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Buckley 2.0: How Would The Buckley Court Decide Buckley Today?

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BUCKLEY 2.0: HOW WOULD THE *BUCKLEY* COURT DECIDE *BUCKLEY* TODAY?

If you read Supreme Court campaign finance cases, you will be struck by the disconnect between the lofty rhetoric used to justify the constitutional protections afforded political speech and the impoverished sound bites and hyperbolic attack ads that dominate contemporary electoral communications. The origin of this disconnect is in large part two phenomena. First, in the last decade the Court has failed to take the factual record seriously and, as a result, makes generalizations that are belied by contemporary campaign practices. Relatedly, the Court has adopted doctrines that co-exist in uneasy relationships with campaign finance doctrines of longstanding. As a result, the Court has created an alternative universe that only first amendment absolutists find credible, and it has constitutionalized an increasingly corrupt electoral landscape.

All campaign finance cases rely, in varying degrees, on *Buckley v. Valeo*,[1] the first Supreme Court decision to evaluate the constitutionality of the Federal Election Campaign Act (FECA), enacted in 1971.[2] *Buckley* spoke very forcefully about the importance of political speech for democratic self-government. Yet the decision did not endorse an absolutist position for protecting political speech.[3] Rather, the decision can be seen as striking a balance between the

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[1] 424 U.S. 1 (1976) (per curiam). All the Justices except Justice Stevens, who did not take part in the decision, joined in the part of the opinion finding that there was a case or controversy. Justices Brennan, Stewart, and Powell joined the entire opinion, but the remaining four justices joined in some parts and concurred or dissented in others.

[2] Federal Election Campaign Act of 1971, 86 Stat. 3, as amended in 1974, 88 Stat. 1263 (hereafter FECA). The law was originally codified at 2 U.S.C. §§431 et seq., but Title 2 sections were editorially reclassified as sections of Title 52, Voting and Elections in Supplement II of the 2012 edition. *See* The Office of Law Revision Counsel, U.S. House of Representatives, http://uscode.house.gov/editorialreclassification/t52/index.html).

[3] *See Buckley*, 424 U.S. at 25 (citing CSC v. Letter Carriers, 413 U.S. 548, 567 (1973) for the proposition that "[n]either the right to associate nor the right to participate in political

free speech claims of individuals and groups with other societal interests, especially the integrity of elections in a representative democracy. Although that balance has been criticized by many, the Supreme Court has so far declined to overrule the decision explicitly, preferring to cherry pick among *Buckley*-originated doctrines.[4] As a result, the balance struck in *Buckley* between free speech values and the goal of election integrity has been lost, and it has been replaced by political speech absolutism justified in pseudo-*Buckley* terms.

To draw out the consequences of these developments, I propose a thought experiment in which I analyze how the *Buckley* Court would decide *Buckley* and recent cases today given the factual and doctrinal changes that have occurred since it issued its pioneering opinion. I call this thought experiment *Buckley 2.0*. Part I examines campaign practices at the time *Buckley* was decided and today and then compares the amounts spent then and now in constant dollars. Part II moves to the doctrinal plane and analyzes how *Buckley 2.0* would likely respond today to issues *Buckley* decided in 1976 or parallel issues arising today, taking into account contemporary empirical data and campaign finance practices and doctrines developed in the last decade.

In Part III, *Buckley 2.0* considers whether the time has come to overrule *Citizens United v. FEC*.[5] It begins by reviewing the basic principles animating the original *Buckley* decision. It

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activities is absolute").

[4] The main exception is McCutcheon v. FEC, 572 U.S. 185 (2014), which invalidated FECA's limit on aggregate contributions during a campaign cycle, despite *Buckley*'s upholding that restriction. *See infra* notes 81-84 and accompanying text. Criticism of *Buckley* began with the decision itself: five of the eight Justices wrote opinions that concurred in part and dissented in part. *See Buckley*, 424 U.S. at 235. The most consistent critic of *Buckley* is Justice Thomas. *See McCutcheon*, 572 U.S. at 228 (urging that *Buckley* be overruled and listing five previous decisions in which he called for it to be overruled).

[5] Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010).

then examines the reasoning set forward in *Citizens United* in support of that Court's conclusion that Congress has no legitimate interest in restricting the sources of funds that corporations and unions use to support candidates in federal elections if these organizations engage in independent spending. Based upon *Buckley 2.0*'s analysis in Part II of the disparity between the concepts of corruption, quid pro quo, the appearance of corruption, and independence as understood by the original *Buckley* as against the interpretation set forth in *Citizens United*, *Buckley 2.0* will conclude that the later case did not faithfully represent the teachings of the original *Buckley*. Thus, it would reject *Citizens United*'s claim that its reasoning is based upon *Buckley*. Restoring the original *Buckley* teachings and in light of empirical evidence derived from contemporary campaign practices, *Buckley 2.0* would conclude that the original *Buckley* would find that unlimited spending by corporations and unions pose a threat of corruption and the appearance of corruption sufficient to justify Congress's restrictions on the sources of funds for campaign spending by those entities, even if they act independently of candidates.

The immediate consequence of *Buckley 2.0*'s conclusion would be to restore the provision of federal campaign finance law requiring corporations and unions to use money raised by their political action committees (PACs) to fund campaign messages that urge the support or defeat of specific candidates for elective office. As the statistics in Part I make clear, before the changes initiated by *Citizens United*, spending by corporations and other business interests by means of their own PACs and the PACs of trade associations to which they contribute had increased more than fourfold over their spending at the time of *Buckley*, calculated in constant, i.e., inflation adjusted dollars. Invalidating the holding of *Citizens United* would thus leave those interests still able to raise enormous sums of money to finance their campaign spending, although it would

require them to raise the money in according with federal rules governing the funding of PACs. Business interests would also continue to be able to avail themselves of the issue advocacy rules to fund without limit most messages that omit express advocacy of the election or defeat of specific candidates. Thus, *Buckley 2.0*'s rejection of *Citizens United* would leave business interests able to communicate their views widely and effectively to the public using a combination of regulated and unregulated funds.

A more far-reaching consequence of *Buckley 2.0*'s invalidation of *Citizen United*'s independent expenditure ruling would be to invalidate the holding of *SpeechNow.org v. FEC*,[6] which relied on reasoning of *Citizens United* to hold that individuals and groups can give unlimited amounts of money to organizations engaged in independent spending, whether they are Super PACs or independent expenditure exempt organizations, known as dark money groups. As shown in Part I, the amounts raised in such vehicles since 2010 have been immense, profoundly altering the financing of contemporary campaigns and deepening the lack of transparency of campaign financing. Thus, by rejecting *Citizens United* and thereby undermining *SpeechNow.org*, *Buckley 2.0* would roll back some of the worst excesses of contemporary campaign finance law and practice. *Buckley 2.0* concludes further that even if *Citizens United* remains good law, *SpeechNow.org* erred in affording contributions the higher level of constitutional protection *Buckley* reserved for independent expenditures and in disregarding the heightened threat of corruption posed by aggregations of unlimited contributions witnessed in recent elections. *Buckley 2.0* would thus find independent grounds for invalidating the holding of *SpeechNow.org*

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[6] SpeechNow.org v. Federal Election Comm'n, 599 F.3d 686 (D.C. Cir. 2010) (en banc), *cert. denied* 562 U.S. 1003 (2010).

and restoring campaign finance law to a more faithful rendering of the original *Buckley*.

