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

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ESSAY

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

RICHARD L. HASEN*

I. WHY LIMIT SUPER PAC CONTRIBUTIONS?

In 1995, journalist and supply-side economics enthusiast Jude Wanniski wrote an op-ed in the *New York Times* noting the anomaly that under the Supreme Court's campaign finance rulings,¹ billionaire Steve Forbes could spend \$25 million (or any amount) supporting his own candidacy to be president, but he could donate only \$1,000 to Jack Kemp's presidential campaign.² Forbes believed Kemp would have been a more effective candidate to promote Forbes' views, and Wanniski suggested that Forbes should have been able to give \$25 million directly to Kemp to bankroll a Kemp candidacy.³

Wanniski saw nothing wrong with Forbes giving Kemp so much money: "Wouldn't we expect President Kemp, with his \$25 million check from Mr. Forbes to take a call from him sooner than from, say, Mr. Business Week? But so what? His views are closer to Forbes's than to Business Week's, with or without campaign contributions."⁴

Wanniski's views appear to be in the minority, at least judged by longstanding laws imposing individual contribution limitations in federal

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

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

³ Wanniski, *supra* note 2 ("Why is my good friend Steve Forbes leaving the comfort of his publishing empire for the rough-and-tumble of Presidential politics? Because his idol, Jack Kemp, decided he did not have the stomach to raise \$25 million at \$1,000 a pop, an ordeal that would require him to make a thousand promises he knew he could not keep. On CNN's 'Capital Gang' recently, Mr. Kemp acknowledged that he would be running if Mr. Forbes could supply \$25 million. On CNN's 'Evans and Novak' earlier the same day, Mr. Forbes acknowledged that he would not be running if Mr. Kemp were in the race.").

⁴ *Id.*

elections as well as in many state and local elections. The 2002 Bipartisan Campaign Reform Act (BCRA, more commonly known as “McCain-Feingold”) doubled the very modest \$1,000 individual contribution limitation from the 1974 Federal Election Campaign Act Amendments to \$2000 and indexed the limits to inflation;⁵ in the 2014 election season the amount will be \$2,600 per election, meaning a citizen can give a congressional candidate \$5,200 (once for the primary and once for the general election).⁶ That individual limit nonetheless coexists with very high spending by federal, especially presidential, campaigns. In the 2012 election, for example, both Democratic candidate Barack Obama and Republican candidate Mitt Romney (along with affiliated party committees) raised above \$1 billion each.⁷ Candidates are raising a lot of money in contributions of \$5,200 or less.

Consider four reasons why supporters of contribution limits may favor them and oppose Wanniski’s suggestion to allow an individual to give a candidate for public office \$25 million or more.

1. Individual contribution limits deter bribery (the “antibribery interest”). While I believe Jack Kemp would not have been bribable even for \$25 million and Forbes would not be attempting a bribe even if he gave Kemp \$25 million, there are many more unscrupulous politicians out there who could be bribed for much less. For example, a New York State Assembly Member was just convicted for taking a mere \$22,000 bribe in exchange for taking favorable actions related to an adult day care center.⁸ Bribery is very difficult to detect because people who are bribed want to keep it a secret. But bribery would be much easier if very large campaign contributions were legal. As things stand now, unscrupulous individuals wanting to engage in a bribery transaction need to hide both the agreement and the payments. With unlimited contributions allowed, the only thing

⁵ 2 U.S.C. 441a(a)(1)(A).

⁶ Federal Election Commission, Contribution Limits 2013-2014, <http://fec.gov/pages/brochures/contriblimitschart.htm>.

⁷ HASEN, *supra* note 1, ch. 16; Campaign Finance Institute, Aggregated Individual Contributions by Donors to 2012 Presidential Candidates Presidential Campaign, National Party, and Joint Committee Fundraising, http://www.cfinst.org/pdf/federal/president/2012/Presidential%20Fundraising%20byCommittee_2012.pdf. Contributions to state and national political parties are subject to higher individual limits. See Federal Election Commission, *supra* note 6.

