framework that serve as a basis for any discussion of indirect contributions today.

Another challenge to applying *Buckley* to new situations is its flimsy logical premise that independent expenditures are less valuable to candidates and therefore less likely to corrupt. Of course, if a candidate were to choose between a \$1,000 contribution and \$1,000 of independent spending on his behalf, he would choose the contribution. But how many people seriously think that most candidates would choose a \$1,000 contribution over a one million dollar independent expenditure? This point, of course, has been made countless times,<sup>31</sup> and despite the Court’s continued reliance on *Buckley*, it is doubtful that most of the justices truly buy the premise.<sup>32</sup> Yet the argument in this Article must rely on *Buckley*’s logical foundation—it has controlled campaign finance law for almost forty

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30. *Id.*; see also *id.* at 78 (“We construed [the term ‘contributions’] to include not only contributions made directly or indirectly to a candidate, political party, or campaign committee, and contributions made to other organizations or individuals but earmarked for political purposes, but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate . . . . So defined, ‘contributions’ have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign.”).

31. See, e.g., John Paul Stevens, *Byron White—Hero and Scholar: Reflections About Punishment, Political Speech, and Public Liability*, 84 U. COLO. L. REV. 893, 901 (2013) (“Byron wrote a separate opinion effectively explaining why the distinction between limitations on contributions (which the Court upheld) and the limitations on expenditures (which the Court invalidated) did not make much sense.”); see also Burt Neuborne, *Buckley: Procedural History and Issues Examined*, in *CAMPAIGN FINANCE REFORM & THE CONSTITUTION: A CRITICAL LOOK AT BUCKLEY V. VALEO* 15 (1998) (“The *Buckley* Court’s separate treatment of expenditures and contributions has been criticized on at least three levels.”).

32. See, e.g., *McCutcheon*, 134 S. Ct. at 1454 (Roberts, C.J.) (“We have said in the context of independent expenditures that the absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . undermines the value of the expenditure to the candidate. But probably not by 95%.”) (internal quotation marks and citations omitted); see also *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009) (Kennedy, J.) (repeatedly eliding distinction between contributions and expenditures and focusing heavily on value of independent expenditures in concluding that independent spending on behalf of judicial candidate was grounds for candidate to recuse when spender was litigant).

years, and any faithful doctrinal analysis must be based on the Court's chosen method of reasoning.

### **B. Subsequent Supreme Court Case Law**

Few cases since *Buckley* have squarely confronted the constitutional limits of defining indirect contributions. The Court obliquely addressed the issue in *Colorado Republican Federal Campaign Committee v. FEC* ("*Colorado Republican I*"),<sup>33</sup> a case in which the Court invalidated the government's decision to treat all party expenditures as coordinated with a candidate. The three-justice plurality generally reiterated the *Buckley* Court's discussion of indirect contributions, explaining that the spending at issue in the case should not be treated as a contribution because it was made "independently and not pursuant to any general or particular understanding with a candidate."<sup>34</sup> It also noted that the FEC had not made the empirical judgment that party officials would "as a matter of course consult with the party's candidates before funding communications intended to influence the outcome of a federal election."<sup>35</sup> Further, the Court pointed out that the FEC had not argued (1) that it was too difficult to separate a party's independent and coordinated expenditures, or (2) that Congress had decided that the distinction between coordinated and independent party spending was untenable.<sup>36</sup> While that language should not be heavily relied upon, it did provide some indication of the plurality's belief that regulators could impose broad prophylactic rules in order to prevent circumvention of contribution limits.<sup>37</sup>

When the case returned a few years later for the Court to determine whether party spending that was actually coordinated could be limited at all, it explained that the boundary between contributions and expenditures is "easy to draw" when expenditures

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33. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996).

34. *Id.* at 614.

35. *Id.* at 620. Of course, this could be read to imply that the FEC has the authority to make such an empirical judgment and therefore regulate party spending as if it were coordinated.

36. *Id.* at 621. Justice Kennedy's concurrence (joined by Justices Rehnquist and Scalia) was more restrictive, concluding that party spending in cooperation, consultation, or concert with a candidate does not fall within the *Buckley* Court's definition of a contribution. *See id.* at 628–29. However, this position may have been due to parties' special role in the political campaign.

37. *See infra* Part IV.A discussion of prophylactic rules and accompanying text.

are made “without any candidate’s approval (or wink or nod).”<sup>38</sup> It also emphasized that “[t]here is no significant functional difference between a party’s coordinated expenditure and a direct party contribution to the candidate,” and expressed concern that allowing unlimited coordinated spending would cause increased contributions to parties so they could engage in such spending.<sup>39</sup>

The Supreme Court also addressed indirect contributions briefly in *McConnell v. FEC*<sup>40</sup> after a challenge to the relevant provisions of the Bipartisan Campaign Reform Act (“BCRA,” also known as “McCain-Feingold”).<sup>41</sup> BCRA directed the FEC to repeal its coordination regulations and draft new ones that would “not require agreement or formal collaboration to establish coordination.”<sup>42</sup> The law provided that the new regulations:

shall address—

- (1) payments for the republication of campaign materials;
- (2) payments for the use of a common vendor;
- (3) payments for communications directed or made by persons who previously served as an employee of a candidate or political party; and
- (4) payments for communications made by a person after substantial discussion about the communication with a candidate or political party.<sup>43</sup>

Addressing the plaintiffs’ argument that the provision was invalid because it directed the FEC not to require agreement to establish coordination, the Court stated that it was “not persuaded that the presence of an agreement marks the dividing line between expenditures that are coordinated . . . and expenditures that are truly independent.”<sup>44</sup> Rather, “the rationale for affording special protection to wholly independent expenditures has nothing to do with the absence of an agreement and everything to do with the functional

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38. *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 442 (2001) (“*Colorado Republican II*”).

39. *McConnell*, 540 U.S. 93.

40. *Id.*

41. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155 (2002).

42. BCRA § 214, 116 Stat. at 94–95.

43. BCRA § 214(c).

44. *McConnell*, 540 U.S. at 221.

consequences of different types of expenditures.”<sup>45</sup> Indeed, “expenditures made after a ‘wink or nod’ often will be ‘as useful to the candidate as cash.’”<sup>46</sup> Given that a supporter could comply with a candidate’s request or suggestion to make an expenditure without first agreeing to do so, BCRA’s instruction to the FEC was perfectly permissible.<sup>47</sup>

The *McConnell* plaintiffs also claimed that the statute’s regulation of “expenditures made ‘in cooperation, consultation, or concert with’” a candidate was unconstitutionally vague.<sup>48</sup> The Court dismissed this claim quickly, opining that the definition “delineates its reach in words of common understanding.”<sup>49</sup>

Although the Court has not specifically addressed indirect contributions since *McConnell*, it continues to clearly signal that the line between contributions and expenditures depends on a spender’s independence. In striking down the federal ban on corporate and union electioneering communications, the *Citizens United* Court directly applied the *Buckley* Court’s reasoning that “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.”<sup>50</sup> The *McCutcheon* Court echoed this sentiment, quoting *Citizens United* for the proposition that “the absence of prearrangement and coordination . . . undermines the value of the expenditure to the candidate.”<sup>51</sup>

Despite their decision to uphold the contribution/expenditure distinction, *Citizens United* and *McCutcheon* may complicate the analysis of indirect contributions to some degree because they have narrowed the definition of corruption: *Citizens United* overruled *Austin v. Michigan Chamber of Commerce*,<sup>52</sup> which had adopted a

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45. *Id.*

46. *Id.* (quoting *Colorado Republican II*, 533 U.S. at 442).

47. *Id.* at 222.

48. *Id.*

49. *Id.* (internal quotation marks omitted).

50. *Citizens United*, 558 U.S. at 345 (quoting *Buckley*, 424 U.S. at 47).

51. *McCutcheon*, 134 S. Ct. at 1454 (quoting *Citizens United*, 558 U.S. at 357 (quoting *Buckley*, 424 U.S. at 47)). Interestingly, Chief Justice Roberts in *McCutcheon* went on to say that the absence of prearrangement and coordination undermine the value of independent expenditures, “[b]ut probably not by 95%.” *Id.* A natural conclusion to draw is that large independent expenditures could create the opportunity for corruption if they are of a sufficient amount. Since presumably the Chief Justice did not intend to proclaim that expenditure limits are acceptable if set appropriately higher than contribution limits, the limitation on speech must be the obstacle to expenditure limits’ constitutionality.

52. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

broader view of corruption,<sup>53</sup> and read *Buckley* to hold that the governmental interest that could justify the restrictions at issue “was limited to *quid pro quo* corruption.”<sup>54</sup> *McCutcheon* reiterated this, holding that “[a]ny regulation must . . . target what we have called ‘*quid pro quo*’ corruption or its appearance,”<sup>55</sup> and holding that aggregate limits on contributions to federal candidates and parties did not serve that interest.<sup>56</sup> But as Professor Yasmin Dawood recently noted, “[i]n *Citizens United*, the majority settled on a narrow *quid pro quo* understanding of corruption, yet it is not completely clear what this *quid pro quo* approach means either in theory or practice.”<sup>57</sup> For reasons discussed more in Part III.B., the narrowing of the definition of corruption does not dramatically affect existing law on how contributions may be defined.

### C. Decisions From Other Courts

By far the most influential decision from a court other than the Supreme Court is *FEC v. Christian Coalition*,<sup>58</sup> a 1999 case from the District Court for the District of Columbia in which the FEC claimed that the Christian Coalition coordinated with Republican candidates and the National Republican Senatorial Committee to produce and distribute voter guides.<sup>59</sup>

In the section addressing indirect contributions, the *Christian Coalition* court first noted that the Supreme Court “has allowed Congress and the FEC wide berth to promulgate ‘prophylactic’ rules limiting contributions.”<sup>60</sup> The court then began to analyze “expressive coordinated expenditures by [MCFL]<sup>61</sup> corporations.”<sup>62</sup> It first recognized that a coordinated expenditure, unlike a contribution, “is not fungible and its value to the candidate depends on the

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53. *Id.* at 660 (noting law’s purpose to prevent “the corrosive and distorting effects of immense aggregations of wealth”).

54. *Citizens United*, 558 U.S. at 359.

55. *McCutcheon*, 134 S. Ct. at 1441.

56. *Id.* at 1442.

57. Yasmin Dawood, *Classifying Corruption*, 9 DUKE J. CONST. L. & PUB. POL’Y 103, 103 (2014).

58. *Christian Coal.*, 52 F. Supp. 2d 45.

59. *Id.* at 48.

60. *Id.* at 84.

61. Prior to *Citizens United*, business corporations could be prohibited from engaging in independent spending, but “MCFL” corporations, which were formed for political purposes and not established by businesses or unions, could not. See *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 264 (1986).

62. *Christian Coal.*, 52 F. Supp. 2d at 86.

circumstances.”<sup>63</sup> Thus, spending at the request or suggestion of the candidate could always be treated as coordinated,<sup>64</sup> but absent such a request, there must be “[s]ubstantial discussion or negotiation . . . such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure,” though they need not be equal partners.<sup>65</sup> The court believed this standard would ensure that the candidate had “taken sufficient interest to demonstrate that the expenditure is perceived as valuable for meeting the campaign’s needs or wants.”<sup>66</sup>

The court applied its standard to several campaigns that were the subject of FEC enforcement. Examining the Bush-Quayle campaign, the court found that the Coalition might have designed its voter guides using non-public information gained because of its executive director’s “proximity to the campaign,” but “more overt acts of coordination [were] required” to treat the expenditures as contributions.<sup>67</sup>

The influence of *Christian Coalition* has been far-reaching, despite the fact that it is a district court case and therefore is controlling law in no jurisdiction. *Christian Coalition* provided a fairly comprehensive definition that has been adopted (partially or completely) by the federal government<sup>68</sup> and in many states.<sup>69</sup> However, at least one other court has looked at *Christian Coalition* and came to a different conclusion: the Kentucky Supreme Court in *Martin v. Commonwealth* cited *Christian Coalition*, but concluded

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63. *Id.* at 91.

64. *Id.*

65. *Id.* at 92.

66. *Id.*

67. *Id.* at 95.

68. See General Public Political Communications Coordinated With Candidates and Party Committees; Independent Expenditures, 65 Fed. Reg. 76138-01 (Dec. 6, 2000) (explaining that newly promulgated rules “generally follow the standard articulated by the United States District Court for the District of Columbia in the *Christian Coalition* decision”); Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 93 (2013) (“The *Christian Coalition* decision provided the template that shaped the FEC’s coordination definition.”). The rules are currently codified at 11 C.F.R. § 109.21, and are still very similar to the standard set by the *Christian Coalition* court.

69. See, e.g., Wis. Elections Bd. Op. 00-02 (2000) (Reaffirmed Mar. 26, 2008); Disciplinary Counsel v. Spicer, 106 Ohio St. 3d 247, 252 (Ohio 2005); Mont. Admin. R. 44.10.323(4) (“‘Coordinated expenditure’ means an expenditure made in cooperation with, consultation with, at the request or suggestion of, or the prior consent of a candidate or political committee or an agent of a candidate or political committee.”); Code Me. R. 94-270, Ch. 1, § 6(9) (providing that if an “expenditure is made in cooperation, consultation or concert with, or at the request or suggestion of, the candidate, the expenditure is considered to be a contribution from the spender to the candidate”).

that its standard was more restrictive than *Buckley* required.<sup>70</sup> Instead of adopting a “joint venture” requirement, the Court relied directly on the *Buckley* Court’s language, holding that “an expenditure placed in cooperation with or with the consent of the candidate” could be treated as a contribution.<sup>71</sup>

Thus, while the Supreme Court has never attempted to provide a comprehensive definition of indirect contributions, it has provided some guidance through its language and its concerns that candidates will exchange official action for campaign assistance that they find valuable. While *Christian Coalition* has served as the basis for some regulation, the paucity of court treatment of the issue means that disagreement is still abundant. After the following section addresses various regulatory schemes, Parts III and IV will present different viewpoints on the constitutionality of various definitions of indirect contributions.