I. The Electoral Landscape Then and Now

Campaign finance law affects all who participate in the electoral process, whether as individuals, business entities, or other groups. This Part compares selected campaign practices at the time *Buckley* was decided with the most recent presidential campaign cycle (2015-2016). The goal is to establish the electoral landscape–the facts on the ground–at the time of *Buckley* and now, so that a hypothetical *Buckley 2.0* will have an empirical basis for reassessing its original decision in light of contemporary campaign finance law and practices.

There is a tendency to blame corporate spending for many of the ills of the campaign finance system. Those who do this probably mean spending by business entities or interests in general, rather than corporations per se, given that much business revenue in the United States is generated by non-corporate entities such as limited liability companies and other limited liability business vehicles.[7] Business interests also contribute money or make expenditures through trade associations, chambers of commerce, and other interest groups. The discussion that follows attempts to be precise about which types of entities are at issue. However, because what corporations do or fund has traditionally been captured more systematically than campaign spending by business interests in general, it is often not possible to compare apples to apples. This is especially true because the proliferation of types of business entities and outside groups had not yet blossomed in the 1970s, when *Buckley* was litigated. Moreover, the disclosure rules

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[7] *See* IRS, *Statistics of Income Tax Stats - Integrated Business Data*, https://www.irs.gov/statistics/soi-tax-stats-integrated-business-data (showing, based upon 2013 returns, that traditional "C" corporations account for 1.6 million of 33.4 million business returns). LLCs and other pass-through entities accounted for 3.4 million returns. *Id.*

enacted as part of the original FECA legislation did not become effective until April of 1972,[8] so data from the last presidential election cycle before *Buckley* is incomplete.[9]

To provide perspective on the discussion that follows: The last presidential election held prior to the *Buckley* litigation was in 1972.[10] The cost of the presidential and congressional races combined was $236 million,[11] or $1.378 billion in 2016 inflation-adjusted dollars.[12] In 2016, the cost of the presidential and congressional races combined was roughly $6.5 billion,[13] or roughly

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[8] *See* JOSEPH E. CANTOR, CONG. RESEARCH SERV., REPORT NO. 84-78, POLITICAL ACTION COMMITTEES: THEIR EVOLUTION, GROWTH, AND IMPLICATIONS FOR THE POLITICAL SYSTEM 55, 64 (1981, updated 1984) (hereafter CANTOR (1984)).

[9] *See* CANTOR (1984), *supra* note 8, at 63-64 (describing the main private organizations and scholars that collected data before the FEC began to collect data systematically). A comprehensive empirical study of financing the presidential and Congressional elections in 1972 is HERBERT E . ALEXANDER, FINANCING THE 1972 ELECTION (1976) (hereafter ALEXANDER (1976)). In general, the present analysis examines presidential elections rather than off-year elections. The statistics compared include aggregate amounts spent on presidential and Congressional races unless otherwise specified.

[10] The case was heard by the Supreme Court in 1975; the decision was published January 30, 1976. *See Buckley*, 424 U.S. at 1.

[11] *See* HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM 16 (1976) (hereafter ALEXANDER, FINANCING POLITICS). According to Alexander, the presidential contest cost $138 million in 1972, and the congressional contests combined cost $98 million. *Id*.

[12] *See* http:/www.usinflationcalculator.com. The inflation rate was 474.2%.

[13] *See* Niv M. Sultan, *OpenSecrets News, Election 2016: Trump's free media helped keep cost down but fewer donors provided more of the cash*, OPENSECRETS.ORG (Apr. 13, 2017), https://www.opensecrets.org/news/2017/04/election-2016-trump-fewer-donors-provided-more-of-the-cash. Other sources list the total amount spent during the 2015-2016 election differently, ranging from $6-7.5 billion. *See* COMM. FOR ECON. DEV. OF THE CONFERENCE BOARD, THE LANDSCAPE OF CAMPAIGN CONTRIBUTIONS: CAMPAIGN FINANCE AFTER CITIZENS UNITED 3 (2017) (hereafter CED), https://www.ced.org/pdf/TCB-CED-The-Landscape-of-Campaign-Contributions.pdf (listing total as $7.5 billion).

four and a half times as much as the 1972 federal elections in constant dollars. Some of the increase may be attributable to a larger electorate in 2016.[14] Yet there have been other developments that could have reduced the cost of races, such as many fewer swing states[15] and competitive congressional races,[16] as well as the use of relatively inexpensive electronic sources like e-mail and social media to reach potential voters. It is, then, not clear how much, if any, of the 450% increase in this aspect of election spending can be attributed to the cost of reaching a significantly larger electorate. Other forces appear to be driving the rapid acceleration of the cost of federal elections.

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[14] The voting age population in 1972 was140,776,000. *See* The American Presidency Project, *Voter Turnout in Presidential Elections 1820-2012*, http://www.presidency.ucsb.edu/ data/ turnout.php. In 2016, it was 250,055,734, an increase of roughly 75%. *See* United States Election Project, *2016 General Election Turnout Rates*, http://www.electproject.org/2016g.

[15] *See* Larry J. Sabato, Kyle Kondik, & Geoffrey Skelley, *The Electoral College: The Only Thing that Matters*, U.VA. CTR. FOR POLITICS (March 31, 2016), http://www.centerforpolitics.org/crystalball/articles/the-only-thing-that-matters. *See also* William A. Galston & Pietro S. Nivola, *Delineating the problem*, in Nivola and David W. Brady, eds., RED AND BLUE NATION? VOLUME ONE 14 n. 29 (2006) (identifying roughly 24 competitive states in the 1976 presidential election and 12 in 2004); Stacey Hunter Hecht & David Schultz, *Introduction*, in STACEY HUNTER HECHT & DAVID SCHULTZ, PRESIDENTIAL SWING STATES: WHY ONLY TEN MATTER xi-xvi (2015) (recounting the history and concluding that the concept of a swing state is not precisely defined).

[16] Between 1996 and 2016 the number of competitive districts decreased by over half to merely 17. *See* Galen Druke, *Want Competitive Elections? So Did Arizona. Then the Screaming Started*, FIVETHIRTYEIGHT (Dec. 21, 2017), https://fivethirtyeight.com/features/ want-competitive-elections-so-did-arizona-then-the-screaming-started. According to another source, in November 2016 there were roughly 395 safe seats in the House and of the 40 remaining seats, 11 seats leaned toward one of the parties. *See* http://www.insideelections.com/ ratings/house/ 2016-house-ratings-november-3-2016. In the Senate in 2016, 23 out of 34 in play that year were considered safe. *See* http://www.insideelections.com/ratings/senate/ 2016-senate-ratings-november-3-2016. The Cook Political Report has roughly the same numbers. *See* https://www.cookpolitical.com/ratings/house-race-ratings/139359; https:/ /www.cookpolitical.com/ratings/senate-race-ratings/139360.