⁸ John Herzfeld, *Jury Convicts N.Y. State Legislator on Charges of Trading Favors for Bribes*, BLOOMBERG BNA MONEY & POLITICS RPT, Jan. 15, 2014, http://news.bna.com/mpdm/MPDMWB/split_display.adp?fedfid=39901945&vname=mpebulallissues&fn=39901945&id=39901945.

that conspirators would need to hide is the agreement: “I will give you \$25 million and in exchange you will support legislation for a tax break which will save me \$1 Billion.” By keeping individual contributions limits low, there is not enough money at stake in campaign contributions for a politician to be bought and unscrupulous individuals need to take steps to hide the money.

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

3. Individual contribution limits promote political equality by limiting the sale of access and disproportionate influence over election outcomes (the “equality” interest). Wanniski pooh-poohed the objection that Kemp would take Forbes’ phone calls first, reasoning that Kemp would have done that without the contribution, and that because Kemp’s ideology lined up with Forbes’ ideology, the extra access would make no difference in policy. That may well be true of the Kemp-Forbes relationship, but it may not be true for many large donors. To use the earlier example, a donor might give \$25 million to a candidate not because the donor agrees with the candidate’s ideology, but because the donor hopes it will give the candidate access to make a pitch for a \$1 billion tax cut. To some this access is unfair, because only the large donor gets to make the pitch for the tax cut while those on the other side would be much less likely to get the access. Further, there is a separate equality concern: the \$25 million contribution could make it more likely that the candidate gets elected, and that means that the large donor has a bigger say over the

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

outcome of the election than others who feel just as passionately but lack the same funds to support the candidates of their choice.

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

Opponents of strong campaign regulation contest these points on empirical grounds, normative grounds, or both. While virtually no one supports bribery of elected officials, some contend that outright bribery is rare, based on the number of prosecutions, and bribery would not rise appreciably with very large legal campaign contributions.¹⁰ While campaign contributions are valuable to candidates, they may not be nearly as valuable to unscrupulous politicians as piles of cash in the freezer¹¹ or a new yacht.¹²

Some believe undue influence or the sale of access should not count as corruption, and all that the law should do is prevent actual *quid pro quo* corruption or its appearance.¹³ Some reject political equality as a legitimate reason for limiting campaign contributions.¹⁴ The relationship between money spent on elections and electoral outcomes is complicated.¹⁵ Finally, empirical evidence

¹⁰ Stephen A. Ansolabehere, *The Scope of Corruption: Lessons from Comparative Campaign Finance Disclosure*, 6 ELECTION L.J. 163, 175 (2006).

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

¹² Bill Campbell, *Former Rep ‘Duke’ Cunningham Freed After Bribery Conviction*, NPR News, Jun. 4, 2013, <http://www.npr.org/blogs/thetwo-way/2013/06/04/188667106/former-rep-duke-cunningham-freed-after-bribery-sentence>. But it is important not to underestimate how much personal value candidates and elected officials can get out of campaign contributions, including luxury locations with lobbyists and fundraisers. See Eric Lipton, *A Loophole Allows Lawmakers to Reel in Trips and Donations*, N.Y. TIMES, Jan. 19, 2014, <http://www.nytimes.com/2014/01/20/us/politics/a-loophole-allows-lawmakers-to-reel-in-trips-and-donations.html?hp&r=0>.

¹³ Bradley A. Smith, *Super PACs and the Role of “Coordination” in Campaign Finance Law*, 49 WILLAMETTE L. REV. 603, 615 (2013).

¹⁴ BRADLEY A. SMITH, UNFREE SPEECH (2003).

¹⁵ For a summary, see LOWENSTEIN, HASEN & TOKAJI, *supra* note 1, at 676-80.

casts serious doubts on any relationship between campaign finance laws and public confidence in the government or the electoral process.¹⁶

I will return to these objections and related constitutional issues shortly, but before I do, I want to contrast Wanniski's Forbes-Kemp scenario with two other relationships involving rich donors and presidential candidates.