#### **D. The Definition of Indirect Contributions Used by the FEC and the States**

Laws defining indirect contributions have changed since FECA’s simple directive, in large part due to *Christian Coalition*, BCRA, and BCRA’s approval in *McConnell*. Though the FEC now has detailed coordination regulations, as do many states, the constitutionality of those regimes has not been squarely tested. That is in part because of rampant underenforcement by the FEC and many states—when spenders who violate existing rules are not penalized, they have less incentive to challenge the coordination regulations in court.<sup>72</sup>

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70. *Martin v. Commonwealth*, 96 S.W.3d 38, 56 (Ky. 2003), *cert. denied*, *Martin et al. v. Kentucky*, 539 U.S. 928 (2003).

71. *Id.* There is also some treatment of the issue in *Shays v. FEC*, 337 F. Supp. 2d 28, 62 (D.D.C. 2004), *aff’d sub nom.* *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005). Another recent district court case addressed the issue, though not in as much depth as *Christian Coalition*. In *Democratic Governors Ass’n v. Brandi*, 2014 WL 2589279 (D. Conn. June 10, 2014), the court granted the state’s motion to dismiss on the plaintiff’s challenge to Connecticut’s law defining indirect contributions. The court read the disputed version of the law to allow state regulators to use as evidence of coordination a candidate’s fundraising for an entity that would transfer money to another entity to make expenditures. *Id.* at \*9. In *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 495–97 (7th Cir. 2012), the court rejected a vagueness challenge to Illinois’ definition of indirect contributions that included outside expenditures made with a candidate’s “knowledge,” interpreting the term to require advance, non-public communication by the spender to the candidate.

72. See COVINGTON & BURLING, LLP, *E-Alert: FEC Year in Review 2013* (February 6, 2014), <http://www.cov.com/files/Publication/0226ed7a-4e2a-4412-95cd-0df24536cee7/Presentation/PublicationAttachment/569bad8a-d2eb-474e-9796-1078b5e0b349/Covington%20Alert%20-%20FEC%20Year%20in%20Review.pdf> (“The FEC found no case in

Federal law provides that “expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate.”<sup>73</sup> As part of BCRA, Congress directed the FEC to repeal its regulations defining coordination and promulgate new regulations; it clarified that the new rules should “not require agreement or formal collaboration to establish coordination.”<sup>74</sup> After protracted litigation,<sup>75</sup> the FEC promulgated rules that determine when an expenditure is considered coordinated through the use of a “content” standard and a “conduct” standard.<sup>76</sup>

The FEC’s content standard determines what type of communications will be treated as a contribution. The idea behind the content standard is to prevent regulations from encompassing advertisements that are truly not election-related. Explicit content standards are not necessary, and are not included in many state laws, because the standard definition of a contribution requires that the spending in question relate to an election.<sup>77</sup> Yet the FEC’s rule

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2013 in which its coordination rules had been violated. Many cases alleging coordination were disposed of with a 3-3 vote based on the standards needed to justify the agency beginning an investigation.”). Many states have rarely enforced provisions preventing collaboration between candidates and independent spenders. Chisun Lee, Brent Ferguson, & David Earley, *After Citizens United: The Story in the States*, THE BRENNAN CENTER FOR JUSTICE 2 (2014), <https://www.brennancenter.org/publication/after-citizens-united-story-states>. *But see* *Ponte v. Buttrey*, No. COPP 2014–CFP–007 at 2–3 (Apr. 21, 2014) (citing nine recent coordination enforcement decisions). The U.S. Department of Justice made headlines in February of 2015 when it reached a plea deal with a man who managed a Virginia candidate’s congressional campaign while also creating a Super PAC to assist the candidate. He was apparently “the first political operative to be criminally convicted of illegal coordination federally.” Matt Zaposky & Matea Gold, *Va. political operative pleads guilty to coordinating campaign contributions*, WASH. POST (Feb. 12, 2015), [http://www.washingtonpost.com/local/crime/va-man-pleads-guilty-to-coordinating-campaign-contributions/2015/02/12/e63a92dc-b146-11e4-827f-93f454140e2b\\_story.html](http://www.washingtonpost.com/local/crime/va-man-pleads-guilty-to-coordinating-campaign-contributions/2015/02/12/e63a92dc-b146-11e4-827f-93f454140e2b_story.html).

73. 2 U.S.C. § 441a(a)(7)(B)(i) (2014).

74. BCRA § 214(b)–(c) (2002).

75. *See Shays*, 528 F.3d 914.

76. *See* 11 C.F.R. § 109.21.

77. Typically, laws use phrases such as “for the purpose of influencing an election” or “for political purposes.” *Buckley* upheld this fairly broad definition, and for the most part, content standards have not been controversial. *See Buckley*, 424 U.S. at 24. However, earlier this year a U.S. district court in Wisconsin held that Wisconsin law could only treat coordinated expenditures as contributions if the resulting communication contained express advocacy. *O’Keefe v. Schmitz*, 14-C-139, 2014 WL 1795139 at \*6, \*8 (E.D. Wis. May 6, 2014) (stating that a candidate’s issue advocacy coordinated with an issue advocacy group “cannot be characterized as *quid pro quo* corruption,” and admonishing that “attempts to purify the public square lead to places like the Guillotine and the Gulag”). While the Seventh Circuit reversed that holding and left the decision to state courts,

narrows the scope: To meet the FEC's content standard, a communication must redistribute campaign materials, expressly advocate the election or defeat of a candidate, or make references to federal candidates and be run within a certain time window before the election.<sup>78</sup> Thus, coordinated expenditures that do not contain express advocacy and are outside a pre-election time window are not treated as contributions, and are not limited in amount.<sup>79</sup>

The FEC's conduct standard determines the type of collaborative actions that will trigger a finding that an expenditure qualifies as a contribution. There are five categories of conduct that will cause an expenditure to lose its independent status, and be deemed "coordinated" under federal rules: (1) when an expenditure is made at the request or suggestion of a candidate;<sup>80</sup> (2) when an expenditure is made and a candidate is materially involved in decisions about the resulting communication;<sup>81</sup> (3) when an expenditure is made and the spender and the candidate engage in substantial discussions about the resulting communication;<sup>82</sup> (4) when an expenditure is made and a spender uses the same commercial vendor used by a candidate if the vendor has provided the candidate with one of a certain list of services within the previous 120 days and the vendor provides the spender with material nonpublic information about the candidate or material nonpublic information "previously used by the commercial vendor in providing services to the candidate;"<sup>83</sup> or (5) when an expenditure is made and the spender was an employee of or independent contractor for the candidate in the preceding 120 days, with the same stipulations that exist in the common vendor

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O'Keefe v. Chisholm, No. 14-1822, 2014 WL 5088077 (7th Cir. Sept. 24, 2014), the same district judge later issued a similar opinion in a new case that raised the same issue, Citizens for Responsible Gov't Advocates, Inc. v. Barland, No. 14-C-1222, 2014 WL 5148437, at \*1 (E.D. Wis. Oct. 14, 2014); see also Robert Bauer, *The Coordination of Issue Advocacy Part I: Coordination and the Press*, MORE SOFT MONEY HARD LAW (June 27, 2014), <http://www.moresoftmoneyhardlaw.com/2014/06/coordination-issue-advocacy-part-coordination-press/> ("It is not clear, however, that the government can restrict coordinated electioneering communications in which there is no express advocacy or its functional equivalent—issue speech within 60 and 30 days of an election that qualifies as "issue advertising" under *Wisconsin Right to Life*.").

78. 11 C.F.R. § 109.21(c).

79. Some FEC Commissioners have argued that the Commission may regulate more broadly than the content standard allows because of the permissive wording of the federal statute. See Chair Cynthia L. Bauerly & Comm'r Ellen L. Weintraub, FEC, Statement on Advisory Op. Request 2011-23 (American Crossroads) (Dec. 1, 2011).

80. 11 C.F.R. § 109.21(d)(1).

81. *Id.* at § 109.21(d)(2).

82. *Id.* at § 109.21(d)(3).

83. *Id.* at § 109.21(d)(4).

provision.<sup>84</sup> The regulations also provide that the conduct standards are not met if the commercial vendor or former employee has implemented a firewall to prohibit the flow of information between those who provide services to the candidate and those who provide services to the spender.<sup>85</sup>

State laws vary in scope, with some going further than the FEC's rules (especially in response to the growth in Super PAC spending),<sup>86</sup> and some leaving regulators little guidance as to what constitutes coordinated spending. Maine's rule presumes that spending qualifies as a contribution if it is done in cooperation with any person who has worked for a campaign in the year preceding the expenditure.<sup>87</sup> The regulation encompasses a much greater amount of communication than the federal standard, which applies its corresponding requirement to (a) those who have worked for the candidate in the previous 120 days; and, more importantly, (b) spenders that are privy to material nonpublic information about a candidate's campaign plans.<sup>88</sup> In Florida, the law also has the potential to stretch much more broadly than federal law: an expenditure loses its independent status if the spender simply "[c]ommunicates with the candidate . . . concerning the preparation of, use of, or payment for, the specific expenditure or advertising campaign at issue."<sup>89</sup> As noted above, federal law only covers "substantial discussion" between the campaign and the spender or "material involvement" by the campaign.<sup>90</sup>

Connecticut's fairly new statute achieves its breadth through specific language. It defines independent expenditures in a typical manner, providing that spending loses its independence if made with "the consent, coordination, or consultation of, a candidate."<sup>91</sup> Yet the following subsection of the law creates a rebuttable presumption that

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84. *Id.* at § 109.21(d)(5).

85. *Id.* at § 109.21(h). The FEC's advisory opinions provide some assistance in determining what type of conduct will trigger a finding of coordination. For example, in a 2011 Advisory Opinion, the agency determined that candidates were allowed to perform fundraising for Super PACs as long as they only requested amounts within the federal contribution limits. FEC, Advisory Op. 2011-12 (Feb. 11, 2014).

86. *See, e.g.*, Minn. Campaign Fin. & Pub. Disclosure Bd., Advisory Op. 437, at 3 (Feb. 11, 2014) (requiring "the highest degree of separation between candidates and independent expenditure spenders that is constitutionally permitted").

87. 94-270 ME. CODE R. ch. 1 §6(9)(B)(1).

88. 11 C.F.R. § 109.21(d)(4)-(5).

89. FLA. STAT. ANN. § 106.011(12)(b) (2014). It does not appear that the constitutionality of this provision has been tested.

90. 11 C.F.R. § 109.21(d)(2)-(3).

91. CONN. GEN. STAT. ANN. § 9-601c(a) (2013).

certain expenditures are not independent. Such expenditures include those made “pursuant to a general . . . understanding with [] a candidate,”<sup>92</sup> “by a person based on information about a candidate’s plans, projects or needs, provided by [] a candidate,”<sup>93</sup> made by a person who has informed the beneficiary candidate of the audience, timing, location or mode or frequency of dissemination,<sup>94</sup> and to a consultant that has been used by a candidate in the same year that the spending occurs.<sup>95</sup> It should be emphasized that the conduct listed only creates a presumption for the state regulator to use, and therefore any constitutional analysis of Connecticut law would have to recognize that the presumption could be rebutted by a demonstration that there was no actual “consent, coordination, or consultation.”<sup>96</sup>

In summary, while federal and state laws vary to some degree in their breadth, most laws allow candidates and spenders to engage in at least *some* collaboration before the expenditure is treated as a contribution. Further, candidates may often raise money for outside spenders, and outside groups sometimes may be controlled by close allies of the candidate without triggering a contribution limit. The following Parts will discuss the proliferation of groups that use these tactics, proposals to broaden the definition of indirect contributions to limit such action, and whether the proposed broader definitions are constitutional.

## II. Renewed Interest in Indirect Contributions

Laws and lawsuits addressing the definition of indirect contributions have existed for decades, but reformers have focused more heavily on the issue in the last five years. The stronger spotlight is due to the explosion in independent spending<sup>97</sup> that began in 2010

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92. *Id.* at § 9-601c(b)(1).

93. *Id.* at § 9-601c(b)(3).

94. *Id.* at § 9-601c(b)(8).

95. *Id.* at § 9-601c(b)(9). Section § 9-601c(d) provides that when the state determines independence, it shall consider the creation of a firewall policy to prevent the sharing of information between employees or consultants that provide services to the spender and the candidate.

96. Part of this law was recently challenged, but the case was largely dismissed in *Democratic Governors Ass’n v. Brandi*, 2014 WL 2589279 (D. Conn. June 10, 2014). The rebuttable presumption essentially switches the evidentiary burden from the state to the regulated entity. Presumably, this tool can be used to ease the job of state regulators and cover some actions that would not be regulable under *Buckley*. The permissible breadth of such presumptions is outside the scope of this Article.

97. According to the Center for Responsive Politics, total outside spending in federal elections went from about \$340 million in 2008 to just over \$1 billion in 2012. For midterm

after *Citizens United* and *SpeechNow v. FEC*, which held that the government may not limit contributions to PACs that spend independently of candidates.<sup>98</sup>

The new world of spending has given rise to several related concerns. For some, the main problem is that the super-rich may make unlimited contributions to PACs, seemingly exerting enormous control over the political process. These reformers worry that the remaining members of the public lose their say because politicians are principally responsive to those who support them financially.<sup>99</sup> When the amount of spending rises, even maximum contributions seem to matter little, further crowding the less wealthy out of the political playing field. Compounding this concern, for-profit corporations may now engage in independent spending thanks to *Citizens United*; while corporate interests have not seemed to dominate outside spending as some feared, they do play a role and control some Super PACs,<sup>100</sup> and the existence of dark money groups means that the amount of corporate spending is unknown.<sup>101</sup>

Lack of disclosure about the sources behind outside spending is a problem regardless of whether the money comes from a corporation. Contributions to candidates are fully disclosed, but current law provides various ways for outside groups to obscure the true source of

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elections the difference was even starker, with \$70 million in outside spending in 2006 compared to \$305 million in 2010. *Total Outside Spending by Election Cycle, Excluding Party Committees*, CTR. FOR RESPONSIVE POLITICS, [https://www.opensecrets.org/outside\\_spending/cycle\\_tots.php?cycle=2014&view=A&chart=N#summ](https://www.opensecrets.org/outside_spending/cycle_tots.php?cycle=2014&view=A&chart=N#summ).

98. *SpeechNow*, 599 F.3d 686. *Buckley* held that the government could not limit independent spending by individuals, meaning that individuals' spending has been unlimited since 1976. However, before *SpeechNow* was decided, a limit on contributions to PACs seemed to discourage such spending.