A. Electoral Spending by Corporations and Other Business Interests

Business spending on federal elections has risen dramatically, assessed in constant dollars, since 1976, when *Buckley* was decided.[17] Even in areas where corporations are still restrained by *Buckley*-era regulations, they now inject vastly larger sums into federal races. In addition, when *Buckley* was decided, corporations were limited in their electoral funding and spending by several campaign finance laws that no longer apply. The amounts spent by business interests in areas affected by these changes have similarly risen dramatically.

1. *Spending by business interests where law has not changed.*

From 1971 until 2002, corporations were allowed to spend their treasury funds (business revenues) on most electoral matters except for expressly urging the election or defeat of specific candidates (express advocacy) or for making contributions to candidates, their campaigns, and their agents.[18] In 2002, Congress enacted the Bipartisan Campaign Reform Act (BCRA),[19] which included a provision prohibiting corporations from using treasury funds for "electioneering

[17] *Buckley* examined the constitutionality of federal campaign law, so this essay is limited to federal issues, even though state campaign finance developments can affect federal practices.

[18] On the many avenues for corporations to fund federal candidates or campaigns before FECA, see CANTOR (1984), *supra* note 8, at 28-35. For a history of the legal limits on corporate campaigns spending, both state and federal, *see* United States v. Automobile Workers, 352 U.S. 567, 570-87 (1957). This history predates the enactment of FECA. *Id*. FECA considers spending (by individuals or entities) that is coordinated with candidates or their campaigns to be contributions to them and, therefore, subject to contribution limits. *See Buckley*, 424 U.S. at 46 n.53; 52 U.S.C. §30116(a)(7), formerly 2 U.S.C. §441a(a)(7); 11 CFR §109.21.

[19] *See* Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. 107-155, 116 Stat. 81, codified at 52 U.S.C. §30118(b)(2), formerly 2 U.S.C. §441b(b)(2). BCRA amended FECA. *See supra* note 2.

communications" on the eve of a primary or an election.[20] Thus, as of 2010, corporations were required to fund contributions to candidates, express advocacy, and electioneering communications through funds they raised in their political action committees (PACs), which are strictly regulated by the Federal Election Commission (FEC).[21] Among other restrictions, they can raise funds for their PACs from their shareholders, executives, or administrative personnel (and the families of these groups), but not from the general public.[22] In addition, the amount each contributor can give to a corporation's PAC is capped at $5,000.[23] Further, PACs are themselves limited to giving a maximum of $5,000 to each candidate, although they can also contribute

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[20] An "electioneering communication" is a communication made using broadcast, satellite, or cable media, if it is made in the 30 days before a primary or 60 days before an election, refers to a candidate (by name or other identifying attribute or logo), and can be received by at least 50,000 people in a congressional candidates's district, a senate candidate's state, or, in the case of a candidate for president, in the United States. *See* 52 U.S.C. §30104(f)(3), formerly 2 U.S.C. §434(f)(3); 11 C.F.R. §100.29(a), (b).

[21] 52 U.S.C. §30118, formerly 2 U.S.C. §§ 441b(a), 441b(b)(4)(A)(i) (1976). FECA does not speak about PACs, but about "political committees," which include PACs and other groups involved in federal elections.

[22] 52 U.S.C. §30118(b)(4)(A)(I), formerly 2 U.S.C. §441b(b)(4)(A)(i) (1976). Corporations are permitted to solicit permitted parties twice a year, by mail, and at their homes and as long as procedures are adopted to prevent the corporation from determining who had contributed nothing or less than $50. 52 U.S.C. §30118(b)(4)(B), formerly 2 U.S.C. §441b(b)(4)(B) (1976). Early research found that most of the money raised came from high level personnel. *See* Mulkern, Handler, & Godtfredsen, *Corporate PACs as Fundraisers*, 23 CAL. MANAGEMENT REV. 49 (1981). Corporations are permitted to use their business revenues to pay the expenses of administering their PACs. *See* 52 U.S.C. §30118(b)(2), formerly 2 U.S.C. §441b.

[23] 52 U.S.C. §30116(a)(1)(C), formerly 2 U.S.C. §441a(a)(1)(C) (1976). This statement was true of multicandidate PACs only. If a PAC did not give to at least five different candidates and raise money from 50 people, the maximum contribution to it was $1,000. However, most PAC s qualified for the larger contribution. *See* Frank J. Sorauf, *Political Action Committees*, in CORRADO, MANN, ORTIZ, POTTER, & SORAUF, EDS., CAMPAIGN FINANCE REFORM. A SOURCEBOOK 123, 124 (1997).

additional amounts to certain political committees.[24] As a rule, these restrictions provided corporations with a smaller pool of funds and limited them to smaller contributions for the three types of restricted activities than would have been possible in the absence of the FECA limits. Unions were similarly limited with respect to using their PAC funds for contributions and for spending on express advocacy and electioneering communications.[25]

As discussed below, in 2010 *Citizens United v. FEC* held that corporations can use their treasury funds on spending that is independent of candidates and campaigns.[26] This means that corporations can now use business revenues for express advocacy and electioneering communications as long as they do not coordinate with candidates or campaigns when they engage in these activities. In contrast, corporations must still make contributions to candidates for federal office or to their campaigns using money from their PACs. Parallel rules apply to unions.[27]

Although the same rules govern the funding of corporate PACs and contributions from them to candidates today as they did when *Buckley* was decided, the sums corporate PACs and

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[24] *See* 52 U.S.C. §30116(a)(1), formerly 2 U.S.C. §441a(a)(2)(A) (1976).

[25] *See* 52 U.S.C. §30118(b)(4)(A)(ii), formerly 2 U.S.C. §§441b(a), 441b(b)(4)(A)(ii) (1976) (limiting unions to soliciting contributions from unions members and their families); 52 U.S.C. §30118(b)(4)(B), formerly 2 U.S.C. §441b(b)(4)(B) (1976) (permitting unions to solicit members twice a year by mail at their homes as long as procedures are adopted to prevent them from determining who has contributed nothing or less than $50).

[26] Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010). Although the plaintiff in *Citizens United* was a nonprofit corporation, the holding applies to all corporations and to unions, as long as they operate independently of candidates and their campaigns.

[27] *See* FEC, *Campaign Guide: Corporations and Labor Organizations* (Jan. 2018), https://www.fec.gov/resources/cms-content/documents/colagui.pdf.

other business interests raised and contributed at the time the case was decided are very different from what they raise and contribute today. These amounts can be divided into contributions that PACs make to candidates and other expenditures made by PACs.