In 2004, liberal financier George Soros wanted to help defeat Republican President George W. Bush, who was running for reelection. Soros could give only a few thousand dollars directly to the campaign of Democrat John Kerry, who was running against Bush. But Soros gave approximately \$27 million to other organizations which promoted Kerry's candidacy.¹⁷ At the time, federal law provided that an individual could not give more than \$5,000 to a political committee supporting candidates for federal office. But Soros gave millions to a group called "Americans Coming Together" ("ACT"),¹⁸ which was a political organization organized under section 527 of the tax code, and which argued that even though it was running ads attacking Bush and supporting Kerry, and even though the organization was headed by Kerry's former campaign manager, the group was not a political committee and therefore not bound by the \$5,000 individual contribution limitation. There was no evidence the group coordinated with Kerry's campaign, but it did mimic his advertising and augment his campaign strategy. A few years after the election, the Federal Election Commission determined that ACT violated the law, imposed a \$775,000 fine, and decided it should have registered as a political committee because its major purpose was to elect a federal candidate. It should not have accepted contributions exceeding \$5,000 from individuals.¹⁹

Those with serious concerns about Soros giving \$27 million directly to Kerry would have similar concerns about Soros giving the same amount to independent groups with close personal ties to Kerry. Again, while I have no

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

¹⁷ Weekend Edition Saturday, *George Soros, Maintaining Political Interest*, NPR News, Jun. 10, 2006, <http://www.npr.org/templates/story/story.php?storyId=5476317>.

¹⁸ Thomas B. Edsall, *Soros-Backed Activist Group Disbands as Interest Fades*, WASH. POST, Aug. 3, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/02/AR2005080201849.html> ("Soros and his close associate—Progressive Corp. Chairman Peter Lewis—together put \$38.5 million into ACT and the Media Fund. With this seed money, the two organizations collected \$196.4 million, enough to set up voter mobilization programs in every presidential battleground state and to flood the airwaves with pro-Democratic commercials in the early spring of 2004 when Kerry's campaign was broke.").

¹⁹ Kenneth P. Vogel, *Soros-Linked Group Hit with Huge Fine*, POLITICO, Aug. 29, 2007, <http://www.politico.com/news/stories/0807/5555.html>; Federal Election Commission, News Release, FEC to Collect \$775,000 Civil Penalty from Americans Coming Together, Aug. 29, 2007, <http://www.fec.gov/press/press2007/20070829act.shtml>.

reason to doubt the honesty of Kerry and Soros, unscrupulous donors and candidates could agree to a bribe, with the money going to a group committed to doing everything to elect the candidate. That committee need not even know about the bribe; it is certainly not required that there be “bargaining opportunities” involving the outside group.²⁰ The other interests noted for limiting contributions to candidates are in play as well: a large donor to an independent group could well have undue influence over the candidate, even if the financial support is marginally attenuated; the large donor to the independent group is likely to get special access to the candidate and the large contribution could have an outsized influence on the election campaign; and the public’s confidence could be shaken by a large contribution to an independent group with close ties to the candidate. All of these arguments are somewhat lessened by the independence of the outside group, but they are still present.

The final scenario concerns the 2012 election, and the campaign contributions of conservative casino magnate Sheldon Adelson related to the 2012 presidential election. By the time of the 2012 election, the Supreme Court had decided *Citizens United v. FEC*,²¹ allowing independent corporate spending in elections, the United States Court of Appeals for the District of Columbia Circuit had decided *SpeechNow.Org v. FEC*, allowing individuals to give unlimited sums to political committees which make only independent expenditures supporting or opposing candidates, and the Federal Election Commission issued two advisory opinions which allowed corporate and labor union contributions to these independent expenditure only committees,²² which became known as Super PACs. In the 2012 elections, all of the serious presidential candidates had single-candidate Super PACs supporting them, with many headed by friends or former campaign associates of the candidates. Some Super PACs even took campaign contributions from the candidate’s family members. In essence, these Super PACs were the legal version of what ACT was trying to do back in 2004.

Adelson gave unprecedented sums to Super PACs, first \$20 million to “Winning Our Future,” the Super PAC supporting Republican Newt Gingrich in the Republican primaries, and then \$30 million to “Restore Our Future,” the Super PAC supporting Mitt Romney’s general election campaign against

²⁰ Cf. Smith, *supra* note 13, at 632 (“No bargaining opportunities arise unless [the Super PAC employee] has contact with the campaign or candidate post-Super PAC employment.”)

²¹ 130 S.Ct. 876 (2010).

²² *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), *cert. denied sum nom* Keating v. FEC, 131 S.Ct. 553 (2010); FEC Adv. Op. 2010-09 (Club for Growth); FEC Adv. Op. 2010-11 (Commonsense 10).