99. See, e.g., MARTIN GILENS, *AFFLUENCE & INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 81 (2012) (finding a "complete lack of government responsiveness to the preferences of the poor").

100. Paul Blumenthal, *Corporations Have Found Yet Another (Secret) Way to Get Politicians Elected*, HUFFINGTON POST (July 31, 2014), [http://www.huffingtonpost.com/2014/07/31/super-pacs-corporations\\_n\\_5635382.html](http://www.huffingtonpost.com/2014/07/31/super-pacs-corporations_n_5635382.html). The full extent of corporate participation in our elections is unknown because of holes in disclosure law. See, e.g., Tara Malloy & Bradley A. Smith, *A Debate on Campaign Finance Disclosure*, 38 VT. L. REV. 933, 937 (2014) ("For example, if I were to give \$100,000 to Priorities USA (a nonprofit organization that has engaged in spending in the election), and not earmark the funds for anything, I would not have to be disclosed.").

101. See Jonathan Weisman, *G.O.P. Error Reveals Donors and the Price of Access*, N.Y. TIMES (Sept. 24, 2014), at A15, available at <http://www.nytimes.com/2014/09/25/us/republicans-corporate-donors-governors.html> (explaining error by Republican Governors Association that revealed "that many of America's most prominent companies, from Aetna to Walmart, had poured millions of dollars into the campaigns of Republican governors since 2008," in part through dark money 501(c)(4) organizations).

their funding.<sup>102</sup> As the *Christian Coalition* court noted, undisclosed coordinated expenditures “would be substantially more valuable than dollar-equivalent contributions because they come with an ‘anonymity premium’ of great value to a candidate running a positive campaign.”<sup>103</sup>

While all of these problems associated with truly independent spending are troublesome, those who control and donate to outside spending groups are often not content with providing independent support.<sup>104</sup> Many big spenders think the big money helps more if it is spent with some input from the campaign or a former campaign staffer,<sup>105</sup> and an outside group can probably raise more money if a

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102. Ian Vandewalker & Christopher Famighetti, *Dark Money Groups Dominate Independent Spending in House Toss-Up Races*, BRENNAN CENTER FOR JUSTICE (July 30, 2014), <http://www.brennancenter.org/analysis/election-spending-2014-13-toss-house-districts> (examining spending in thirteen House toss-up races and finding that in the second quarter, 86% of outside spending came “from dark money groups that keep some or all of their donors’ identities hidden”); Paul Ryan, *Two Faulty Assumptions of Citizens United and How to Limit the Damage*, 44 U. TOL. L. REV. 583, 588 (2013) (discussing absence of effective disclosure of independent spending groups). This is not a problem inherent in outside spending. As noted by *Citizens United*, outside spending may be subjected to disclosure laws. *Citizens United*, 558 U.S. at 369–70. With stronger and more sensible rules, outside spending could be fully disclosed.

103. *Christian Coal.*, 52 F. Supp. 2d at 88. The value of the “anonymity premium” depends on the disclosure law of the jurisdiction in question. Other concerns exist as well. Some contend that because outside spenders are not accountable to voters, they are more likely to run negative or substance-free advertising. See DANIEL P. TOKAJI & RENATA E. B. STRAUSE, *THE NEW SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS* 61 (2014) (reporting a campaign staffer’s complaint that “independent spending made the campaign ‘dumber and sillier,’ forcing candidates to spend their resources addressing non-substantive allegations, rather than issues”), available at <http://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf>.”).

104. Though concerns about lack of true independence are discussed frequently today, they are by no means new. See Richard Briffault, Book Review, *The Federal Election Campaign Act and the 1980 Election*, 84 COLUM. L. REV. 2083, 2092 (1984) (“As chronicled by Drew and Alexander, the independent committees in 1980 showed that there are all manners of ways in which people running independent campaigns can run them in tandem with the candidates without formal consultation.”) (internal quotation marks omitted).

105. For example, an outside group may seek to respond to an attack ad in support of its preferred candidate, but might not do so in the way the campaign would prefer. TOKAJI & STRAUSE, *supra* note 103, at 64. As noted in Parts III and IV, *Buckley* concluded that difference in value between candidate-controlled spending and independent spending was constitutionally significant. While many reformers would likely agree that money given directly to a candidate (or spending coordinated with a candidate) is more likely to cause corruption, they would disagree with the Supreme Court’s view about the minimal danger of independent expenditures.

candidate does the fundraising.<sup>106</sup> Those who have sought to get the most out of their spending have generally succeeded. Due to loose rules and almost nonexistent enforcement,<sup>107</sup> many expenditures that are not “totally independent” are either legal or are not investigated by the FEC or a state enforcement agency.<sup>108</sup>

The rise in candidate-specific Super PACs (also called “Buddy PACs”),<sup>109</sup> which spend all or most of their money on a single candidate, has helped to spur a new wave of criticism over spending that is less than independent. Many candidate-specific Super PACs are operated or funded by people with close ties to a candidate, raising even greater suspicions of collaboration. While Buddy PACs are not the only “independent” spending groups that blur the line between indirect contributions and independent expenditures, they are fairly prevalent and have probably attracted the most attention because their claims of independence tend to draw the most disbelief from outside observers.<sup>110</sup> Yet larger outside groups that support multiple candidates create the same problem if they collaborate with any of the candidates they support.<sup>111</sup>

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106. See, e.g., Marian Wang, *Uncoordinated Coordination: Six Reasons Limits on Super PACs Are Barely Limits At All*, PROPUBLICA (Nov. 21, 2011), <http://www.propublica.org/article/coordination-six-reasons-limits-on-super-pacs-are-barely-limits-at-all>.

107. See COVINGTON & BURLING, *supra* note 72.

108. It is unclear how often truly illegal coordination occurs, though in 2014 at least one candidate was caught discussing clear plans to coordinate: on a secretly recorded video, the president of the Wisconsin Senate said he was “putting together [his] own super PAC” with funds of up to \$500,000. Patrick Marley & Jason Stein, *Mike Ellis drops out of state Senate race*, MILWAUKEE JOURNAL-SENTINEL (Apr. 11, 2014), <http://www.jsonline.com/news/statepolitics/ellis-drops-out-of-senate-race-b99245893z1-254907211.html>.

109. TOKAJI & STRAUSE, *supra* note 103, at 5.

110. See, e.g., Paul Blumenthal, *A Personal Super PAC Is The Latest Weapon For This Year’s Senate Candidate*, HUFFINGTON POST (July 19, 2014), [http://www.huffingtonpost.com/2014/07/19/super-pacs-2014\\_n\\_5599999.html](http://www.huffingtonpost.com/2014/07/19/super-pacs-2014_n_5599999.html); Matea Gold & Tom Hamburger, *Must-have accessory for House candidates in 2014: The personalized super PAC*, WASH. POST (July 18, 2014), [http://www.washingtonpost.com/politics/one-candidate-super-pac-now-a-must-have-to-count-especially-in-lesser-house-races/2014/07/17/aaa2fcd6-0dcd-11e4-8c9a-923ecc0c7d23\\_story.html](http://www.washingtonpost.com/politics/one-candidate-super-pac-now-a-must-have-to-count-especially-in-lesser-house-races/2014/07/17/aaa2fcd6-0dcd-11e4-8c9a-923ecc0c7d23_story.html); Fredreka Schouten & Christopher Schnaars, *Some candidates’ Super PACs are a family affair*, USA TODAY (July 18, 2014), <http://www.usatoday.com/story/news/nation/2014/07/18/relatives-fund-candidate-super-pacs-rothblatt/12824361/>. Often, in the face of criticism, candidates attest to bending over backwards to avoid coordination. During the 2012 election, Mitt Romney discussed a Super PAC supporting him and said that “[i]f we coordinate, in any way whatsoever, we go to the big house.” Peter Overby, *SuperPACs, Candidates: Dancing Solo or Together*, NATIONAL PUBLIC RADIO (Jan. 6, 2012), <http://www.npr.org/2012/01/06/144801659/a-look-at-super-pacs-and-political-coordination>.

111. For example, Karl Rove’s American Crossroads, a group that spends on many races, requested an advisory opinion from the FEC allowing the group to consult with

Though their existence has been lamented since 2010, single-candidate groups appear to be gaining influence. In the 2012 federal elections, there were ten races in which a single-candidate Super PAC spent over \$1 million,<sup>112</sup> and over half of Super PACs that spent only on congressional races supported a single candidate.<sup>113</sup> But, while there were forty-two single-candidate Super PACs involved in congressional races in 2012, there were ninety-four in 2014.<sup>114</sup> The *Washington Post* reported that in the 2014 election “[f]or the first time, the kinds of super PACs that became prominent in the 2012 presidential campaign are also a basic requirement in competitive, down-ballot House races.”<sup>115</sup>

While candidate-specific Super PACs may sometimes collaborate or hire a candidate’s former staff, cooperation in other cases may be more direct. In Arizona, for example, a prosecutor in an ongoing case found that a former campaign worker had coordinated her group’s expenditures with attorney general candidate Tom Horne.<sup>116</sup> The finding was not based on the fact that she began receiving donations to the PAC just days after she resigned from her campaign post, but due to the fact that records showed her receiving strategy e-mails from the candidate and forwarding them to the PAC’s advertising company, and speaking on the telephone with the candidate while exchanging e-mails with the advertising company about strategy. An even more egregious case emerged in Utah after investigations into former attorney general John Swallow’s campaign. A legislative report concluded that his campaign staff created supposedly independent groups that raised more than \$450,000 from

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candidates on advertisements that it would run in support of those candidates. *American Crossroads Makes Absurd Request to FEC to Use Absurd FEC Regulation to Treat Coordinated Activities as Not Coordinated*, DEMOCRACY 21 (Nov. 10, 2011), <http://www.democracy21.org/archives/whats-new/american-crossroads-makes-absurd-request-to-fec-to-use-absurd-fec-regulation-to-treat-coordinated-activities-as-not-coordinated/>.

112. TOKAJI & STRAUSE, *supra* note 103, at 40.

113. See TAYLOR LINCOLN, PUBLIC CITIZEN, SUPER CONNECTED 4 (2012), *available at* <http://www.citizen.org/documents/super-connected-candidate-super-pacs-not-independent-report.pdf>.

114. Editorial, *Dark Money Helped Win the Senate*, N.Y. TIMES (Nov. 8, 2014), at SR10, *available at* <http://www.nytimes.com/2014/11/09/opinion/sunday/dark-money-helped-win-the-senate.html>.

115. *Id.*

116. In re Horne, No. LC2014-000255, slip op. at 6–9, 17–19 (Ariz. filed May 29, 2014) (order requiring compliance).

payday loan companies, which Swallow had promised to protect once in office.<sup>117</sup>

In response to these developments, there has been momentum to broaden the definition of indirect contributions and change other rules in order to buffer the negative effects caused by increased unlimited spending. Generally, many reformers believe that unlimited independent spending may create undue influence or outright corruption (contrary to the Supreme Court's assurances in *Citizens United*),<sup>118</sup> but those who seek to broaden the definition of indirect contributions believe that a greater separation between a candidate and a spender will at least deter some of those negative effects. For example, if an outside group seeks to respond to an attack on a candidate it supports, it may do so, but also may "lack[] the critical information or, from the campaign's perspective, get[] the message wrong."<sup>119</sup> However, if a candidate plays a role in the PAC's decisionmaking or fundraising or has close ties to the PAC's founders or staffers, there is greater reason to believe he or she will value the PAC's spending and possibly engage in quid pro quo corruption. Because outside groups are not limited in raising or spending money, that threat is all the greater.

Reacting to the perceived threat, those who work to reduce the influence of money in politics have sought to broaden the definition of indirect contributions in order to ensure greater distance between candidates and their outside supporters. For example, Dan Tokaji and Renata Strause, after documenting the increasing role of outside money and the rampant cooperation that occurs between outside spenders and campaigns, suggest that reformers may "argue for a broader definition that would encompass what we have called 'cooperation,' although such a definition may be hard to justify before the current Supreme Court."<sup>120</sup>

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117. UTAH HOUSE OF REPRESENTATIVES, REPORT OF THE SPECIAL INVESTIGATIVE COMMITTEE (Mar. 11, 2014), available at <https://www.documentcloud.org/documents/1088927-utah-house-special-investigation-committee-final.html>; Nicholas Confessore, *A Campaign Inquiry in Utah Is the Watchdogs' Worst Case*, N.Y. TIMES (Mar. 18, 2014), at A1, available at <http://www.nytimes.com/2014/03/18/us/politics/a-campaign-inquiry-in-utah-is-the-watchdogs-worst-case.html>.

118. See *Citizens United*, 558 U.S. at 310, 357 (concluding that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption").

119. TOKAJI & STRAUSE, *supra* note 103, at 64.

120. TOKAJI & STRAUSE, *supra* note 103, at 100. A related but distinct reason for reformers' criticism of candidate-spender collaboration may be the fact that contribution limits are one of the last vestiges of campaign finance law. While spending by individuals, corporations and unions may not be limited, contribution limits are still widely used. It

Reformers have also put forth specific legislative proposals for broader definitions of indirect contributions. Currently pending in the House is H.R. 5641, a proposal by Representatives David Price and Chris Van Hollen to broaden the federal definition of indirect contributions to include those payments “not made entirely independently of the candidate . . . including a payment which is made pursuant to any general or particular understanding, or more than incidental communication with the candidate.”<sup>121</sup> Further, the bill would treat expenditures as contributions if they were made by a group that was formed “with the express or tacit approval of the candidate,” that has benefitted from a candidate’s fundraising, or that is managed by any person who provided professional services for the candidate in the four-year period before the election cycle in question.<sup>122</sup> A legislative proposal written by Trevor Potter, among others, contains similar provisions, and would also treat expenditures as contributions if they were made by any colleague of the candidate or by a person who, within the previous five years, was employed by the political party of the candidate.<sup>123</sup> The proposal also appears to bar independent spending from anyone who is a former colleague or business partner of an employee of the candidate’s campaign.<sup>124</sup>

These proposals try to address the growing problem of Super PACs and other outside groups that may raise and spend in unlimited amounts, but have connections to candidates that some believe increase the quid pro quo risk. H.R. 5641 would do this in part by expanding on *Christian Coalition’s* “substantial discussion or negotiation” requirement, capturing any payment made after more than incidental communication.<sup>125</sup> It would prevent candidates from raising money for Super PACs, and would also extend the FEC’s former employee provision to a four-year period preceding the

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has been generally accepted since *Buckley* that coordinated expenditures are functionally equivalent to contributions. Thus, to allow Super PACs to flout the law by coordinating their spending with candidates would be to concede one of the few remaining methods reformers have to curb the influence of money in politics.