In 1972 (the last presidential election before *Buckley*), corporate PACs gave at least $1.7 million to congressional candidates,[28] which would be almost $9,761,000 in 2016 dollars. In the 2016 election cycle, in contrast, corporate PACs alone gave approximately $182 million in contributions to all federal candidates,[29] or more than 18 times the inflation-adjusted amount that corporate PACs contributed in 1972. However, since FECA went into effect only seven months before the 1972 election,[30] statistics from 1974 or 1976 might provide a better baseline for comparison.[31] In those two elections, corporate PAC contributions were $2.4 million and $6.7

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[28] *See* CANTOR (1984), *supra* note 8, at 124. Another source has $3.1 million, but that figure combines "business" and "professional" contributions. *See* ALEXANDER, FINANCING POLITICS, *supra* note 11, at 214. Professional PACs included PACs of groups like the American Medical Association (A.M.A.), know as AMPAC. *Id*. at 32-33, 60. The 1984 Congressional Research Service overview of federal campaign finance laws lists only contributions to congressional candidates because presidential candidates then opted for public financing, precluding contributions to them by PACs or others, and because PAC contributions to presidential candidates have historically accounted for less than 5% of their contributions. *See* CANTOR (1984), *supra* note 8, at 65.

[29] *See* https://transition.fec.gov/press/summaries/2016/tables/pac/PAC2_2016_24m.pdf. Labor PAC contributions to all Federal candidates in 2015-2016 totaled $46,728, 402. *Id*. The numbers reported on the FEC website are slightly different from those reported by the Campaign Finance Institute, which applies its own methodology to the raw FEC statistics. *See, e.g.,* http://www.cfinst.org/pdf/vital/VitalStats_t10.pdf.

[30] Prior to the enactment of FECA, which went into effect in April of 1972, corporations had no way to contribute to candidates. *See* The Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (1907). Since FECA, they can contribute to them using PAC money.

[31] The 1974 election was not a presidential election cycle, but the 1976 election also involved predominantly House and Senate contributions since the presidential candidates took public financing.

million respectively,[32] or $11,680,000 and $28,260,000 in inflation-adjusted dollars. Contributions by corporate entities in 2016 thus increased roughly 350% over the counterpart contributions in the earlier years, in constant dollars.

Trade associations also represent business interests.[33] The category was not identified as such in 1972 as it is now.[34] In 1974 and 1976, "Trade, Membership, and Health" group PACs contributed $1.8 million and $2.6 million to congressional candidates, respectively,[35] which are $8.76 million and $11 million in inflation-adjusted dollars. In 2015-2016, trade associations

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[32] *See* CANTOR (1984), *supra* note 8, at 124. These amounts are somewhat exaggerated because they are based upon FEC data that combined "corporate" and "business" contributions. *See id*. at 124 n.2 (explaining the inconsistencies in FEC reporting of "business" and "corporate" contributions).

[33] *See* Tie-ting Su, Alan Neustadtl, & Dan Clawson, *Business and the Conservative Shift: Corporate PAC Contributions 1976-1986*, 76 SOC. SCI. Q. 20, 22, n.1 (1995) (stating that trade association PAC contributions are "highly correlated with corporate donations"); CANTOR (1984), *supra* note 8, at 88 (stating that trade associations and health care groups are assumed to have "a basically pro-business orientation").

[34] *See* CANTOR (1984), *supra* note 8, at 125, n.2. Another source classifies business, professional, agricultural, dairy, and health-related groups as "special interest groups," *see* ALEXANDER, FINANCING POLITICS, *supra* note 11, at 228, but does not distinguish business and professional when it lists contributions, *see id* .at 214. Alexander does list contributions by dairy, education, health-related, and "rural-related" (which includes electrical and agricultural interests), and contributions by these groups totaled $3,950,000 in 1972.

[35] *See* CANTOR (1984), *supra* note 8, at 125 and n.3. *See also* JOSEPH E. CANTOR, CONG. RESEARCH SERV., REPORT NO. 86-148, CAMPAIGN FINANCING IN FEDERAL ELECTIONS: A GUIDE TO THE LAW AND ITS OPERATION 36 (1986) (hereafter CANTOR (1986)) (listing $10 million in "business-related" contributions to candidates, which included a portion of trade association contributions). *But see* HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM 84 (2d ed. 1980) (hereafter ALEXANDER (1980)) (stating that corporate and business-related trade associations gave more than $7 million in direct contributions to candidates that year).

contributed $82,561,099 to congressional candidates,[36] an increase of 387% and 322% over 1974 and 1976. In addition, membership and cooperative PACs in 2015-2016 contributed almost $45 million to congressional candidates.[37] These comparisons are rough, among other reasons, because health PACs are not broken out in 2015-2016 and because not all membership PACs are business oriented, e.g., those of the Sierra C lub and the National Rifle Association.[38] Despite these limitations in the data, combining inflation-adjusted totals of corporate and trade association PAC contributions in 1974 ($20 million) and 1976 ($40 million) with comparable amounts in 2016 ($265 million), business-related PACs in 2016 contributed to candidates between six and ten times what they did in the period before *Buckley* was decided, even though the campaign finance rules in this area have remained unchanged.

The dramatic increase in business-related contributions to candidates for federal office has been mirrored by other expenditures made by business interests in federal elections (without taking into account their contributions to Super PACs and social welfare organizations, which are discussed below[39]). Typical examples include independent expenditures, contributions to state or local candidates, direct mail, contributions to presidential candidates in primaries, fundraising, and

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[36] *See* http://transition.fec.gov/press/summaries/2016/tables/pac/PAC2_2016_24m.pdf. In 2015-2016, trade associations gave $213,407 to presidential campaigns. *Id.*

[37] *See* http://transition.fec.gov/press/summaries/2016/tables/pac/PAC2_2016_24m.pdf.

[38] A better comparison might be that in 1974, business and business related special interest groups gave $4.8 million to House and Senate candidates, *see* ALEXANDER, FINANCING POLITICS, *supra* note 11, at 228, or $27.3 million in 2014 dollars, as compared with $257,264,309 in the 2014 House and Senate races. *See* https://classic.fec.gov/press/summaries/2014/tables/pac/PAC2_2014_24m.pdf. Contributions in 2014 were more than 9 times the contributions in 1974 in constant (2014) dollars.

[39] *See infra* Part I.A.2.

administrative costs.[40] According to the FEC, corporate PACs had roughly $5.8 million in total expenditures in the 1975-1976 election cycle,[41] equal to $24,464,685 in 2016 dollars. In the 2016 election, in contrast, corporate PACs spent $385,710,026 in total expenditures on behalf of federal candidates,[42] which is more than 15 times what they spent in 1975-1976 in constant dollars.

In addition to direct spending by corporate PACs, business-related trade association PAC expenditures for congressional candidates in the 1975-1976 election cycle was roughly $5.5 million,[43] which would be $23.2 million in 2016 dollars. Trade association PACs spent approximately $65.5 million in the 2015-2016 cycle,[44] or more than six times as much in constant

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[40] *See* CANTOR (1984), *supra* note 8, at 68-70. According to Cantor, independent expenditures were responsible for an increasing share of PAC spending other than contributions to candidates between 1974 and 1980. *Id*. at 67.