President Obama's reelection.²³ This was part of a \$98 million to \$150 million or more which Adelson and his wife contributed in the 2012 elections²⁴—making Wanniski's plea for \$25 million to Kemp in 1996 seem quaint.

Restore Our Future was headed by Charlie Spies, a close associate of Mitt Romney, and other Romney associates.²⁵ There was no evidence Restore Our Future violated the rules on coordinating with the Romney campaign. But, consistent with FEC rulings, Romney was allowed to solicit funds (of no more than \$5,000) for the independent group.²⁶ (President Obama apparently did the same thing soliciting funds for Priorities USA, a pro-Obama Super PAC headed by Bill Burton, a former close associate of Obama.²⁷) Restore Our Future complemented the Romney campaign's strategy, and generally mimicked the campaign's message.

Once again, as with the Soros-Kerry connection, the Adelson-Romney connection raised similar concerns which would have been raised about a multi-million dollar contribution from Adelson directly to Romney. To repeat, while I have no reason to doubt the honesty of Romney and Adelson, unscrupulous donors and candidates could agree to a bribe, with the money going to a group committed to doing everything to elect the candidate. Once again, there need be no bargaining involving the Super PAC directly. The anti-undue influence, political equality, and public confidence arguments are the same as in Soros-Kerry. All of the arguments are somewhat lessened by the independence of the outside group compared to giving directly to the candidate, but they are still present.

There is one additional concern about undue influence arising from Super PACs which is not present when it comes to direct contributions to candidates: a wealthy individual or entity could threaten to bankroll a large Super PAC working against an elected official up for reelection unless that official acts in ways which

²³ Theodor Meyer, *How Much Did Sheldon Adelson Really Spend on Campaign 2012?*, PROPUBLICA, Dec. 20, 2012, <http://www.propublica.org/article/how-much-did-sheldon-adelson-really-spend-on-campaign-2012>.

²⁴ *Id.*

²⁵ Factcheck.org, Restore Our Future, July 25, 2012, <http://www.factcheck.org/2011/09/restore-our-future/>.

²⁶ Ryan J. Reilly, *FEC: Politicians Can Solicit Donations for 'Super PACs,' But Only Up to 5K*, TALKING POINTS MEMO, Jun. 30, 2011, <http://talkingpointsmemo.com/muckraker/fec-politicians-can-solicit-donations-for-super-pacs-but-only-up-to-5k>.

²⁷ Amanda Terkel & Sam Stein, *Obama Broke Super PAC Pledge During Campaign*, HUFFINGTON POST, Nov. 4, 2013, http://www.huffingtonpost.com/2013/11/04/obama-super-pac_n_4214466.html; Factcheck.org, Priorities U.S.A./Priorities USA Action, Aug. 6, 2012, <http://www.factcheck.org/2011/09/priorities-usapriorities-usa-action/>.

are more consistent with the wealthy individual or entity's interests.²⁸ Even without an explicit threat or *quid pro quo*, the potential for wealthy individuals or entities to bankroll opposition to an elected official's campaign can influence the elected official's actions. The threat is much more credible because the potential donor can threaten to give to an entity which can take unlimited contributions rather than simply giving the individual contribution limit to an opposing candidate's campaign.

The three examples demonstrate that the case for contribution limits to individual candidates looks very much like the case for contribution limits to independent groups, or at least to such groups which are closely aligned to the candidates and therefore are groups that donors and candidates would view as nearly as good as a direct contribution to a candidate. There remain some small differences between contributing directly to the candidate or giving to a supportive and reliable Super PAC backing the candidate, but in general the concerns about large contributions are parallel.

II. SUPER PAC CONTRIBUTION LIMITS AND THE FIGHT OVER "CORRUPTION"

In the last part I listed four different interests which could justify individual contribution limitations applied directly to candidates as well as to single-issue reliable Super PACs supporting candidates: the antibribery interest, the anti-undue influence interest, the political equality interest, and the public confidence interest. Whether these interests or others motivate those who support contribution interests, and the relative importance of each interest, is hard to say. But regardless of what motivates supporters of individual contribution limits, the Supreme Court has limited the permissibility of interests which may be weighed against the First Amendment rights of those who contribute and want to accept contributions. It also has required application of "exacting scrutiny" as the balancing test for judging the constitutionality of contribution limits. For this reason, only some arguments to sustain individual contribution limits will pass judicial muster.