121. H.R. 5641, 113th Cong. § 1(b) (2d Sess. 2014).

122. *Id.*

123. THE AMERICAN ANTI-CORRUPTION ACT, PROVISION 7 (2014), available at <http://anticorruptionact.org/full-text/>. An accompanying document assessing the constitutionality of the proposal states that “[b]ringing the FEC’s regulations closer in line with these statements of the Supreme Court is very likely to be upheld if challenged.” THE AMERICAN ANTI-CORRUPTION ACT, CONSTITUTIONALITY 5, available at [https://s3.amazonaws.com/s3.unitedrepublic.org/docs/AACA\\_Constitutionality.pdf](https://s3.amazonaws.com/s3.unitedrepublic.org/docs/AACA_Constitutionality.pdf).

124. THE AMERICAN ANTI-CORRUPTION ACT, PROVISION 7 (2014), available at <http://anticorruptionact.org/full-text/>.

125. H.R. 5641, 113th Cong. § 1(b) (2d Sess. 2014).

targeted election cycle.<sup>126</sup> While proposals like these are unlikely to pass in the current Congress, they may be enacted eventually, and states are already leading the way.<sup>127</sup> For that reason, it is important to address questions about their constitutionality. The following section will review the most prominent recent commentary about the constitutionality of broader definitions of indirect contributions, and Part IV will address the commentary and set forth a theory of the permissible scope of such definitions.

### III. Recent Commentary, Case Law and Response

As indicated in Part I, under *Buckley* and the influential *Christian Coalition* opinion, it is fairly clear that in order to define a payment as a contribution, there must be some indication that the candidate perceives the payment as valuable.<sup>128</sup> In the following Part, this Article will attempt to set a more concrete standard on that precept, arguing that spending may be treated as a contribution if a candidate has taken action that would indicate perceived value and the resulting definition does not impermissibly limit the spender's participation in the marketplace of ideas. But first, this Part will address other recent developments on the topic of indirect contributions, including recent publications that offer a narrower view, as well as the changing definition of corruption in *Citizens United* and *McCutcheon*.

#### A. Views on *Buckley* and the Limits of Regulation

Along with increased popular concern over relationships between candidates and outside spenders, the Super PAC era has provoked scholars to attempt to determine the constitutional limits of defining indirect contributions. In 2013, Professor Richard Briffault wrote a short article discussing the rise of candidate-specific Super PACs and proposed a revised definition of indirect contributions.<sup>129</sup> The article criticizes the *Christian Coalition* "joint venture"

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126. *Id.*

127. See, e.g., Minn. Campaign Fin. & Pub. Disclosure Bd., Advisory Op. 437, at 3 (requiring "the highest degree of separation between candidates and independent expenditure spenders that is constitutionally permitted"); CONN. GEN. STAT. ANN. § 9-601c (2013) (discussed *supra* Part I.D.).

128. *Christian Coal.*, 52 F. Supp. 2d 45 (attempting to determine when "a candidate has taken a sufficient interest to demonstrate that the expenditure is perceived as valuable for meeting the campaign's needs or wants").

129. Briffault, *supra* note 68, at 92. See also Ryan, *supra* note 102, at 597-98 (arguing that "the Empowering Citizens Act would bring the law a common-sense understanding of 'coordination' that is currently lacking").

requirement because PACs and candidates can communicate through the press, and therefore need not engage in a joint venture to coordinate their actions.<sup>130</sup> Briffault argues that candidate-specific Super PACs should be deemed coordinated if they are staffed by a candidate's or party's former employees, or have received fundraising support, or an endorsement from the candidate.<sup>131</sup> He contends that this would be permissible based on *Colorado Republican II's* "wink or nod" language and *McConnell's* approval of BCRA coordination factors that do not focus on candidate-committee contact.<sup>132</sup>

Professor Briffault's suggestions have been met with criticism from several commentators. Former FEC Chairman Brad Smith wrote an essay in the summer of 2013 disagreeing with Briffault and promoting a different understanding of coordination.<sup>133</sup> The foundation for Smith's argument is that in upholding contribution limits, the *Buckley* Court barred restrictions on speech, but allowed limits on the right to associate.<sup>134</sup> Thus, in the coordination realm, the "direct contact in the context of providing something of value" allows quid pro quo corruption, which Congress may try to prevent.<sup>135</sup> Any rule that directly limits speech would be struck down,<sup>136</sup> and the definition of contributions must only include spending that creates an opportunity for an "explicit exchange bordering on bribery."<sup>137</sup>

Based on this understanding, Smith maintains that a broader approach to defining indirect contributions would be invalid because it would not focus on candidate-spender contact, and would create impermissible speech restrictions.<sup>138</sup> This conclusion means that for constitutional purposes, the perceived value of the expenditure is relatively inconsequential, and it is impermissible to deem an expenditure a contribution based on a spender's relationship with a vendor used by the candidate or a spender's consultation with a candidate's former employee. At least in part, Smith believes this is

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130. Briffault, *supra* note 68, at 94.

131. *Id.* at 97.

132. *Id.* at 95.

133. Bradley A. Smith, *Super Pacs and the Role of "Coordination" in Campaign Finance Law*, 49 WILLAMETTE L. REV. 603 (2013). 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 (2005).

134. Smith, *supra* note 133, at 611.

135. *Id.* at 618.

136. *Id.* at 619.

137. *Id.* at 613, 619 (arguing that *Buckley* allows no limitations on speech, but only "rules limiting contact between speakers and the candidate or his agents").

138. *Id.* at 626.

because there is little evidence that vendors or former employees are often used as agents for quid pro quo arrangements.<sup>139</sup> Smith particularly targets Briffault's suggestion, contending that even if spending is "on behalf of" a candidate, without dealings between the parties, there is no opportunity for quid pro quo corruption because that type of corruption cannot come from mere gratitude.<sup>140</sup> However, Smith does accept Briffault's proposition that allowing candidates to raise money for single-candidate Super PACs can be regulated as coordination because the fundraising creates the opportunity for quid pro quo bargaining opportunities.<sup>141</sup>

A recent article by Professor Rick Hasen partially agrees with Smith's viewpoint, concluding that "[a] coordination rule which does not require explicit interactions appears to violate the First Amendment."<sup>142</sup> Professor Hasen criticizes Professor Briffault's proposal as much broader than "actual coordination."<sup>143</sup> He rejects the idea that a broad definition of indirect contributions could be used as prophylactic means to prevent corruption, maintaining that coordination is unnecessary to achieve a candidate's goals because information that would help a candidate do so is publicly available. For that reason, personal relationships between a candidate and a spender do not create a greater risk.<sup>144</sup> The article also argues that Briffault "conflat[es] coordination with common purpose,"<sup>145</sup> and agrees with Smith that *Buckley* was based on coordination of campaign strategy.<sup>146</sup> Thus, explicit interactions are necessary if

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139. *Id.* at 628.

140. *Id.* at 632.

141. *Id.* at 635. However, in a footnote, Smith worries that a "suitable definition" could not be developed. *Id.* at n.129. Smith later clarified his position, worrying that it had been interpreted too broadly and explaining that the passage in question "clearly refer[s] only to single candidate PACs," and even then, only covers "a particular type of solicitation that involves the candidate and the single candidate Super PAC working closely together." Bradley A. Smith, *Solicitation and Coordination*, CENTER FOR COMPETITIVE POLITICS (Feb. 13, 2014), <http://www.campaignfreedom.org/2014/02/13/solicitation-and-coordination/>.

142. Richard L. Hasen, *Super PAC Contributions, Corruption, and the Proxy War over Coordination*, 9 DUKE J. CONST. L. & PUB. POL'Y 16 (2014).

143. *Id.* at 14. As discussed throughout this Article, the Court has not held that "actual coordination" is required for an expenditure to be treated as an indirect contribution.

144. *Id.* at 14–15.

145. *Id.* at 16. It is undoubtedly true that common purpose between candidate and spender is sufficient to turn independent spending into coordinated spending. As explained herein, most of Briffault's proposals do not rely on a simple common purpose.

146. *Id.* at 19.

spending is to be deemed coordinated.<sup>147</sup> Also in line with Smith's view, Hasen would allow candidate fundraising to be grounds for finding coordination because it is "by definition" coordinating fundraising strategy.<sup>148</sup>

Bob Bauer has criticized the analysis of Briffault, Smith, and Hasen in short pieces on his blog.<sup>149</sup> His foundational point, which informs much of the criticism, is that *Buckley* allows expenditures to be defined as contributions only when there is candidate-committee contact of strategic significance regarding "the core organizational strategy for persuading voters."<sup>150</sup> To Briffault's suggestion of regulating groups based on their employment of those who have worked for a candidate, Bauer argues that any independent group can effectively align its message with a candidate's message regardless of whether it has any personal connection to the candidate.<sup>151</sup>

Bauer also disagrees with Smith and Hasen on whether a candidate's fundraising for a PAC can trigger a finding of coordination. He argues that *Buckley* only allows a finding of coordination when there is coordination over a spender's messaging strategy, not when there is coordination over fundraising strategy.<sup>152</sup> Bauer apparently holds this view because the candidate's decision to raise money for a Super PAC does not guarantee that the Super PAC will allow her to control its spending.<sup>153</sup> Thus, Bauer argues that a Super PAC's message still may be of little assistance to the candidate.<sup>154</sup> While he acknowledges the fact that the candidate's decision to raise money may be an indicator of confidence in the

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147. *Id.* at 20.

148. *Id.* at 16–17.

149. Separately, Bauer has written advocating a new and broader understanding of the right to association. That argument is principally based on a contention that *Buckley* fails to give sufficient weight to associational rights. Robert F. Bauer, *The Right to "Do Politics" and Not Just to Speak: Thinking About the Constitutional Protections for Political Action*, 9 DUKE J. CONST. L. & PUB. POL'Y 67 (2014).

150. Robert Bauer, *Coordinating with a Super PAC, Raising Money for It, and the Difference Between the Two*, MORE SOFT MONEY HARD LAW (Jan. 27, 2013), <http://www.moresoftmoneyhardlaw.com/2014/01/coordinating-super-pac-raising-money-difference-two/>.

151. Robert 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/>.

152. *Id.*

153. *Id.*

154. *Id.*

spender, Bauer contends that this only signifies the candidate is willing to take a risk.<sup>155</sup>

## **B. Response to Recent Commentary and Case Law**

In Part IV, this Article contends that under *Buckley* and subsequent case law, courts should derive the permissible scope of the definition of contributions based primarily on candidate action that provides reliable indices of his perception of the value of an expenditure. While that understanding of *Buckley* would lead to a broader scope of regulable spending, it is first necessary to address *Citizens United* and *McCutcheon*, as well as the commentary above that would lead to a narrower definition. This section does not discuss every point made by Bauer, Smith, and Hasen, but will seek to address each of their fundamental arguments and demonstrate that their views of *Buckley* are unnecessarily narrow.

### *1. Whether the Definition of Indirect Contributions is Narrowed Because Contribution Limits May Only Prevent a Quid Pro Quo Bargaining Opportunity*

Under the narrow definition of corruption adopted by the Supreme Court in *Citizens United* and *McCutcheon*, it may be argued that a definition of indirect contributions would be impermissible if it did “not require explicit interactions”<sup>156</sup> between candidate and spender because explicit pre-spending interactions would be necessary for a quid pro quo deal. As noted in the previous Part, Professor Smith has reached that conclusion based on *Buckley* alone.<sup>157</sup> Thus, under Smith’s view, and probably Hasen’s, a candidate’s former campaign manager could not be prevented from running a Super PAC that supported the candidate.<sup>158</sup> But despite the narrowness of the Court’s definition of corruption, indirect contributions need not be defined only to prevent *contact* between a

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155. Bauer also points out that Smith’s concern that the fundraising will create a bargaining opportunity is misplaced, because bargaining opportunities could occur in many contexts, and it is not truly related to whether the message is coordinated. He is similarly concerned that such regulation would improperly limit spending because the quid pro quo opportunity may be between a contributor to a Super PAC and a candidate, though the Super PAC might have no knowledge of the arrangement. In that situation, limiting PAC spending based on the quid pro quo concern would be targeting the wrong entity. *Id.*

156. Hasen, *supra* note 142, at 16.

157. Smith, *supra* note 133, at 618.

158. See Hasen, *supra* note 142 (arguing that “*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 and groups”).

spender and a candidate that could lead to a quid pro quo deal—rather, indices of candidate perception of value should be the principal concern.

First, it is clear that in the years before *Citizens United* and *McCutcheon*, the Court focused on the corruption risk created by the value a contribution could provide, not because it would “open[] the possibility for explicit exchange bordering on bribery.”<sup>159</sup> The first distinction the Court made when contrasting contributions and independent expenditures was that “[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive.”<sup>160</sup> In cases following *Buckley*, the Court has indicated that its contribution/expenditure distinction was based on the value of contributions, not on the ability of contributions to open the door to an explicit exchange.<sup>161</sup> For example, in *FEC v. National Conservative Political Action Committee (“NCPAC”)*,<sup>162</sup> Justice Rehnquist’s majority opinion cited *Buckley* to explain that “the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that

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159. Smith, *supra* note 133, at 613. Smith’s argument derives principally from the *Buckley* Court’s sentence stating: “[t]he 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.” *Buckley*, 424 U.S. at 47. Smith interprets this line as “re-emphasiz[ing] 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.” Smith, *supra* note 133, at 628. Yet it is not clear that the Court’s words should be so interpreted. Smith likely reads the word “also” to mean that decrease in value is a separate concern from a quid pro quo risk. Though the word “also” in that sentence could indeed be interpreted to mean that something other than the value of the spending “alleviates the danger” of a quid pro quo deal, it is not enough to support Smith’s reading that candidate-contributor contact was the Court’s concern. First, it ignores the fact that *Buckley* much more clearly and explicitly focused on the difference in value between contributions and expenditures. *Buckley*, 424 U.S. at 47. If the Court was truly concerned about contact alone, it likely would have said so explicitly and found no need to address the value question. Second, it does not account for the fact that *Buckley* clearly found that the corruption permissibly addressed by contribution limits constituted a broader class of activity than bribery, explaining that “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.” *Buckley*, 424 U.S. at 27–28. Though the exact definition of corruption is disputed today, *Buckley* clearly saw it as broader than outright bribery. Smith, *supra* note 133, at 613. Even if the broader definition only includes an implicit agreement in which legislative action follows from a large contribution, direct contact is certainly not necessary.