[41] *See* FEC Press Release, *FEC Releases Index on Corporate-Related Political Committees* (Sept. 18, 1977), https://transition.fec.gov/press/archive/1977/19770918_Index-76PAC.pdf. There is no separate data for corporate PAC expenditures in 1974; for combined "business related" expenditures of $8.1 million in 1974, see CANTOR (1984), *supra* note 8, at 84. Cantor notes that the numbers are "subject to dispute" because of a lack of consistency in standards for types of business spending prior to 1978. *See id* at 83-84.

[42] *See* Federal Election Comm'n, (2017), *Summary of Pac Activity*, https://transition.fec.gov/press/summaries/2016/tables/pac/PAC1_2016_24m.pdf. During the 1975-1976 election cycle, union PACs spent a total of $17.5 million on federal candidates, Richard Briffault, Herbert E. Alexander & Elizabeth Drew, *The Federal Election Campaign Act and the 1980 Election*, 84 COLUM. L. REV. 2083, 2100 (1984), or $73,815,861 in 2016 dollars, compared with total union PAC spending in the 2015-2016 election cycle of $256,851,404, *see id.*, which is roughly 3 ½ times the 1975-1976 amount in constant dollars.

[43] *See* ALEXANDER (1980), *supra* note 35, at 84.

[44] *See* https://transition.fec.gov/press/summaries/2016/tables/pac/PAC1_2016_24m.pdf. with FEC Press Release, *Statistical Summary of 24Month Campaign Activity of the 2015-2016 Election Cycle* (Mar. 23, 2017), https://www.fec.gov/updates/statistical-summary-24-month- campaign-activity-2015-2016-election-cycle. The former states that trade association contributions in 2015-2016 to candidates for president, House and Senate totaled $82.7 million,

dollars. Given that trade association PAC expenditures combined with corporate PAC expenditures were $456,210,026 in 2015-2016,[45] corporate and business related PACs spent almost ten times in 2015-2016 than they did in 1975-1976, in constant dollars.

In sum, combining business-related contributions to candidates with their other expenditures, business interests spent $716 million in 2015-2016, as compared with $87 million in 1975-1976 (in inflation-adjusted dollars), or eight and a half times more than in the 1976 election cycle. This dramatic increase does not take into account increased spending by business interests as a result of the 2010 decision in *Citizens United*.

2. *Business spending after changes in the law.*

Changes in the Court's election law doctrines have accelerated the increases in amounts spent by corporations and other business interests on elections. Since *Citizens United* held that corporations can spend non-PAC money for independent expenditures in elections,[46] the amount of corporate expenditures during campaigns has increased, although it is difficult to track such spending for two reasons. First, corporations and other business entities are now free to contribute unlimited amounts to independent expenditure-only groups. Some of these organizations are exempt from income tax under the Internal Revenue Code (hereafter IRC), are active in political campaigns, and rarely have to disclose or fully disclose their donors.[47] For

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while the latter states that total trade association PAC disbursements during that election were $148.2 million. This leaves $65.5 million for all other trade association PAC spending.

[45] *See supra* notes 41-44 and accompanying text.

[46] *See supra* note 26 and accompanying text.

[47] *See infra* note 87. Independent expenditures of any size made by individuals singly have been protected by the Supreme Court since *Buckley,* 424 U.S. at 51, so they were unaffected

example, exempt organizations, like section 501(c)(4) social welfare groups and section 50(c)(6) trade or business association groups, until recently had to list their donors on their IRS information returns, but this information was not disclosed to the public, although the FEC disclosure rules imposed on organizations making "electioneering communications"[48] in the run-up to a primary or election or engaging in express advocacy might reveal donor identities in the rare instances when the donations were earmarked for these purposes.[49] Thus, the identities of individual corporate or other business entity donors to such exempt organizations were usually not disclosed to the public. Moreover, the IRS changed its disclosure policy in 2018, so that these exempt organizations no longer have to list their donors' identities on the information returns filed with the IRS.[50] The IRS's new position has been widely criticized, among other reasons because it will no longer be able to determine if donors to the organizations are foreign persons, who are prohibited by law from funding election activities.[51] The new policy will also

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by the two judicial rulings. Independent expenditure-only groups are funded with contributions unlimited in amount from businesses, unions, or individuals as long as the groups operate independently of candidates, parties, and their campaigns. *See infra* note 93.

[48] *See* 11 CFR §104.20; 52 U.S.C. §30104(f). Although FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007), narrowed the reach of the term "electioneering communication" for some purposes, it did not disturb the existing broader definition for purposes of the disclosure rules.

[49] *See* 11 CFR §109.10(b)-(e); 52 U.S.C. §30104(c). *See* 11 CFR §104.20(c)(9).

[50] *See* Revenue Procedure 2018-38, 2018-31 I.R.B. 280. This decision is being challenged in court. *See* Bullock v. IRS, D. Mont., No. 4:08-cv-08000, filed July 24, 2018. *See also* Cong. Rec. S6380 (Sept. 28, 2018) (challenge by Sen. Ron Wyden to what he calls the "Dark Money Rule" introduced by the IRS). The IRS once mistakenly left donors' names visible when it made an organization's Form 990 public. *See* Paul Abowd, *IRS 'Outs' Handful of Donors yo Republican Group*, CTR. FOR PUBLIC INTEGRITY (Apr. 4, 2013), https://publicintegrity.org/federal-politics/irs-outs-handful-of-donors-to-republican-group.

[51] *See* Press Release, *Rep. Price Introduces Legislation to Overturn Controversial "Dark Money Rule"* (Dec. 13, 2018), https://price.house.gov/newsroom/press-releases/

prevent the IRS from determining total contributions to such entities by corporations, LLCs, and other business entities or by labor unions and similar organizations. Thus, even aggregate data could not be made available to lawmakers or the public, denying the possibility of accurate information about the magnitude of business interests funding such entities.

The exempt organizations may use these donations to fund their own election advertising or other campaign activities. Alternatively they can transfer some or all of their money available for campaign spending[52] to Super PACs, which are subject to disclosure rules. In practice this means that Super PACs reveal the names of individuals and entities who give directly to them, but the names of entities usually do not reveal the ultimate donors to their funds. As a consequence, the extent of business spending on campaigns that is funneled through certain exempt organization intermediaries cannot be known. Similarly, although section 527 of the Internal Revenue Code requires PACs not regulated by FECA to disclose their donors,[53] the disclosures typically only reveal the immediate, not the ultimate donor. In many instances, then, corporations may be "hiding behind dubious and misleading names,"[54] so their political spending is invisible to the public and impossible to quantify. Further, groups have devised other stratagems for donors'

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rep-price-introduces-legislation-overturn-controversial-dark-money-rule.

[52] Under the rules of the IRS, exempt organizations must be "primarily" devoted to the purpose and activities that constitute the mission justifying their exemption from taxation, e.g., social welfare for section 501(c)(4) groups, employee welfare for section 501(c)(5) labor groups, and business interests for 501(c)(6) trade associations and related groups. *See* 26 C.F.R. §1.501(c)(4)-1(a)(2)(I); IRS, Gen. Couns. Mem. 34233 (Dec. 3, 1969).