To sum up the matter briefly,²⁹ the Supreme Court has accepted only the interest in preventing corruption and the appearance of corruption to justify

²⁸ Richard L. Hasen, *The Biggest Danger of Super PACs*, CNN Opinion, Jan. 9, 2012, <http://www.cnn.com/2012/01/09/opinion/hasen-super-pacs/index.html>.

²⁹ For summaries, see HASEN, *supra* note 1, chs 14-15; LOWENSTEIN, HASEN & TOKAJI, *supra* note 1, chs. 12-14.

contribution limitations to candidates. Under an exacting scrutiny standard, the Supreme Court has repeatedly upheld contribution limitations applied in candidate elections, except in one instance when the Court held a limit was too low so as to prevent a candidate from being able to engage in effective advocacy.³⁰

The Supreme Court has not directly weighed the constitutionality of contribution limits to independent groups such as Super PACs.³¹ However, in the context of spending limits, in which the Supreme Court has applied strict scrutiny, the Court held in *Citizens United* that independent spending cannot corrupt or create the appearance of corruption.³² The D.C. Circuit in *SpeechNow* then held

³⁰ *Randall v. Sorrell*, 548 U.S. 230, 262 (2006); see Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After Randall v. Sorrell*, 68 OHIO ST. L.J. 849 (2007).

³¹ Before *Citizens United*, there was some question whether the Court in a 1981 case, *California Medical Association v. FEC*, 453 U.S. 182 (1981) had endorsed limitations on campaign contributions to independent expenditure committees and then reaffirmed the constitutionality of limits in *McConnell v. FEC* in its footnote 48. See *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 152 U. PA. L. REV. 31 (2004).

³² *Citizens United*, 558 U.S. at 359-61. Here is the key portion of that analysis:

When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption. The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt:

“Favoritism and influence are not ... avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.” *McConnell*(opinion of KENNEDY, J.).

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

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

The *McConnell* record was “over 100,000 pages” long, yet it “does not have any direct examples of votes being exchanged for ... expenditures,” This confirms *Buckley* 's reasoning that independent expenditures do not lead to, or create the appearance of, *quid pro quo*

that if independent spending cannot corrupt under *Citizen United*'s conception of corruption, then contributions to fund independent spending cannot corrupt either.³³

How can we square this analysis with the analysis in Part I, which showed that similar interests support individual contribution limits and limits on contributions to super PACs and other independent groups? Why reach divergent constitutional outcomes in the two cases?

To begin with, we can take the third interest, political equality, interest off the table. Even if equalization is part of the motivation for supporters of contribution limitations, the Court in *Buckley*,³⁴ *FEC v. Davis*,³⁵ and *Citizens United*³⁶ has rejected the interest. The rejection is all the stronger after *Citizens United* overturned cases obliquely embracing a political equality rationale in the context of corporate and labor union spending. Indeed, following the Court's recent opinion in *Arizona Free Enterprise Club's Freedom PAC v. Bennett*,³⁷ striking down the matching funds portion of Arizona's public financing law, if political equality is even *part* of a law's motivation, a law may violate the First Amendment.

The divergence on the remaining three interests devolve into empirical and conceptual disputes.

It is true the Supreme Court has said that the prevention of corruption or the appearance of corruption can justify contribution limits. The problem is what the Court means by "corruption," a concept which has shifted over time.

corruption. In fact, there is only scant evidence that independent expenditures even ingratiate. Ingratiation and access, in any event, are not corruption. The BCRA record establishes that certain donations to political parties, called "soft money," were made to gain access to elected officials. This case, however, is about independent expenditures, not soft money. When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption.

(Citations omitted and internal quotation marks altered).

³³ *SpeechNow.org v. FEC*, 599 F.3d 686.

³⁴ 424 U.S. 1, 48-49 (1976).

³⁵ 554 U.S. 724 (2008).

³⁶ 558 U.S. at 379-84 (Roberts, C.J., concurring).

³⁷ 131 S. Ct. 2806 (2011).