160. *Buckley*, 424 U.S. at 47 (emphasis added).

161. Smith, *supra* note 133, at 613.

162. *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985).

expenditures will be given as a quid pro quo.”<sup>163</sup> The use of the word “thereby” unequivocally provides a causal link between the value of the spending and the likelihood of a quid pro quo.

Even Justice Scalia, currently in the Court’s majority on narrowing permissible justifications for campaign finance laws, has focused on the value distinction, leaving open the possibility that independent spending *can* result in a quid pro quo, though the risk is lessened because of decreased value. In dissent in *Austin v. Michigan Chamber of Commerce*, he explained: “Independent advocacy, moreover, unlike contributions, ‘may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive,’ thus reducing the danger that it will be exchanged ‘as a *quid pro quo* for improper commitments from the candidate.’”<sup>164</sup>

Despite this long history, the current Court’s narrowed, but unclear understanding of corruption creates uncertainty<sup>165</sup>—if the Court now thinks that contribution limits may only protect against bribery, does that mean that no limitations may exist unless they protect against actual interaction between a candidate and spender before the spending occurs? For the following reasons, that interpretation would be inconsistent with the language of the Court’s opinions and logical foundations of current doctrine.

The first reason comes from language in *Citizens United* and *McCutcheon*. In most circumstances, the justices have allowed for the logical possibility that truly independent expenditures *could* lead to quid pro quo corruption, though *Citizens United* ultimately concluded that they do not do so, seemingly as an empirical matter.<sup>166</sup> If an

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163. *Id.* (emphasis added).

164. *Austin*, 494 U.S. at 683–84 (Scalia, J., dissenting). *Colorado Republican I* also makes clear that candidate-spender contact is not necessary for a quid pro quo. There, the controlling opinion cited *NCPAC*, noting that absence of prearrangement and coordination “does not eliminate” the possibility “that a candidate will understand the expenditure as an effort to obtain a ‘*quid pro quo*,’” though it may lessen the risk. *Colorado Republican I*, 518 U.S. at 616. If the corruption *Buckley* feared could only come from direct contact while a contribution was made, independence should completely eliminate that risk. Finally, the *McConnell* Court explained that “the rationale for affording special protection to wholly independent expenditures has nothing to do with the absence of an agreement and everything to do with the functional consequences of different types of expenditures,” citing *Colorado Republican II*, to demonstrate that independent expenditures “are poor sources of leverage for a spender,” while “expenditures made after a wink or nod often will be as useful to the candidate as cash.” *McConnell*, 540 U.S. at 221–22 (2003) (internal quotation marks omitted).

165. See Dawood, *supra* note 57, at 103.

166. See Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 583 (2011) (explaining that the Court “made the unsupported empirical claim” that independent expenditures do not give rise to corruption); Adam M. Samaha,

independent expenditure could theoretically lead to a quid pro quo exchange if the spending had the value of a contribution, that means that an agreement is not necessary before the spending in question has taken place—if the deal was already made, the spending would not be truly independent because it would have been made at the request or suggestion of the candidate, and should be treated as a contribution even under a narrow definition of the term.

The allowance that independent expenditures could theoretically cause quid pro quo corruption does not just occur in older cases, such as *NCPAC* and *Austin*, described above<sup>167</sup>—it occurs in *Citizens United* when the majority discusses the district court’s statement in *McConnell* that, despite the lengthy record, there are “no direct examples of votes being exchanged for . . . expenditures.” The Court decided that this confirmed *Buckley*’s holding that independent expenditures do not lead to corruption.<sup>168</sup> Similarly, the Court explained that independent expenditure limits “have a chilling effect extending well *beyond* the Government’s interest in preventing quid pro quo corruption. The anticorruption interest is not sufficient to displace the speech here in question.”<sup>169</sup> While a broad look at the Court’s language in *Citizens United* is not particularly illuminating about the exact definition of quid pro quo corruption, this language

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*Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1602 (2012) (discussing *Citizens United*’s empirical claims about corruption and its appearance, and noting the citation of the *McConnell* record).

167. See *supra* notes 162-164.

168. *Citizens United*, 558 U.S. at 360.

169. *Id.* at 357 (emphasis added). This could be read to conflict with the Court’s famous later statement that “independent expenditures . . . do not give rise to corruption or the appearance of corruption.” *Id.* Given the contradiction, this can best be read as a factual conclusion that quid pro quo corruption does not arise from independent expenditures, or at least to the level that creates a sufficient government interest to implement expenditure limits. See Hasen, *supra* note 166, at 583; see also Pamela S. Karlan, *Answering Questions, Questioning Answers, and the Roles of Empiricism in the Law of Democracy*, 65 STAN. L. REV. 1269, 1280 (2013) (writing after *Citizens United* that “beyond the obvious . . . there is little consensus about what qualifies” as quid pro quo corruption, and explaining the uncertainty about the empirical nature of the Court’s corruption conclusion). Chief Justice Roberts has made at least one statement that could contradict this understanding, creating more incoherence: “The separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of quid pro quo corruption with which our case law is concerned.” *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011). The Chief Justice cited the relevant statement in *Citizens United* for this assertion, meaning that he was possibly referring to the Court’s previous empirical statement about the potential for corruption. Just a few years earlier, he cited *Buckley* for the opposite conclusion, explaining the Court’s suggestion in *Buckley* that in some circumstances, large independent expenditures could pose the same dangers as contributions of quid pro quo arrangements. *FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 478 (2007).

indicates that the Court does not believe that quid pro quo corruption only occurs when an explicit deal occurs before an expenditure is made; if it did believe that, there would be no reason to discuss *McConnell*'s factual record or the strength of the anticorruption interest when applied to a limit on independent spending. While *McCutcheon*'s holding was less germane to the topic of independent expenditures, it similarly cited *Buckley* for the proposition that "spending [is] *less likely* to 'be given as a quid pro quo for improper commitments from the candidate.'"<sup>170</sup>

Second, if spending could be only limited based on the threat of direct contact with a candidate that occurs upon making a contribution, contribution limits as they are would be fatally overbroad: they prevent all contributions above the limit, not just those that involve explicit interactions. If the quid pro quo exchange has to be explicit and before (or in conjunction with) the spending, then candidates should be able to set up a contribution system (probably online) that allows unlimited contributions, but does not provide an opportunity for the donor to contact the candidate. Under such a system, there would be no threat of a quid pro quo deal made in conjunction with the contribution. Of course, the natural response to that scenario is that obviously the candidate would be inclined to take a call from the donor shortly thereafter, and the donor could then demand payback in the form of a legislative promise. But that does not differ at all from what could occur with an independent expenditure of the same amount: If it were valuable to the candidate in the same way, the subsequent meeting about payback would be just as likely to occur, despite the fact that there was no pre-spending meeting and the spending was truly independent. This understanding aligns well with the Court's repeated statements that quid pro quo deals are *less likely* to result from independent expenditures—because they are theoretically less valuable.

Another obvious workaround points out the same problem: if a pre-spending explicit agreement is necessary, spenders could republish and disseminate campaign materials on their own without limit. Essentially, campaigns could produce a very limited amount of campaign signs, flyers, and television ads, and put them online<sup>171</sup> or

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170. *McCutcheon*, 134 S. Ct. at 1451 (emphasis added). *McCutcheon* also cited *NCPAC*'s language defining quid pro quo corruption as something that does not require an explicit exchange: "*quid pro quo* corruption occurs when '[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns.'" *Id.* at 1460–61.

171. Outside groups and candidates have begun to do this to a greater degree, using a tactic known as "McConnelling." See *infra* Part IV.B.4.

otherwise in the public domain (along with instructions for their distribution), and rely completely on Super PACs to pay for their distribution, using unlimited funds.<sup>172</sup> To allow this workaround would thwart the purpose of contribution limits to such a degree that they would likely become meaningless.<sup>173</sup>

2. *Whether Increased Value Must Come From Coordination of Communication Strategy*

Bob Bauer's recent insightful commentary reveals that his understanding of *Buckley* differs from Smith's. Bauer correctly focuses on the value of the speech as the means for increasing the risk of quid pro quo corruption, like the Supreme Court and other post-*Buckley* courts.<sup>174</sup> Yet in Bauer's opinion, the permissible definition of indirect contributions is narrow because expenditures may only be treated as contributions if a candidate and a spender have collaborated on communications strategy.<sup>175</sup>

In his January 27, 2014 blog post, Bauer highlights the *Buckley* Court's explanation that lack of coordination can mean an independent message might be of "little assistance," which would, "in

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172. In at least some circumstances, such reproduction or dissemination of campaign materials without candidate-spender contact is not truly "coordination," and thus should be placed in the general category of in-kind contributions. But that does not affect whether a law limiting distribution or republication is permissible. Proposals like Briffault's and the federal Price-Van Hollen bill seek to properly define indirect in-kind contributions. Republication and dissemination should clearly fall into that category, as should communications that are the result of substantial discussion between a candidate and an outside spender. But as the republication example shows, prominence of the word "coordination" should by no means serve to limit the universe of regulable indirect in-kind contributions to those in which the candidate and spender have engaged in a direct interaction.

173. If a court were to reject the reasoning in this subsection and hold that any definition of indirect contributions must focus on preventing actual contact likely to lead to a quid pro quo, reformers could argue that broader regulations are necessary to prevent against the appearance of corruption. For example, if a candidate's campaign manager leaves a campaign to start a Super PAC, it could create the appearance that a quid pro quo deal was made between the Super PAC's funders and the candidate. While it would seem that acceptance of the appearance of corruption rationale would allow for broader regulation, the Court's recent pronouncements have made it difficult to determine the appearance of corruption's extra weight. See *Citizens United*, 558 U.S. at 359–60 (concluding that "independent expenditures do not lead to, or create the appearance of quid pro quo corruption").

174. See *Christian Coal.*, 52 F. Supp. 2d at 91–92.

175. Robert Bauer, *Coordinating with a Super PAC, Raising Money for It, and the Difference Between the Two*, MORE SOFT MONEY HARD LAW (Jan. 27, 2013), <http://www.moresoftmoneyhardlaw.com/2014/01/coordinating-super-pac-raising-money-difference-two/>.

turn, alleviate the dangers of quid pro quo corruption.”<sup>176</sup> Yet he concludes that *Buckley* was “clear” “that candidate-committee contact must involve a matter of strategic significance” having to do with “the core organizational strategy for persuading voters.”<sup>177</sup> Thus, fundraising for a Super PAC cannot count as coordination because the Super PAC might still produce an unhelpful message.<sup>178</sup> It is not certain whether Bauer’s logic would allow candidates to exert other forms of control over the PAC, such as directing staff hiring—while that would indirectly affect the organization’s persuasion strategy, so would the group’s fundraising, perhaps to a lesser degree.

Yet it is not clear why the *Buckley* Court would have cared solely about a candidate’s involvement with the communication itself,<sup>179</sup>

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176. *Id.*

177. *Id.*

178. Read narrowly, *Christian Coalition* supports this position, though it is unclear whether the court considered any activity not specifically related to an individual communication.

179. It is not obvious why Bauer finds it “clear” that the *Buckley* Court thought that the value of a communication could only be increased by a candidate’s input on a communication itself. Bauer cites little direct language, but the page of *Buckley* he cites contrasts “coordinated expenditures amounting to disguised contributions” with “expenditures for express advocacy of candidates made totally independently of the candidate and campaign.” *Buckley*, 424 U.S. at 47. As Bauer notes, the Court goes on to say that “such independent expenditures may well provide little assistance to the candidate’s campaign.” *Id.* Bauer interprets this sentence to mean that “a truly independent message . . . might be of ‘little assistance.’” Bauer, *supra* note 77 (emphasis added). Thus, Bauer’s argument appears to hinge on an assumption that the term “expenditure” was used in that sentence to mean a specific message rather than an outlay of money to create a communication. This would mean that a candidate’s assistance in raising money could not be regulated, and neither could a candidate’s involvement in spending money to hire staff or otherwise engage in non-communicative operations. Yet the word “expenditure” as defined in FECA meant an outlay of money that is used to influence an election, not a specific message. See *Buckley*, 424 U.S. at 147 (reproducing FECA language, which defined “expenditure” as “a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value”). While a looser use of the term would allow “expenditure” to mean the advertisement resulting from the outlay of money, Bauer does not explain why it is clear that the passage he cites in *Buckley* used the term in this context. It is true that *Buckley* occasionally used “expenditure” ambiguously, but there is no indication that its usage in the passage cited by Bauer was not the statutory definition, and context indicates that the Court was using the statutory definition. The passage in question explains that the law “limits expenditures for express advocacy,” and continues in the next sentence by explaining that “such independent expenditures may well provide little assistance.” *Id.* at 47 (emphasis added). By referring to expenditures that were to be *used* for express advocacy, the Court clearly meant outlays of money. *Id.* Another sentence in the paragraph containing the sentence cited by Bauer explains that the absence of prearrangement and coordination “alleviates the danger that expenditures will be *given* as a quid pro quo.” *Id.* (emphasis added). If the Court defined contributions as outlays of money not “made totally independently of the candidate and his campaign,”

because the Court was largely concerned with the candidate's judgment about the value of spending.<sup>180</sup> The candidate's own valuation of assistance to her campaign is the most important factor in determining whether there is a quid pro quo risk, since the candidate would provide the impermissible reward. While the government may clearly regulate more broadly because a candidate will not always provide an indication that she places a high value on certain spending, any such indication from the candidate should undoubtedly serve as a factor in determining the scope of permissible regulation. Thus, while the candidate may indicate her belief in a communication's value by helping to shape it, she is also indicating that belief when she spends her time raising money for a Super PAC.