[53] IRC §527(j)(3)(B). The requirement applies to donations of $200 or more in a calendar year. *Id.*

[54] McConnell v. FEC, 540 U.S. 93, 197 (2003) (basing its statement on the record in the case).

identities to evade disclosure.[55]

In contrast, in the case of trade associations and chambers of commerce, which are exempt under section 501(c)(6), all their money comes from business interests.[56] Thus, although the donors to these organizations are also not disclosed to the IRS, some of their spending on campaigns can be captured. In particular, business are usually permitted to deduct the cost of dues to trade associations from their gross income, thereby reducing their taxable income.[57] However, the Code denies such deductions for costs incurred for campaigning or lobbying, whether the money is spent directly by the business entity or through an intermediary, such as a trade association that engages in these activities.[58] Because those seeking business deductions for dues or other payments made to trade associations have the burden of showing the portion of their payments not attributable to campaigning or lobbying (by the organization), the Code requires the organizations to tell donors the percent of their payments attributable to the

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[55] For example, in the month before a recent special election in Alabama, at least one super PAC bought millions of dollars of ads on credit, thereby avoiding the need to disclose its donors until after the election. *See* Ashley Balcerzak, *Mystery money floods Alabama in Senate race's final days,* CTR. FOR PUBLIC INTEGRITY (Dec. 8, 2017), https://www.publicintegrity.org/ 2017/12/08/21368/ mystery-money-floods-alabama-senate-races-final-days. *See also Dodging Disclosure: How Super PACs Used Reporting Loopholes and Digital Disclaimer Gaps to Keep Voters in the Dark in the 2018 Midterms*, CAMPAIGN LEGAL CTR. (Nov. 2018), https:// campaignlegal.org/sites/ default/ files/2018-11/ 11-29-18%20Post-Election%20Report%20%281045%20am%29.pdf.

[56] *See* 26 C.F.R. §1.501(c)(6)-1 (stating that a section 501(c)(6) organization "is an association of persons having some common business interest," that is devoted to advancing that common business interest, although the organization cannot itself engage in a business for profit).

[57] I.R.C. §162(a).

[58] *See* I.R.C. §162(e); Treas. Reg. §1.162-20(c)

nondeductible activities.[59] The aggregate amounts spent on each of these activities should also be listed on an organization's information return,[60] making possible an estimate of the amount each trade association has spent each year on campaign related activities.

As a result of the complexities involved in tracing the sources of campaign spending by independent expenditure entities, experts disagree about whether, or to what degree, corporate and other business spending has increased since *Citizens United* was decided. According to several sources, large, publicly traded corporations have not increased their non-PAC political spending.[61] However, privately held corporations electoral spending is not covered by this assertion, and according to one source, in 2012 privately held businesses that used treasury funds on electoral spending "were among 2012's biggest sources of outside money."[62] In addition, as noted earlier, business spending not subject to contribution limits may not be captured when an intermediary vehicle, such as a section 527 organization, a super PAC, or an exempt organization is utilized.[63] Data provided by The Campaign Legal Center, a watchdog group, reveal that trade

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[59] *See* I.R.C. §6033(e).

[60] *See* IRS Form 990, Schedule C.

[61] *See* MICHAEL J. MALBIN & BRENDAN GLAVIN, FED. ELECTION CTR., CFI'S GUIDE TO MONEY IN FEDERAL ELECTIONS: 2016 IN HISTORICAL CONTEXT 1 (2018) (hereafter MALBIN & GLAVIN); CED, *supra* note 13, at 5, 6.

[62] Andrew Mayersohn, *Four Years After Citizen United: The Fallout*, OPENSECRETS.ORG (Jan. 21, 2014), https://www.opensecrets.org/news/2014/01/four-years-after-citizens-united-the-fallout. On outside spending, see *infra* Part I.C.

[63] *See* Trevor Potter, *Citizens United Defenders Use Deceptive Arguments to Underestimate Money in Politics,* THE CAMPAIGN LEGAL CENTER (Oct. 26, 2017), https://campaignlegal.org/update/citizens-united-defenders-use-deceptive-arguments-underestimate-money-politics (arguing, based upon data provided by OpenSecrets.org, that Floyd Abrams's claim that corporate spending since *Citizens United* represents a "comparatively small" part of campaign spending during that period is "highly misleading"). Potter also notes that data

association groups spent more than $129 million on election advertising from 2012 to 2016, and IRC §501(c)(4) groups spent more than $520 million on elections during the same period.[64] While it is probable that trade associations represent business interests, it is unclear what proportion of spending by IRC §501(c)(4) groups reflects business interests because these groups do not need to reveal the identities of their contributors and their missions may be attractive to an array of interests, not all of which are business oriented.

What is known is that overall, contributions to Super PACs in 2015-2016 by entities of all kinds (such as unions, corporations, trade associations, PACs, and other super PACs) totaled $519,000,161, or 32% of contributions to Super PACs in that election cycle. And that a third to a half of that sum came from business interests.[65] Again, these are amounts disclosed and the immediate donors, whereas, as noted above, there are potentially large sums of undisclosed spending and misleadingly disclosed contributors that cannot be identified or quantified. Thus, since Super PACs became the "primary vehicles of outside spending,"[66] and outside spending accounted for more than one-fifth of election spending in 2015-2016,[67] business interest spending

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based upon corporate contributions to candidates for president is misleading because 99 percent of corporate PAC contributions in 2016 went to candidates for Congress. *Id.*

[64] *See* Potter, *supra* note 63.

[65] CED, *supra* note 13, at 5 (Figure 2). The remaining 68% was contributed by individuals. *See id.* CED's statistics for Super PACs are based upon an analysis of the 90 largest Super PACs, which were the source of 94% of Super PAC spending in 2015-2016. *Id.* at 4. Since Super PACs are only required to report contributors who give $200 or more, the CED analysis is based upon 81% of Super PAC receipts in 2015-2016.

[66] *Outside Spending in Elections*, ISSUEONE.ORG, *at* https://www.issueone.org/wp-content/uploads/2017/09/outside-spending.pdf.

[67] *Id.*

on elections has increased commensurately. Given that business interests have also increased their spending under pre-*Citizens United* law more than eight times,[68] it is fair to conclude that campaign spending by business interests today has increased dramatically over what it was at the time of *Buckley*, even after correcting for inflation.

B. Individual Contributions and Spending

Since *Buckley* individuals singly have been able to spend unlimited amounts directly on campaigns if they do not coordinate with a candidate or a candidate's campaign.[69] In 2010, the Court of Appeals for the District of Columbia Circuit greatly expanded individuals' ability to influence campaigns by enabling them to give unlimited amounts to groups, if the groups act independently of candidates and their campaigns.[70] This decision, known as *SpeechNow* or *SpeechNow.org*, enabled individuals to amplify the impact of their spending by combining their contributions with other contributions--large and small, made by other individuals or by ideological or business groups--in one campaign vehicle acting in a unified way. These independent expenditure groups are now known as Super PACs.[71]

Even extremely large amounts spent by a wealthy individual singly can have their impact amplified by being combined with contributions from other individuals and entities. The

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[68] *See supra* notes 28-45 and accompanying text. The statistics cited in this section include only reported expenditures. *See also infra* Part I.D

[69] *See Buckley*, 424 U.S. at 51.