Empirically, *Citizens United* appears to establish as an uncontestable fact that independent spending cannot corrupt or create the appearance of corruption. I have been quite critical of this determination, because it does not allow for factfinders to consider a contrary conclusion based upon actual evidence.³⁸ As Part I demonstrated, the potential for *quid pro quo* bribery appears nearly as strong when it comes to large contributions flowing to a reliable single candidate Super PAC staffed by close associates of the candidate and backed by the candidate's friends and family as with contributions flowing to the candidate directly. *Citizens United* appears to exclude the possible bribery role of contributions to reliable Super, and if the Court reached the issue it likely would agree with the *SpeechNow.Org* court that contributions to fund independent spending cannot cause *quid pro quo* corruption any more than independent spending can do so.

The parallel empirical issue arises with respect to the fourth interest, the public confidence interest. Again, as Part I demonstrated, the potential for the public to lose confidence in our system of government or the electoral process appears nearly as strong when it comes to large contributions flowing to a reliable single candidate Super PAC staffed by close associates of the candidate and backed by the candidate's friends and family as with contributions flowing to the candidate directly. But once again, *Citizens United* appears to exclude the possibility of demonstrating with evidence that large contributions funding independent spending to a candidate's reliable Super PAC can cause the public to lose confidence in government.

This leaves the second interest, the undue influence interest. Recall the concern here is elected officials who are too compliant with the interests of donors, and affording access to those donors to make their case. Indeed, in the case of potential Super PAC donors, the undue influence concern may be greater because elected officials may be too compliant with the interests of potential Super PAC donors who may donate not to the candidate or a supportive Super PAC but *against* the candidate to an opposing Super PAC. This (sometimes implicit) threat could give those potential donors improper access.

The problem with using undue influence as a form of corruption is conceptual and not (or not only) empirical. In a series of earlier contributions cases, most notably *Shrink Missouri*,³⁹ the Supreme Court endorsed an undue influence theory of corruption, and relatedly an appearance of undue influence theory of the appearance of corruption.⁴⁰ These cases, however, are in

³⁸ *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011).

³⁹ *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 382-83, 397-98 (2000).

⁴⁰ See Hasen, *supra* note 31; Richard L. Hasen, *Shrink Missouri, Campaign Finance, and "The Thing That Wouldn't Leave,"* 17 CONST. COMMENTARY 483 (2000).

considerable tension with *Citizens United*. Although the *Citizens United* Court was careful to say it was not saying anything about the constitutionality of contribution limits,⁴¹ it did reject the these earlier cases' broad theory of corruption—at least in evaluating spending limits, concluding that ingratiation and access are not corruption.⁴² If undue influence is not a valid theory of corruption, and appearance of undue influence is not a valid theory of appearance of corruption, then it is hard to see the path toward sustaining contribution limits to Super PACs.

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

III. THE COORDINATION PROXY WAR

Savvy campaign finance reformers understand that the *Citizens United/SpeechNow.Org* reading of the meaning of corruption makes it difficult under current doctrine to sustain contribution limitations for Super PACs and other independent expenditure committees. This roadblock has caused some supporters to seek an alternative route to cover such conduct: the coordination rules. Federal law treats coordinated expenditures as contributions,⁴³ and therefore if Super PAC activity is treated as coordinated with a candidate's activity, then Super PACs would no longer be able to raise unlimited contributions. If the Super

⁴¹ *Citizens United*, 558 U.S. at 359 (“*Citizens United* has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.”).

⁴² The Court did tantalizingly suggest that things might be different in analysis of large, soft money contributions. *Citizens United*, 558 U.S. at 360 (“The BCRA record establishes that certain donations to political parties, called “soft money,” were made to gain access to elected officials. This case, however, is about independent expenditures, not soft money.”) It is not clear how to reconcile this part of *Citizens United* with the rest of the opinion.

⁴³ Federal law defines “contributions” to include “expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate.” 2 U.S.C. § 441a(a)(7)(B)(i); see *Shays v. FEC*, 528 F.3d 914, 919-20 (D.C. Cir. 2008); 11 C.F.R. § 109.21; *Smith*, *supra* note 13, at 607-08.

PAC and candidate sit down and discuss strategy, the two entities are coordinating and the coordination rules apply. Unfortunately for those of us who support Super PAC contribution limits, the coordination route appears even less promising than the anticorruption argument for sustaining such limits.