Bauer disputes that candidate fundraising is a proper indicator of value: conceding that such action may be "expressing confidence that the committee will fund an effective message," he nonetheless argues that the decision may mean only that the candidate is willing to take a risk on the effectiveness of the communication.<sup>181</sup> Of course the candidate is not totally certain about the effectiveness of the message; but neither is the candidate completely certain about the effectiveness of a message even when she has had moderate input on the messaging strategy (or even when she has had almost complete control). What is important, in terms of protecting against corruption, is that the candidate has provided a reliable indication that she sees the expenditure as valuable. Clearly, the line of reliability can be debated, but spending time asking for money should be sufficient, as is discussed further in the following Part.

Perhaps the most important response to Bauer's argument is that it fails to take into account the fact that the *Buckley* Court never purported to define the outer limits of how governments may define a contribution. During the *Buckley* Court's discussion of indirect contributions, the Court was interpreting FECA and responding to the government's concerns that contribution limits would be avoided

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it is by no means clear that a candidate's substantial role in raising the money would not destroy the total independence referenced in *Buckley*.

180. Of course, it would be impossible to always ascertain the candidate's judgment about the value of a contribution or expenditure, and therefore the Court would also use indices of actual value as a proxy. The Court assumes that a contribution, which gives a candidate total control of the money in question, is of the highest value. While that is probably true in most cases, it is certainly possible that a candidate would view certain outside spending as more valuable if it were effective and took the burden off of his campaign.

181. Bauer, *supra* note 77.

by outside groups paying for media or other campaign activities,<sup>182</sup> the Court never purported to delineate the boundaries of defining contributions. Rather than generally discussing how contributions or expenditures could be defined, the Court explained, for example, “§ 608(e)(1) limits expenditures for express advocacy of candidates made totally independently of the candidate.”<sup>183</sup> Consequently, while the *Buckley* Court’s broad language ensures that broad definitions are permissible, parsing its language does not tell us exactly what the outer limits of regulation are. If Bauer is correct that the independence the Court discussed related only to a specific message, that limitation was based on the Court’s belief about the scope of FECA, and not about the permissible definitions of indirect contributions in general. Rather than expanding the import of Court’s explicatory words, a better reading comes from interpreting its ideas and applying them to situations not at issue in *Buckley*.

3. *Whether the Fact That Candidates Can Publicly Coordinate Strategy Should Affect the Adoption of a Broader Definition of Indirect Contributions*

Some of the opposition to Professor Briffault’s proposed definition of indirect contributions that would partially focus on candidate-spender relationships is based on the argument that a relationship between a candidate and a spender is actually not helpful. Professor Hasen contends that “actual coordination is unnecessary to achieve the aims of supporting the candidate and there is no need for those with a personal relationship with the candidate to risk a felony.”<sup>184</sup> Bob Bauer strikes a similar chord, asking why candidates and spenders “have to have known each other when they can read websites and tweets?”<sup>185</sup> It is not certain whether Hasen and Bauer criticize only the policy of focusing on candidate-spender relationships or also the idea’s constitutionality, but the following paragraphs will address both.<sup>186</sup>

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182. *Buckley*, 424 U.S. at 46.

183. *Id.* at 47.

184. Hasen, *supra* note 142, at 14.

185. Bauer, *supra* note 149. Bauer’s comment was made in response to Professor Briffault’s argument that the ability of candidates and former staffers to communicate publicly means that *Christian Coalition*’s focus on contact is outdated. Bauer agrees that public communication is easier today, but argues that because anyone can easily engage in such communication, personal relationships are not as useful.

186. Bauer appears to question the constitutionality when stating that “[m]aybe the issue is indeed one of appearances, but appearances, the ‘look’ of things, can’t carry the work of revising the standard of constitutionally protected ‘independence.’” *Id.* Professor

Even assuming that it would be impossible to prevent a campaign and a spender from publicly coordinating on strategy, it is questionable exactly how valuable such public communication is. While Professor Hasen appears to assign such communication great value, Bauer concedes that at least sometimes “[f]ormer staff status may be additional comfort to the candidate.”<sup>187</sup> Indeed, Dan Tokaji and Renata Strause report that in interviews “[a] number of campaign staffers expressed considerable frustration” because outside groups hoping to respond to an attack ad “lack[] the critical information or . . . get[] the message wrong.”<sup>188</sup> And this makes perfect sense, even with the ability to tweet. While campaigns may share some strategy publicly, they will not always have perfect foresight on what to share, and may not want to share certain information with the public.<sup>189</sup> Even if a campaign shares its goals or general strategy, an outside group may not conform to the campaign’s wishes. Thus, the existence of a former staffer or vendor who has intimate knowledge of the candidate or campaign would, sometimes at least, make a real difference.

If Hasen and Bauer could show that public coordination is of such value that Briffault’s proposal would accomplish little, while also showing that such public coordination is not regulable, their argument would seem to defeat almost all coordination regulations, not just those that focus on candidate-spender relationships. For example, the FEC’s regulations treat an expenditure as an indirect contribution if a candidate has material involvement in the creation of an advertisement,<sup>190</sup> but not if the information material to the creation was obtained from a publicly available source. Thus, it would seem that under Hasen’s and Bauer’s view, the current regulation is unwise or unconstitutional because the private communication targeted by the rule could be accomplished through public communication.

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Hasen’s article criticizes Briffault’s work for its “apparent conflation of coordination with common purpose.” Hasen, *supra* note 142, at 16.

187. Bauer, *supra* note 149. Yet Bauer argues that “a well run independent committee . . . can expect just as much as any other to ‘be viewed by the candidate . . . as providing integral support.’” *Id.* (quoting Briffault, *supra* note 68, at 98).

188. TOKAJI & STRAUSE, *supra* note 103, at 64.

189. For example, in 2014, an outline of Georgia Senate candidate Michelle Nunn’s full campaign plan was leaked to the media, though “[f]rom all appearances, the document was intended to remain confidential,” probably because it said she could “come across as a ‘lightweight,’ ‘too liberal,’ ‘not a real Georgian.’” Eliana Johnson, *Michelle Nunn’s Campaign Plan*, NAT’L REVIEW ONLINE (July 28, 2014), <http://www.nationalreview.com/article/383894/michelle-nunns-campaign-plan-eliana-johnson>.

190. 11 C.F.R. § 109.21(d)(2) (2010).

Policy questions aside, the *Buckley* Court's treatment of coordinated expenditures demonstrates that the potential for public communication does not jeopardize the constitutionality of restrictions on private collaboration. Certainly, as Bauer argues (and as is further discussed in Part IV), *Buckley* was concerned with indicators that certain payments would be valuable to candidates; yet just as clearly, it did not require that the law successfully encompass all potentially valuable payments. The existence of constitutionally protected independent spending (which the Court has conceded may provide value to a candidate)<sup>191</sup> ensures that this is correct—Congress may attempt to prevent spending that creates a quid pro quo threat even if it is not permitted to prevent all of the spending that creates such a threat. If that were untrue, contribution limits would have long ago been struck down.

#### **IV. The Constitutional Case for a Broader Definition of Indirect Contributions**

##### **A. Defining Indirect Contributions**

The preceding Part addressed *Citizens United*, *McCutcheon*, and several interpretations of *Buckley*, arguing that a broader definition of contributions is permissible under the case law. To achieve a clearer view of the constitutional picture, this Part reviews *Buckley* once more and attempts to discern a theory of the permissible scope of a definition of indirect contributions based on its principles. It then adds to the theory by referring to the terminology used by the Supreme Court in *Buckley* and subsequent cases.

##### *1. Buckley's Principles and the Resulting Definition of Indirect Contributions*

The *Buckley* Court's contribution/expenditure distinction was based on two fundamental conclusions: First, contributions could "secure a political quid pro quo" from candidates because of their

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191. *McCutcheon*, 134 S. Ct. at 1454 ("We have said in the context of independent expenditures that the absence of prearrangement and coordination of an expenditure with the candidate or his agent undermines the value of the expenditure to the candidate. But probably not by 95 percent.") (internal quotation marks and citations omitted); *Colorado Republican I*, 518 U.S. at 616 (Breyer, J.) (explaining that absence of prearrangement and coordination "does not eliminate" the possibility "that a candidate will understand the expenditure as an effort to obtain a 'quid pro quo,'" though it may lessen the risk).

clear utility to a campaign.<sup>192</sup> Independent expenditures would not create the same level of risk because there was no indication whether an independent expenditure would actually provide assistance, and therefore no strong reason to believe a candidate would reward the spender with official action.<sup>193</sup> Second, contribution limits did not stifle too much speech because (due to the Court's holding), anyone could engage in unlimited independent spending, ensuring robust dialogue in the public square.<sup>194</sup> After providing that two-pronged foundation, the Court assured the government that coordinated expenditures could not be used to circumvent contribution limits because, under FECA, contribution limits would apply unless an expenditure were made "totally independently" of a campaign.<sup>195</sup> The Court held that without prearrangement, coordination, or consent, (1) the value of the expenditure is undermined, and (2) the danger of a quid pro quo is "alleviate[d]."<sup>196</sup> This conclusion makes clear that the Court in *Buckley* saw contributions as outlays of money that are more valuable to a candidate than independent expenditures.

That portion of the opinion also demonstrates the Court's reasoning that the indication of increased value must come from *action by the candidate or his campaign* that destroys the total independence of the spending. The distinction between a typical contribution and an independent expenditure, at its most basic level, turns on whether the candidate or campaign takes any action with regard to the outlay of money. And the common bond between all of the words used by the Court—prearrangement, coordination, consent, wink, and nod—is that they involve an action by a candidate indicating perception of value. That language fits well with the Court's logical conclusion: concern over corruption is heightened when a candidate could feel that she owes something to a spender. The focus on candidate action also fits well with the situations in which almost all experts agree that expenditures should be treated as indirect contributions: (1) when there is a request or suggestion by the candidate; (2) when the candidate provides input on a specific

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192. See *Buckley*, 424 U.S. at 26–27; see also *Christian Coal.*, 52 F. Supp. 2d at 92 (attempting to determine when "a candidate has taken a sufficient interest to demonstrate that the expenditure is perceived as valuable for meeting the campaign's needs or wants").

193. *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."). See *infra* Part III.B.1.

194. *Id.* at 28–29.

195. *Id.* at 47.

196. *Id.*

communication; and (3) when a spender pays to disseminate campaign material produced by the candidate's campaign.<sup>197</sup>

Based on *Buckley*, then, contributions (1) must be defined to ensure that the candidate or campaign has taken some action with regard to the spender or spending in question to demonstrate a belief in the utility of the expenditure; and (2) must not be so broadly defined as to significantly infringe on independent speech or robust public discussion.<sup>198</sup> In other words, an expenditure may be treated as a contribution if there are reliable indications, based on some action from the candidate or campaign concerning the spender or spending in question,<sup>199</sup> that an expenditure will provide sufficient utility or perceived utility to a candidate such that quid pro quo corruption becomes a strong concern. Further, the definition must not infringe on speech in such a way that impermissibly inhibits public discussion.

It is tempting, considering the current role of Super PACs, to argue that indirect contributions could be defined more broadly, without reliance on candidate action; rather, that an expenditure should be treated as an indirect contribution simply if the spender has a special connection to a candidate that could lead a rational observer to believe that the candidate would place high value on the spending.<sup>200</sup> This framework would probably capture some spending that a candidate-action requirement would not always capture, such

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197. When a spender pays to disseminate campaign material, the candidate's action indicating value is her own creation or approval of the advertisements in question. Candidate action indicating value may occur before an expenditure occurs, and need not be communicated directly to the spender.

198. The first point is clearly the principal concern, because most attempts to define contributions do not go so far as to realistically threaten a contributor's opportunity to engage in spending that is clearly independent. Justice Thomas has argued that coordination regulations impermissibly restrict the speech in question, focusing not on the conduct of consulting a candidate, but on the limitations on speech created by the spender. This, of course, would lead to the end of all coordination regulation so long as the spender engaged in any substantial expression. *Colorado Republican II*, 533 U.S. at 468 (Thomas, J., dissenting) ("see[ing] no constitutional difference" between a purely independent expenditure and one in which a party consults with the candidate on the proper time slot for an advertisement).

199. As demonstrated in examples, this action could occur at various times. The clearest example is candidate input about a specific communication. But a candidate's decision to raise money for a Super PAC is a similar indication despite the fact that it may occur longer before a specific expenditure. A candidate's decision to hire and work with a campaign manager could also qualify (if the campaign manager later starts or operates a Super PAC).

200. Indeed, the *Buckley* Court used the term "connected" once, explaining that if expenditures were placed "in cooperation with or with the consent of a candidate," "they are connected with a candidate or his campaign." *Buckley*, 424 U.S. at 78. Yet in context, it appears likely that the candidate's action—cooperation or consent—creates the requisite connection.

as spending from a candidate's family members or spending made with the candidate's knowledge.<sup>201</sup> It is true that the *Buckley* Court was only interpreting FECA, and its language does not specifically foreclose a broader definition—indeed phrases like “totally independently” could be interpreted to sweep in spending with a certain connection to a candidate. Yet the Court's distinction between independent expenditures and contributions rests on decision making power exercised by the candidate, as evidenced by its reliance on terms contemplating candidate action simply requiring a connection or common purpose would likely fall short of this constitutionally-required line, especially since the Court implicitly refused to accept that extremely high-level independent spending could be valuable enough to justify spending limits.

While using a “connection” test would be too broad, “candidate action” should not be construed narrowly—the foundational principles of *Buckley* do not address when the action must occur or what type of action is necessary. While cooperation on an advertisement shortly before it is aired is certainly enough, a candidate's decision to raise money for an outside group that will support that candidate financially should be enough too, if it provides a somewhat reliable indication that the candidate perceives the spending as valuable. Similarly, the candidate's action could be production of his own campaign materials regardless of whether he provides them to an outside group for redistribution or republication—if an outside group reproduced those materials, its spending could be treated as a contribution because the candidate's action has clearly indicated his approval of those materials, even if the approval was not directed at the outside group in question.<sup>202</sup>

## 2. *More Guidance from the Supreme Court's Language*

Even with the guidelines described here, the *Buckley* Court's application will not always be totally clear—under the test proposed above, *Christian Coalition* could stand unchanged if minor input on a communication were not seen as a reliable indication of a candidate's perception of value. But the Court's language provides helpful

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201. Of course, spending by a candidate's family member would meet the “reliable indication” test if the candidate had engaged in significant campaign work with the family member. But spending from a family member that has not had much contact with the candidate likely would not.