[70] SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010) (en banc), *cert. denied*, 562 U.S. 1003 (2010).

[71] On Super PACs, see R. Sam Garrett, *Super PACs in Federal Elections: Overview and Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE REPORT R42042 (Sept. 16, 2016); Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644 (2012).

amplification effect will be heightened because none of the contributors to the recipient organizations will be subject to dollar limits, so the resulting combined funds are in principle unlimited. In the 2015-2016 election cycle, Super PACs spent in excess of $1.1 billion, which was almost half of the spending of all PACs active in the election cycle combined.[72] One estimate based upon data available from the FEC found that almost 68% of contributions to Super PACs, or roughly $1.1 billion, came from individuals.[73] A large part of that amount came from contributions that would not have been legal before *SpeechNow.org*,[74] given that prior to that decision individuals could give at most $5,000 to a single PAC.[75] In the 2015-2016 cycle, of the $1.1 billion contributed by individuals to Super PACs, the top one percent of individual donors (511 individuals) contributed $933,609,804 or 89% of all individual contributions, and the remaining 50,500 individuals who gave to those Super PACs in aggregate contributed 11% of the

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[72] *See* FEC Press Release, *Statistical summary of 24-month campaign activity of the 2015-2016 election cycle* (Mar. 23, 2017) (identifying $1.8 billion in disbursements from all separate segregated fund PACs and all nonconnected PACs), www.fec.gov/updates/statistical-summary-24month-campaign-activity-2015-2016-election-cycl. *See also* Nathaniel Persily, Robert Bauer, and Benjamin L. Ginsberg, *Campaign Finance in the United States: Assessing an Era of Fundamental Change*, BIPARTISAN POLICY CENTER 38 (Jan. 2018) (explaining that Super PACs raised $1.8 billion but only spent $1.1 billion in the 2016 election cycle).

[73] *See* CED, *supra* note 13, at 5 (Figure 2) (noting that individuals accounted for 67.7% of itemized contributions to Super PACs, or $1,086,032,803). This is "roughly double the $538 million individuals gave to Super PACs in 2012." David B. Magleby, *Super PACs and 501(c) Groups in the 2016 Election* 7 (unpublished paper, Nov. 9-10, 2017), https://www.uakron.edu/bliss/state-of-the-parties/papers/magleby.pdf. *See also supra* note 70 (noting the difference between amounts contributed to Super PACS and their expenditures).

[74] MALBIN & GLAVIN, *supra* note 61, at 9.

[75] This cap on individual contributions to regular PACs was established by the 1976 amendments to FECA, which were enacted in response to the *Buckley* decision. *See* Federal Elections Campaign Act Amendments of 1976, Pub. L. 94-283, §112, 90 Stat. 475, enacting 2 U.S.C. §441(a)(1)(C).

total.[76] Again, records reveal that 85% of the money raised by the Super PAC associated with Hillary Clinton's campaign came from donors who contributed at least $1 million dollars.[77] Taking into account other unlimited spending vehicles, such as IRC §501(c)(4) organizations, OpenSecrets.org estimates that the top one percent of the top one percent (.01 percent) of contributors to federal elections gave more than $2.3 billion in 2015-2016, which was 45 percent more than the parallel group gave in 2012.[78]

Thus, the changes initiated by *Citizens United* and extended by *SpeechNow.org*, which enabled individuals to give unlimited amounts to independent expenditure entities, have resulted in a dramatic increase in the overall amount contributed by individuals to such organizations. One analysis has estimated that more than $1 billion of total federal election spending in the 2015-2016 cycle is attributable to changes in the law made by *Citizens United* and *SpeechNow.org*.[79] Regardless of whether one finds these amounts troubling as a policy matter, they have created an electoral environment unimaginable to the *Buckley* Court. Equally dramatic, the changes discussed have made it possible for a small number of extremely wealthy individuals to dominate

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[76] *See* Ctr. For Responsive Politics, *Outside Spending, Donor Stats (2016)*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/donor_stats.php?cycle=2016&type=I.

[77] MALBIN & GLAVIN, *supra* note 61, at 9.

[78] Sultan, *OpenSecrets News, Election 2016*, *supra* note 13 (noting that the increase in number of individuals in 2016 was only 3 percent).

[79] *See* Adam Lioz, Juhem Navarro-Rivera, and Sean McElwee, *Court Cash: 2016 Election Money Resulting Directly From Supreme Court Rulings*, DEMOS 2, 4, 7 and n.10 (Mar. 14, 2017), http://www.demos.org/publication/court-cash-2016-election-money-resulting-directly-supreme-court-rulings.

outside spending vehicles.[80] The potential dominance over specific races attributable to contributions from such a small number of donors may mark the greatest departure of the current electoral landscape from electoral politics at the time of *Buckley*.

In addition to the impact of *Citizens United* and *SpeechNow.org*, the potential for greatly increased individual spending on behalf of traditional recipients of regulated contributions also may have occurred because of a change in the law regarding aggregate spending, although it is too soon to know what the actual effects of the change will be. The legal change occurred when the Court ruled in *McCutcheon v. FEC* that *Buckley*-era caps on aggregate per election cycle spending per election cycle are unconstitutional.[81] At the time of the *Buckley* decision, the aggregate contribution limit on individuals imposed by FECA was $25,000,[82] or $105,451.00 in 2016 dollars. As a result of the Court's invalidation of the aggregate contribution limit in *McCutcheon*, the maximum aggregate contribution limit per individual is now estimated to be $3,628,000 in an election cycle, if the individual gives the maximum permitted to each federal

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[80] Outside spending groups include Super PACs and exempt organizations such as section 501(c)(4) social welfare groups, section 501(c)(5) union groups, and section 501(c)(6) trade associations. *See infra* note 87 and accompanying text. Not all of these groups need to report all of the funds they raise or spend. *See* Ctr. For Responsive Politics, *Outside Spending, What Super Pacs, Non-Profits, and other Groups Spending Outside Money Must Disclose about the Source and Use of their Funds,* OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/rules.php.

[81] *See* McCutcheon v. FEC, 572 U.S. 185 (2014).

[82] *Buckley*, 424 U.S. at 38. The limit had already increased to $123,200 by 2012. *See McCutcheon*, 572 U.S. at 194. *See also* R. SAM GARRETT, CONG. RESEARCH SERV., R43334, CAMPAIGN CONTRIBUTION LIMITS: SELECTED QUESTIONS ABOUT MCCUTCHEON AND POLICY ISSUES FOR CONGRESS 2 (2014).

candidate and entities associated with the candidates and parties.[83] In constant (2016) dollars, this is an increase of almost thirty times per individual contributor. It is unlikely, however, that many, if any, individuals will spend the theoretical maximum this way. Nevertheless, a watchdog group found that 646 individuals had given "at or near the overall limit" before *McCutcheon* was decided and, thus, that the increase in aggregate spending permitted could enable high wealth individuals to greatly magnify their influence on particular candidates.[84] Also, although expenditures by individuals on express advocacy made independently of candidates, the parties, and their committees were not capped at the time of *Buckley*, there was no counterpart ability of individuals to combine their expenditures by contributing them, in unlimited amounts, to political entities like Super PACs as there is today since the *SpeechNow.org* decision,[85] thereby amplifying their voices.