Basically, the coordination route posits that the overlapping personal and personnel connections between a candidate's committee and a single-candidate reliable Super PAC justify treating contributions to the Super PAC as coordinated with the candidate's committee, and therefore subject to the individual contribution limits.

For example, here is the coordination approach of the proposed American Anti-Corruption Act (AACA),⁴⁴ which has been promoted by former FEC Chairman Trevor Potter, Professor Larry Lessig, and others:

PROVISION 7: REVISE THE FEC'S COORDINATION REGULATIONS

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

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

In order for an expenditure to be considered an independent expenditure, the organization paying for the expenditure must act totally independently of any candidate or political party. This includes, but is not limited to, requirements that the person making the expenditure may not employ or retain any individual or accept any assistance, including the solicitation of funds, from any individual who is the candidate benefited by such expenditure, or who has, with respect to the candidate benefited by such expenditure, within the last 5 years (1) raised funds for the candidate; (2) been employed or retained by the candidate or candidate's campaign(s) or the congressional office or committee staff of a Member of Congress or the Executive office of the President; (3) been employed or retained by a national political party committee of the political party of the candidate; (4) been employed or retained by a vendor employed or retained by the candidate, candidate's campaign(s), or candidate's party committee of that candidate to act in a fundraising, polling, media consultant, or campaign

⁴⁴ See Anticorruptionact.org (last visited Jan. 19, 2014). The text of the Act is posted at https://s3.amazonaws.com/s3.unitedrepublic.org/docs/AACA_Full_Provisions.pdf.

management capacity; or is (5) a spouse, partner, or relative of the candidate (father, mother, sister, brother, child, first cousin, aunt, uncle) (6) a current or former business partner or colleague of the candidate or of an employee of the candidate's campaign. Additionally, if a candidate publicly or privately endorses or approves of an organization's expenditure benefiting that candidate or any of the organization's activities, then the expenditures of such organization shall be deemed coordinated with such candidate.

Here is Professor Richard Briffault's coordination proposal:⁴⁵

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

The problem with both the AACA and the Briffault proposals is that they reach much more broadly than actual coordination. For example, the AACA would effectively bar Super PACs desiring to employ *anyone* who has worked for *any* member of Congress (not just the supported candidate) for the last five years. More broadly, the AACA is targeting Super PACs which employ anyone who is politically active or any relative, former colleague, or former donor to a candidate. This definition really has nothing to do with coordination and is instead simply a way to put single-candidate (and many other) Super PACs out of business.

Supporters of AACA might defend the broad coordination standard as a prophylactic means to prevent those with close personal relationships to a candidate from using those connections to surreptitiously coordinate on strategy. The problem with that argument is that actual coordination is unnecessary to achieve the aims of supporting the candidate and there is no need for those with a personal relationship to the candidate to risk a felony. All of the information that a Super PAC needs to be an effective proxy for a campaign is public, and nothing

⁴⁵ Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 97 (2013), <http://www.columbialawreview.org/wp-content/uploads/2013/05/Briffault-113-Colum.-L.-Rev.-88-2013.pdf>.

depends on the personal relationship. As election lawyer Bob Bauer notes, “why do [candidates and Super PAC employees] have to have known each other when they can read websites and tweets?”⁴⁶

Briffault’s proposal is narrower than the AACA’s proposal, and there is no question Briffault is right that a single-candidate Super PAC will share a common purpose with a candidate’s campaign. He explains the basis for his proposal:⁴⁷

The thrust of the first factor is that if a committee is devoting all of its election spending to promoting a specific candidate—whether with affirmative ads or attacks on that candidate’s opponent—then donations to that committee are effectively donations to the candidate. If an organization is involved in multiple election contests, then donations to the organization cannot be said to go to the aid of a specific candidate. In that case, although the organization’s spending may benefit certain candidates, the link between a particular donor and a particular candidate is attenuated. But where the organization is a single-candidate committee, the connection between donor and ultimate beneficiary is much stronger, and the donation begins to resemble *Buckley*’s “disguised contribution.”...