202. As noted elsewhere, a candidate who is not responsible for an outside group's reproduction of such materials should not (and could not) be held liable for accepting excess contributions. See *Bonogofsky v. Kennedy*, Mont. Comm'r of Pol. Practices, No. COPP-2-13-CFP-0015 at 36 (Oct. 16, 2013).

guidance, if not complete clarity: use of the terms “totally independent,” “in cooperation or with [] consent,” and “wink or nod” provide some indication, but clearly do not address the full scope of expenditures that carry increased utility.<sup>203</sup> Interpretation of terms like these will be discussed further in Part IV.B.2.

While the Court’s use of these terms indicates that the Court would approve of a fairly broad definition of contributions, they should not be interpreted to set an outer limit. As discussed in Part III.B.2, the Court’s language describing coordinated expenditures was used in interpreting FECA, and its statements were made in response to the government’s arguments that contribution limits would be avoided “by the simple expedient of paying directly for media advertisements or for other portions of the candidate’s campaign activities.”<sup>204</sup> Thus, the Court did not consider whether a broader definition of indirect contributions was permissible.

### 3. *Additional Considerations*

It is also important to remember that expenditures that carry increased utility but are not given directly to the candidate maintain some attributes of independent spending that do not exist for direct contributions. Those attributes will vary depending on the expenditure at issue. As noted by the *Christian Coalition* court, *Buckley* “left undiscussed the First Amendment concerns that arise with respect to ‘expressive coordinated expenditures.’”<sup>205</sup> Principally, they contain some degree of expressive speech; of course the degree of such speech will depend on the expenditure at issue. Thus, the most accurate method to determine the constitutionality of limiting a certain expenditure would be to individually weigh its utility to a candidate (using empirical evidence, if available), against the amount of expressive speech that would be limited if a contribution limit were

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203. As mentioned in the Introduction, it is important to keep in mind that the Court never constitutionalized the term “coordination”—rather, that term was one of several used in *Buckley* to describe FECA. While it is now used almost universally to describe the full range of expenditures between totally independent spending and direct contributions, the Court has given it no special weight.

204. *Buckley*, 424 U.S. at 46.

205. *Christian Coal.*, 52 F. Supp. 2d at 85; *see also id.* at 85 n.45. (“As used in this Opinion, an ‘expressive coordinated expenditure’ is one for a communication made for the purpose of influencing a federal election in which the spender is responsible for a substantial portion of the speech and for which the spender’s choice of speech has been arrived at after coordination with the campaign. A mere expenditure to increase the volume of the candidate’s speech by funding additional purchases of campaign materials—posters, buttons, leaflets, etc.—does not raise the same type of First Amendment concerns that are at issue here.”).

applied. Practical considerations prevent such a method of jurisprudence, similar to how direct contributions are not examined individually to determine the likelihood that they will cause quid pro quo corruption.<sup>206</sup> Without the ability to make such determinations individually, legislation defining contributions must try to accurately discern the utility of certain expenditures and the amount of expressive speech that limits on such expenditures would threaten. That is not an easy task, and recognition of the difficulty is important when assessing permissibility of the legislative definition.

On a related note, another factor to consider in assessing the constitutionality of any definition of contributions is the fact that legislatures may institute prophylactic rules, which regulate more action than that which is strictly harmful, but are sometimes necessary because of the difficult nature of identifying and uncovering the harmful action in question.<sup>207</sup> The Supreme Court has described FECA's contribution limits as "prophylactic measure[s]," because they restrict many contributions that will not involve quid pro quo arrangements.<sup>208</sup> Thus, an argument could be made that indirect contributions may be defined more broadly than would otherwise be permissible in order to prevent a valid risk of quid pro quo corruption.<sup>209</sup>

Yet the following Part, which addresses specific proposed definitions of indirect contributions, will not rely much on the avenue provided by prophylactic rules. This is because, despite upholding contribution limits, the Supreme Court has expressed skepticism about prophylactic rules that infringe on First Amendment rights. The Court in *McCutcheon* struck down aggregate contribution limits

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206. See *Buckley*, 424 U.S. at 30 ("Not only is it difficult to isolate suspect contributions, but, more importantly, Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated.").

207. See, e.g., Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 309 (2004) (explaining that prophylactic legislation "prevent[s] complex legal problems by proscribing facially legal conduct").

208. *McCutcheon*, 134 S. Ct. at 1458.

It should be noted that there is some uncertainty concerning the term "prophylactic rule," at least when the rule is a statute rather than a judicial decree. As Justice Stevens has noted, "all rules of law are prophylactic. Speed limits are an example; they are designed to prevent accidents. The Sixth Amendment is another; it is designed to prevent unfair trials." *Michigan v. Harvey*, 494 U.S. 344, 369 (1990) (Stevens, J., dissenting). Regardless of a law's label, it is safe to say that the Court will view a law with more suspicion if it restricts a broad set of conduct that does not often lead to the harm it seeks to prevent.

209. See *Colorado Republican I*, 518 U.S. at 621 (noting the FEC's failure to argue that it was too difficult to separate a party's independent and coordinated expenditures).

as a “prophylaxis-upon-prophylaxis approach.”<sup>210</sup> The plurality’s decision there was based in part on the belief that the suggested methods of circumventing the base contribution limits were “divorced from reality,” and the same would not necessarily be true of broad definitions of indirect contributions attempting to prevent outside groups from spending in a way that creates a corruption risk.<sup>211</sup> Nevertheless, the Court’s skepticism created significant uncertainty, especially because a prophylactic rule broadly defining contributions would potentially infringe on protected independent spending, currently a stronger First Amendment interest than the right to make contributions.

Before moving to a discussion of the applications of this doctrine, it is important to note that the overall analysis is not radically different from that performed by the court in *Christian Coalition*. That court clearly saw perceived value as a principal consideration for courts, though it focused mainly on coordination between candidate and spender in the production of a communication.<sup>212</sup> While this Article argues that *Christian Coalition* defined the scope of permissible regulation too narrowly, it does not depart from the view that perceived value serves as the basis for determining the scope of indirect contributions.

Because the guideline proposed here would expand on *Christian Coalition*, it is likely to face criticism for failing to delineate outer limits of contributions. Yet, while no constitutional principle will be uniformly simple to apply, this section has provided considerations that contain real limiting principles. Most importantly, the test of utility must be based on some candidate action that reliably indicates increased value with regard to the specific spender or expenditure in question—for example, collaboration on communication strategy, a request for assistance, or fundraising on behalf of an outside group. Common purpose, such as similar messaging or stated goals, would be insufficient, as would a Super PAC’s decision to support just one candidate. This test by no means draws a bright line, but like *Buckley* and many other constitutional holdings, it does provide concrete considerations such that a large portion of proposed regulations will fall clearly on one side of the line or the other. The following section

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210. *Harvey*, 494 U.S. at 1458 (quoting *Wis. Right To Life*, 551 U.S. at 479; see also *NAACP v. Button*, 371 U.S. 415, 438 (1963) (“Broad prophylactic rules in the area of free expression are suspect.”)).

211. *McCutcheon*, 134 S. Ct. at 1456.

212. *Christian Coal.*, 52 F. Supp. 2d. at 91–92.

will give more detail by applying the doctrine proposed here to specific regulatory proposals.

## B. Application

Of course, identifying the proper considerations for determining the scope of regulable contributions does not mean that those considerations will be easily applied. This section will address some of the most common themes discussed in literature and media, and it will apply the principles put forth in Part IV.A.<sup>213</sup>

### 1. Candidate-Specific Super PACs

While we have seen outside groups engage in a number of innovative practices in the last several years, the creation of candidate-specific Super PACs may be the most overwhelming threat to contribution limits as we know them. Such PACs were the principal focus of Professor Briffault's *Coordination Reconsidered*, and have risen to greater prominence in 2014.<sup>214</sup> After Thad Cochran's narrow win in Mississippi's Senate primary, *The Washington Post* reported that three-quarters of the money spent supporting his challenger, Chris McDaniel, came from outside groups.<sup>215</sup> The same article detailed the extensive foundational network established by the groups and wondered whether future campaigns will essentially be operated almost entirely by Super PACs.<sup>216</sup> Regardless of whether this trend continues, drawing a line on candidate-specific Super PACs is essential to coherent coordination regulation.

Professor Briffault's proposal is to treat an expenditure as a contribution if it is made by a group that focuses on a small number of candidates and "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

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213. As mentioned briefly above, rules in this context, like other contexts, cannot take into account indications made by a specific candidate about a perception of value; like contribution limits generally, they must try to approximate the types of behavior that create a risk of corruption. A preferable way to do this, if any such rule were to be challenged in court, would be through development of an evidentiary record. Yet this rarely happens in campaign finance cases—*McConnell* is an exception. In all likelihood, courts will determine what constitutes a reliable perception of candidate value without a deep evidentiary record.

214. See *supra* Part II.

215. Phillip Bump, *Coming soon: A campaign run entirely by super PACs*, WASH. POST (July 28, 2014), available at <http://www.washingtonpost.com/blogs/the-fix/wp/2014/07/28/coming-soon-a-campaign-run-entirely-by-super-pacs/>.

216. *Id.*

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."<sup>217</sup> His suggestion, as noted in Part III, was met with criticism for failing to adhere to *Buckley's* boundaries.<sup>218</sup>

Professor Briffault's proposal would be largely acceptable under the candidate-action theory promoted here, though some details would need to be sorted out. Briffault argues, and the FEC rule recognizes in a more limited manner,<sup>219</sup> that if someone has worked for a campaign,<sup>220</sup> it is almost certain that his or her assistance on an expenditure will provide an indication of utility to the candidate.<sup>221</sup> This is true for the most part, and applying the rule to any campaign or candidate staffer with significant authority or knowledge would be proper—the candidate's action is the decision to employ the person and provide them with valuable information. That choice indicates that subsequent spending is likely to be valuable. Knowledge of the candidate and her campaign strategy is quite beneficial, and such contact with a candidate almost certainly increases the likelihood of quid pro quo corruption. However, the increased utility is more questionable for a campaign volunteer or even a campaign staffer who was not aware of non-public campaign strategy—if the candidate has not entrusted the staffer with certain information, it would be difficult to say the candidate took an action that would indicate greater perceived value. Consequently, legislation implementing the policy would likely need to draw a line to ensure that the former campaign employee had some minimum level of importance to the campaign or the candidate.

Further, an outside group's employment of staff who previously worked for a political party should not by itself be sufficient to treat the group's spending as a contribution.<sup>222</sup> While work for a political party is likely relevant to an expenditure's utility, the candidate has

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217. Briffault, *supra* note 68, at 97.

218. Bauer, *supra* note 149.

219. See 11 C.F.R. § 109.21(d)(4)–(5) (2010).

220. Some line would need to be drawn between campaign volunteers, or even paid assistants with little authority, and staffers who have a good idea of a campaign's needs or wants.

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

222. Professor Hasen reads Briffault's proposal to prevent Super PACs from hiring "anyone who has worked for any member of Congress (not just the supported candidate) for the last five years." Hasen, *supra* note 142, at 14. The language in Briffault's proposal does not clearly reach that far. However, if the proposal is read that way, the analysis applied to party employees here would also apply to those who have been employed by other candidates.

probably made no decision indicating that a party employee's spending would be especially helpful. A former party staffer likely has general knowledge about party preferences and strategy, but not specific knowledge about a candidate's campaign strategy.

Like Briffault's proposal, most provisions of the proposed American Anti-Corruption Act ("AACA") would be justified on the ground that they are focused on candidate action indicating a perception of value. Yet the provision that appears to prevent outside spending from a person who is a former colleague or business partner of a candidate's employee would likely fail the test.<sup>223</sup> Though it is certainly conceivable that a person who is close with a candidate's employee would have better access to campaign information, the provision casts a wide net that would reach people with no relationship to the employee, let alone the candidate.

Unlike several other proposed rules addressed in this Part, Briffault's rule and the AACA could be criticized on the grounds that they impermissibly limit speech by those who have worked for a candidate.<sup>224</sup> *Buckley* does not address this issue specifically, but a common-sense line must be drawn since current campaign workers may be prevented from engaging in unlimited spending on behalf of their employers.<sup>225</sup> And the line cannot be drawn at current employment, or campaign workers could simply quit the campaign and start a Super PAC shortly before the election. Extending the time period for a reasonable amount—in Briffault's proposal, through the next election cycle—reflects the reality that a former campaign worker's input will undoubtedly help a group tailor its message, increasing utility and increasing the likelihood of a quid pro quo. On the other hand, the line should not be drawn to include former colleagues of a candidate's employee: in addition to the problems mentioned above, such a rule would limit the speech of a potentially

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223. See *Provision 7, THE AMERICAN ANTI-CORRUPTION ACT*, <http://anticorruptionact.org/>.

224. See Joel M. Gora, *Campaign Finance Reform: Still Searching Today for A Better Way*, 6 J.L. & POL'Y 137, 167 (1997) (arguing that coordination rules involving candidate contact "embody an impermissible kind of 'gag order' by association"). Smith criticizes Briffault's theory based on the fact that past employment is no indication that future contact will occur. His general argument is addressed in Part III.B.1, *supra* note 159. While a proper line must be drawn such that casual contact or contact over issues does not prevent people from engaging in independent speech, Briffault's proposal properly draws the line at those who have chosen to work for the candidate (except the party employee provision, as noted in the preceding paragraph).

225. See, e.g., *C.I.R. v. Kowalski*, 434 U.S. 77, 95 (1977) (treating spending as a contribution if made with consent of candidate's agent).

large group of people, most of whom have no real connection to a candidate.

## 2. *Candidate Involvement in Communications*

Traditionally, rules concerning indirect contributions have been designed mainly to limit collaboration between a candidate and an outside group on a specific communication. Indeed, Bob Bauer posits that such collaboration, the principal concern of *Christian Coalition*, is the only activity that coordination regulation may constitutionally limit.<sup>226</sup>

As noted, the *Christian Coalition* court focused on whether an “expenditure is perceived as valuable for meeting the campaign’s needs or wants.”<sup>227</sup> Yet while it properly considered a candidate’s perception of value, the court offered no real justification for its conclusion that in the absence of a candidate’s request or suggestion, there must be “substantial discussion or negotiation” or candidate control to indicate a perception of value.<sup>228</sup> Indeed, even Brad Smith has said that the *Buckley* Court may not have required the high standard created by the *Christian Coalition* case.<sup>229</sup> While a request or suggestion, candidate control, or substantial negotiation or discussion is surely sufficient to treat an expenditure as a contribution, it should not be necessary—perception of value can be reliably demonstrated from much less.<sup>230</sup> If a candidate sees an advertisement from an outside group and makes fairly minor suggestions about when or where the advertisement should run, that is almost certainly a strong indicator of the candidate’s belief in its value, and a resulting threat of quid pro quo corruption. Conversely, a candidate may make a request or suggestion that a group engage in spending even if there is some risk that the resulting advertisement will be of marginal use or counterproductive. Even if major substantive involvement is more

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226. Bauer, *supra* note 149.

227. *Christian Coal.*, 52 F. Supp. 2d at 92.

228. *Id.* at 91–92. The court concluded that “substantial discussion or negotiation” meant that “candidate and spender emerge as joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners.” *Id.* at 92.

229. Smith, *supra* note 133, at 625. Despite this allowance, Smith sees the test as “fit[ting] quite comfortably into the Buckley paradigm.” *Id.*

230. It is possible that the court was implicitly weighing the volume of protected speech from the independent spender with the risk of quid pro quo corruption, and concluded that when a candidate has minor involvement, the spender’s speech interest outweighs the corruption risk. Yet *Buckley* does not direct such weighing, and defining coordinated speech that includes minor candidate input does not impermissibly limit speech as long as the spender may discuss issues with the candidate and may engage in any independent speech that is not produced in collaboration with the candidate.

likely to indicate a perception of value (which has not been convincingly shown), that does not mean that minor involvement does not provide sufficient perception of value to permissibly regulate.<sup>231</sup>

Granted, the inquiry into candidate perception of value is not an easy one. Candidates will act differently, some would be more involved in low-value outside advertisements than others, and there is likely no reliable method to draw a bright line. Yet in this situation, we must once again refer to *Buckley*. While *Christian Coalition* properly derived the value-based principle from *Buckley*, it did not thoroughly consult *Buckley*'s language when it created the joint venture requirement.<sup>232</sup> It did not address the fact that *Buckley* did not stop at "coordination," but used words like "cooperation" and "consent."<sup>233</sup> Further, *Buckley* described FECA as limiting "expenditures for express advocacy of candidates made *totally independently* of the candidate and his campaign."<sup>234</sup>

The use of these terms indicates that the *Christian Coalition* burden is too high. Surely, minor candidate input on an advertisement can be called cooperation,<sup>235</sup> and similarly amounts to implied consent. And finally, minor input prevents an expenditure from being "totally independent" of a candidate.<sup>236</sup> While there certainly must be some room for groups to maintain candidate

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231. It is true that the *Christian Coalition* test limits less speech, because a candidate's substantial involvement means that the spender's speech is combined with the candidate's. Yet the test proposed here still provides an almost unlimited outlet for speech: the spender remains free to make any expenditure it wants as long as it does not collaborate with the candidate. This leaves the spender free to spend money on any issue, and will not deprive the public discussion of any ideas.

232. See *Christian Coal.*, 52 F. Supp. 2d at 92.

233. The same conclusion can be drawn from subsequent case law. In the face of a vagueness challenge, *McConnell* upheld BCRA's coordination law treating expenditures as contributions if made "in cooperation, consultation, or concert with" a candidate. *McConnell*, 540 U.S. at 219-223. The Court noted that these terms were "words of common understanding." *Id.* at 222 (citation and quotation marks omitted). In the common understanding of words like "consultation" ("a discussion about something that is being decided") or "cooperation" ("a situation in which people work together to do something"), there is no requirement that an interaction must be substantial. MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/>. While it is true that the Court's finding on the vagueness issue does not guarantee success on the First Amendment issue, it is hard to imagine the Court approving the broad language in spite of a view that the language was impermissible under *Buckley*.

234. *Id.*

235. See *supra* note 233 (citing *McConnell* and its description of words "cooperation" and "consultation").

236. Likewise, the "wink or nod" language of *Colorado Republican II* indicates that a much lower bar than "joint venture" is permissible.

contact for purposes of issue discussion, outright collaboration on an advertisement, under *Buckley*, deprives a communication of its totally independent status.

The Kentucky Supreme Court took this view when reviewing a law defining indirect contributions in *Martin v. Commonwealth*.<sup>237</sup> After citing *Christian Coalition* and narrowing the statute such that it regulated “consultation . . . regarding the content, timing, place, nature, or volume of the communication,”<sup>238</sup> it rejected the appellants’ view that the Constitution requires that the candidate exercise control over the communication or engage in substantial discussion or negotiation with the spender. In rejecting that part of the *Christian Coalition* holding, the Court explained that “our polar star, [*Buckley*], defined a ‘contribution’ as an expenditure placed ‘in cooperation with or with the consent of’ the candidate . . . , obviously concluding that this definition was ‘closely drawn to avoid unnecessary abridgement of associational freedoms.’”<sup>239</sup> The Court in *Martin*, unlike the *Christian Coalition* court, based its conclusion on relevant and helpful guidance from the Supreme Court.

Conversely, a candidate’s simple knowledge of an outside group’s advertisement is not a sufficient indicator of utility.<sup>240</sup> The fact that a candidate learns of an advertisement usually has insufficient bearing on a candidate’s belief in the advertisement’s utility, especially if the candidate gains the knowledge from someone other than the person or group making the expenditure. Further, focusing on candidate knowledge obtained from someone other than the spender threatens to impermissibly limit a spender’s participation in the public discussion.

However, while Supreme Court precedent does not clearly answer the question, it is certainly possible that a regulation could permissibly deem spending coordinated if a “supposedly independent group gives a candidate’s campaign advance, secret notice of its planned advertising campaign to attack the opponent in a particular way, but without actually drawing an explicit response from the candidate’s campaign.”<sup>241</sup> In that situation, the rule would need to

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237. *Martin*, 96 S.W.3d at 56, *cert. denied*, 539 U.S. 928 (2003).

238. *Id.* (internal quotation marks omitted).

239. *Id.* (also citing *Colorado I*).

240. See *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 495–97 (7th Cir. 2012) (addressing a vagueness challenge and upholding the Illinois definition of contributions that included those made with a candidate’s “knowledge,” interpreting the term to require advance, non-public communication by the spender to the candidate).

241. *Id.* at 496.

ensure that there were some indicator of utility from the candidate—likely a wink or nod. Alternatively, a rule could create a rebuttable presumption that spending occurring after a spender gives such secret notice qualifies as a contribution.<sup>242</sup>

### 3. *Candidate Fundraising for Outside Groups*

There is some disagreement about whether spending may be deemed a contribution if a candidate has raised money for a group making an expenditure in the candidate's favor. While most commentators have allowed that such spending could be treated as a contribution,<sup>243</sup> Bob Bauer disagrees,<sup>244</sup> and the FEC ruled that federal candidates may solicit up to \$5,000 for such groups.<sup>245</sup> Bauer's disagreement lies with the fact that he believes that coordinated activity only turns spending into a contribution if the candidate and organization collaborate on messaging strategy. That opinion is discussed in Part III.B.2. But under the broader utility-based view put forth here, a candidate's fundraising for an outside group would turn that group's expenditure into a contribution under most circumstances. By choosing to spend his valuable time fundraising for an outside group, the candidate has provided a clear indicator of his belief in the utility of the group's spending, and that raises the concern that a quid pro quo could occur.<sup>246</sup> The possibility that the candidate is just taking a risk does not change the outcome—that could be true anytime a candidate collaborates with a spender. And treating such spending as an indirect contribution would not impermissibly infringe on speech of the spender: Preventing a candidate's fundraising is a conduct limitation similar to *Christian*

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242. CONN. GEN. STAT. ANN. § 9-601c(b) (2013). States like Connecticut use such presumptions as regulatory tools with the recognition that interactions between candidates and spenders are difficult to prove. The permissibility of the use of rebuttable presumptions and the broader issue of evidentiary sufficiency are outside the scope of this Article.

243. Smith and Hasen both allow that such a regulation could be constitutional, but Smith questions whether a workable rule could be developed. Smith, *supra* note 133, at 635 n.129.

244. Bauer, *supra* note 77.

245. FEC, *supra* note 85, at 3.

246. As with the other situations discussed in this Part, a conclusion about a rule's constitutionality does not amount to a conclusion about a rule's workability (let alone political likelihood). Likewise, treating certain spending as a contribution may be preventable for other purposes. For example, if a candidate sent a campaign e-mail to supporters that included a directive to contribute to a Super PAC, but the Super PAC had no knowledge of the candidate's intent, it is doubtful that the Super PAC spending could be held liable for violating contribution limits even if the candidate became liable for accepting unlawful contributions.

*Coalition's*, and spenders remain free to speak on any topic without candidate fundraising.

While the conclusion about candidate fundraising should be fairly clear when the supportive Super PAC spends a significant amount of money supporting the candidate that provides the fundraising, there may be some situations in which the fundraising should not automatically mean that any future spending should be deemed coordinated. For example, if the candidate has raised money for the PAC in a previous election cycle, but the PAC never supported her during that election cycle, the fundraising probably should not turn any spending for the candidate into a contribution in the current election cycle.<sup>247</sup> Thus, any regulation that seeks to target candidate fundraising must have proper limitations to ensure that the candidate's fundraising is likely an indication of perceived value.<sup>248</sup>

#### 4. *Redistribution of Campaign Material*

For similar reasons, redistribution of campaign material or use of a campaign's footage of a candidate should be treated as a contribution even if the material is made publicly available.<sup>249</sup> While the FEC has long treated dissemination of campaign material as an in-kind contribution,<sup>250</sup> campaigns have recently begun to post video footage of candidates online so that friendly Super PACs can use the footage in "independent" advertisements.<sup>251</sup> Such redistribution of

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247. See Phila. Board of Ethics, Reg. No. 1, Subpart H, 1.39(e) (Oct. 31, 2014), available at [http://www.phila.gov/ethicsboard/PDF/BOERegNo1\\_Campaign%20Finance\\_AsAmended\\_Effective10.31.14.pdf](http://www.phila.gov/ethicsboard/PDF/BOERegNo1_Campaign%20Finance_AsAmended_Effective10.31.14.pdf) (treating expenditures as coordinated if candidate has solicited funds for spender within twelve months before election).

248. The question is more difficult when the candidate raises money for a broad, national group that has not indicated it will provide any support, but does end up providing support. This difficulty could be handled by use of a shorter time limitation or other creative tailoring, yet at the very least, the fundraising should be available as evidence of coordination.

249. If a spender engages in such redistribution and there is no indication the candidate intended or implicitly suggested reproduction, the candidate should not face liability for accepting an excessive contribution.

250. 11 C.F.R. § 109.23 (2006).

251. The Campaign Legal Center and Democracy 21 have opined that this violates current law. Letter from J. Gerald Herbert & Fred Wertheimer (Mar. 21, 2014), available at <http://www.democracy21.org/wp-content/uploads/2014/03/MCCONNELL-KOC-letter-3-21-14.pdf>. The City of Philadelphia recently implemented a rule that treats such expenditures as contributions. See Phila. Board of Ethics, Reg. No. 1, Subpart H, 1.40 (Oct. 31, 2014), available at [http://www.phila.gov/ethicsboard/PDF/BOERegNo1\\_Campaign%20Finance\\_AsAmended\\_Effective10.31.14.pdf](http://www.phila.gov/ethicsboard/PDF/BOERegNo1_Campaign%20Finance_AsAmended_Effective10.31.14.pdf). The City of San Diego recently enacted a similar proposal. San Diego Mun. Code Ch. 2 Art. 7 § 27.2947(a) available at <http://docs.sandiego.gov/municode/MuniCodeChapter02/Ch02Art07Division29.pdf> ("Any committee that makes a payment for distributing or disseminating an

online video can be compared to leaving campaign signs and flyers in a public area and allowing others to distribute them. If a person or group engaged in an expensive distribution effort, few would question treating it as a contribution because of the implicit suggestion of action by a candidate.<sup>252</sup>

First, candidates who provide such material for any outside group to use are often seeking to circumvent the law, and a prophylactic provision preventing such action is surely permissible. Further, a candidate's decision to publicly disseminate campaign material is definitive action indicating the utility of such usage, as well as an implicit request or suggestion that such material be used for outside advertisements.<sup>253</sup> Just like candidates who fundraise for Super PACs, a candidate posting video footage online certainly cannot be sure that all expenditures containing his material will be beneficial, but has made a decision that use of such material will generally be helpful, therefore heightening the risk of a quid pro quo. Further, the infringement on speech that would result from restricting this practice is narrow—use of campaign materials is not necessary to create an effective message, and restrictions on their use will not appreciably limit a spender's freedom to communicate.

### Conclusion

Defining indirect contributions is not an easy project, given the lack of direct guidance from the Supreme Court. But legislatures, courts, and commentators should use the guidance that exists in *Buckley*, both in its language and logical foundations. The *Buckley* Court's concern about corruption was based principally on the theory that valuable contributions would create a quid pro quo risk, not on the theory that direct contributions create a bargaining opportunity. Further, *Buckley* did not indicate that expenditures only increase in value for constitutional purposes if candidates play a role in creation of a specific communication. Rather, *Buckley* used broad language, indicating that defining indirect contributions should be a task of

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advertisement that duplicates, reproduces, or republishes a *candidate's* campaign materials, in whole or in part, has made a *contribution* to the *candidate* for purposes of the *contribution* limits.”).

252. While the videos in question are more likely to be modified by redistributors, and therefore contain their own speech, that alteration does not change the fact that the candidate has made the suggestion.

253. See Nick Field, *PA-13: Leach Pokes Fun with #Boyleing*, POLITICS PA (May 7, 2014), <http://www.politicspa.com/pa-13-leach-pokes-fun-with-boyleing/57645/> (“While all candidates record footage like this, it would make little sense for them to post it online unless they wanted others to use it.”).

determining whether a candidate has provided reliable indications that she believes an expenditure is valuable. Principally, though not always, these indications will come from a direct signal by the candidate, when she cooperates, provides consent, coordinates, or gives a wink or nod. Unnecessarily narrowing the definition of indirect contributions will only lead to continued abuse of the *Buckley* Court's contribution/expenditure distinction, leaving our political system more vulnerable to quid pro quo corruption.