The second factor addresses the concern that it is possible for a committee to be formed by a truly independent group of concerned citizens to advance just one candidate, but also to stress particular issues, concerns, or campaign themes that differ from those of the supported candidate. Even though focused solely on a single candidate in a specific election, such a group might still fit the model the Supreme Court sought to protect in *Buckley*. But the involvement in the committee of individuals with recent ties to the candidate or the endorsement of the committee’s work by the candidate or his staff indicates that the committee is very likely to act consistently with the preferred strategies, tactics, messages, and themes of the candidate and to act as an alter ego for the candidate’s official campaign even without the explicit interactions that the law currently looks for. The ties that indicate that a committee is not truly independent of a candidate would include having staff who recently worked for the candidate, either on her campaign or in her government office; who recently worked for a committee of that candidate’s party; who raised funds for a current or recent campaign of that candidate; or who

⁴⁶ Robert F. Bauer, *Professor Briffault on Super PACs and the Question of “Coordination,”* MORE SOFT MONEY HARD LAW, May 8, 2013, <http://www.moresoftmoneyhardlaw.com/2013/05/professor-briffault-on-super-pacs-and-the-question-of-coordination/>.

⁴⁷ Briffault, *supra* note 45, at 97-99.

recently worked for a vendor who provides campaign services to the candidate. A committee that exists solely to promote one or a very small number of candidates and is organized and operated by individuals with recent strong political ties to that candidate or candidates is very likely to be viewed by the candidate or candidates aided as providing integral support to their campaigns even in the absence of express current interaction between the independent committee and the candidate. Under those circumstances, it would be fair to say that donations to that committee should be treated as disguised contributions to the candidate.

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

The problem with Briffault's analysis is his apparent conflation of coordination with common purpose. As Professor Brad Smith persuasively argues, *Buckley's* understanding of coordination *focuses on coordination of campaign strategy*, and not simply the closeness of the prior or current relationship among different individuals or groups.⁴⁸ A rule which would count as coordination the simple fact that people have common goals and common histories would go well beyond the coordination prohibition aimed at barring disguised contributions to a candidate through a third party. In other words, to show coordination, it is not enough to prove that the Super PAC acts "consistently" with the candidate's views or even "as an alter ego;" coordination requires proof of "the explicit interactions that the law currently looks for."⁴⁹ A coordination rule which does not require explicit interactions appears to violate the First Amendment.

Briffault is on stronger grounds arguing for a rule which treats candidates who urge donors to give to the Super PAC as coordinating with that Super PAC. A candidate who raises funds for a group by definition is coordinating fundraising strategy with that group; the candidate is taking time raising funds for the group

⁴⁸ Smith, *supra* note 13, at 630-35.

⁴⁹ Briffault, *supra* note 45, at 98.

rather than himself. Even Smith seems to agree that treating this activity as coordination would be constitutional under existing doctrine.⁵⁰

It is no doubt true that Super PACs with close personal or personnel ties to the candidate can create a public perception of undue influence over that candidate. Briffault is surely right that “when a committee exists solely to support a specific candidate and either is organized and directed by individuals with close political ties to the candidate or is recognized as a supporter by the candidate, donors to the committee pose the same dangers of corruption and the appearance of corruption as donations to the candidate’s official campaign committee.”⁵¹ Indeed, I would argue that reliable Super PACs create nearly the identical *actual* undue influence problem, which arises as well when a donor makes large campaign contributions directly to candidates. But, as we have seen, this idea of creating undue influence through outside groups is in tension with the crabbed definition of corruption and the appearance of corruption under the *Citizen United*. And regardless, undue influence, as bad as it may be, is *not* coordination. They are analytically distinct concepts.

IV. CONCLUSION

The doctrinal move to an expanded definition of coordination to deal with the problem of Super PACs is completely understandable. But given the state of current doctrine, the effort would be unlikely to be successful. Courts would be likely, for reasons explained by Smith, to reject a broad coordination rule as infringing on the First Amendment rights of those involved with independent Super PACs.

Instead, coordination is the sideshow and the fight over the meaning of corruption is the main event. Reformers must convince the Supreme Court to return to the broader definition of corruption which extends anticorruption to include not just the prevention of bribery but also the prevention of undue influence. That day may not come until the Supreme Court personnel changes, but it is the linchpin for the successful resuscitation of meaningful campaign finance regulation in the United States.

⁵⁰ Smith, *supra* note 13, at 635.

⁵¹ Briffault, *supra* note 45, at 99.