In sum, wealthy individuals employing unlimited contribution vehicles now fund an enormous share of the spending in federal campaigns. The implications for *Buckley 2.0*'s reconsideration of the original *Buckley* are discussed in Parts II-III.

C. Outside Spending

According to the Center for Responsive Politics, "[o]ne of the most dramatic changes in the federal political system in the last decade has been the explosion in outside spending." The

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[83] *McCutcheon*, 134 S. Ct. at 1472 (Breyer, J., dissenting).

[84] Bob Biersack, *McCutcheon's Multiplying Effect: Why An Overall Limit Matters*, OPENSECRETS.ORG (Sept. 17, 2013), https://www.opensecrets.org/news/2013/09/mccutcheons-multiplying-effect-why.

[85] *SpeechNow,org*, 599 F.3d 692-95 (applying the reasoning of *Citizens United* to independent expenditure entities).

term "outside spending" often refers to entities other than candidates, their campaigns, and political parties that spend money on elections.[86] The main examples of such entities are exempt organizations described in a subsection of 501(c) of the Internal Revenue Code,[87] section 527 organizations, and Super PACs. Most exempt organizations active in elections are social welfare organizations, labor groups, and trade associations and chambers of commerce.[88] Together these groups and Super PACs are estimated to have spent between $1.5 and $1.8 billion in 2015-2016, which represents more than 20% of the roughly $6.5 billion spent on that election.[89] This amount

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[86] *See*, e.g., *WMP/CRP Special Report on Outside Group Activity, 2000-2016: Assessing Dark Money Trends and Magnitude*, WESLYAN MEDIA PROJECT (Aug. 24, 2016) (hereafter "*WMP/CRP Report*"), https://bipartisanpolicy.org/wp-content/uploads/2018/01/Report-on-Outside-Group-Activity-2000-2016.-WMP-CRP.pdf; Ian Vandewalker, *Election Spending 2016: Outside Groups Outspend Candidates and Parties in Key Senate Races*, BRENNAN CTR. FOR JUST. (Nov. 1, 2016)), https://www.brennancenter.org/sites/default/files/publications/ Election%20Spending%202016%20outside%20groups%20outspend.pdf. Some authorities consider political party committees as outside spending groups. Since some political party spending is coordinated with candidates and some is independent, parties may in fact be outside groups when their spending is independent of candidates.

[87] The most commonly used are IRC §501(c)(4) social welfare groups, IRC §501(c)(5) labor organizations, and IRC §501(c)(6) trade associations and chambers of commerce.

[88] *See supra* note 87.

[89] *See* FEC Press Release, *Statistical summary of 24-month campaign activity of the 2015-2016 election cycle*, https://www.fec.gov/updates/statistical-summary-24-month-campaign-activity-2015-2016-election-cycle/ (stating that independent expenditure only political committees spent $1.8 billion in 2015-2016). Other sources state that Super PACs spent $1,066,914,448 during that cycle in addition to more than $200 million spent by exempt organizations; Ctr. For Responsive Politics, *Outside Spending, Total by Type of Spender*, OPENSECRETS.COM, https://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2016. The statistics do not reflect election spending not reported to the FEC, e.g., messages like electioneering communications broadcast outside the 300/60 day regulated periods. *Outside Spending in Elections*, ISSUE ONE, https://www.issueone.org/wp-content/uploads/2017/09/outside-spending.pdf.

is almost 50% greater than the amount of outside spending in 2012.[90] During the 2018 mid-term elections, outside spending was roughly $1.3 billion, which represented a 60% increase over the previous mid-term election.[91]

The term "outside spending" is intended to connote spending by groups or individuals that are independent of candidates. In order to be entitled to receive contributions that are not capped by FECA contribution limits, the people and entities spending must be independent of candidates because the Supreme Court first justified unlimited spending by corporations using their corporate treasuries (instead of their PAC money) on the ground that there would be no possibility of campaign corruption as long as corporate expenditures were not coordinated with a candidate.[92] One type of independent expenditure entity that arose in the wake of *Citizens United* and its progeny was the Super PAC, which is "super" because it is permitted to receive contributions not subject to FEC contribution limits as long as the Super PAC operates independent of candidates and their campaigns, as independence is defined in the regulations implementing FECA.[93] It

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[90] *See id.* Outside spending in 2012 accounted for 16.5% of total election spending, while in 2016, it was 21.7% of total election spending. *See id.* These amounts reflect only expenditures reported to the FEC. Other election related spending by outside groups is not captured by these figures. For parallel statistics that include spending by parties as outside spending, see *WMP/CRP Report*, *supra* note 86.

[91] *See* Soo Rin Kim, *Midterms spending overview: Total expected to reach $5.2 billion*, ABC News (Nov. 6, 2018), https://abcnews.go.com/beta-story-container/Politics/midterms-spending-overview-total-cost-expected-reach-52/story?id=58996037.

[92] For a fuller account of *Citizens United*, its reasoning, and developments based upon that decision, see *infra* Part II.B. This decision applies to union spending not funded by union PACs as well. *See* Union Facts, *What Citizens United Means for Union Political Spending*, UNION FACTS, https://www.unionfacts.com/article/political-money/what-citizens-united-means-for-union-political-spending.

[93] On the FEC standard for independence, see *infra* Part II.B.5.

should be noted, however, that a significant portion of Super PACs are single-candidate Super PACs, that is, their expenditures are made exclusively on behalf of a single candidate, although they do not coordinate their activities with that candidate, as coordination is defined by the FEC. In 2012, roughly 42% of the Super PAC spending was attributable to single-candidate Super PACs; by 2016, half of Super PAC spending was attributable to them.[94]

Is outside spending a bad thing? Some have argued that outside money enables a wider range of voices to be heard during campaigns than was possible when candidates and party committees dominated campaign spending.[95] That may be true, given that FEC reports indicate that the amount of outside spending has surpassed the amount of candidate spending in a growing number of races since 2008.[96] Who these newly empowered voices are, and whom or what they

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[94] In 2012, single-candidate Super PACS spent $268,904,425, https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=C. In 2012, total Super PAC spending was $609,936,792, https://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2012. In 2016, single-candidate Super PACs spent almost $530,000,000, *see 2016 Outside Spending by Single-Candidate Super PACs*, OPENSECRETS.ORG, https://www.opensecrets.org/ outsidespending/summ.php?cycle=2016&chrt=V&disp=O&type=C. In 2016, total Super PAC spending was $1,066,914,448, https://www.opensecrets.org/outsidespending/summ.php?cycle=2016&chrt=V&disp=O&type=S

[95] *See* Bradley A. Smith, *Why the Media Hate Super PACs*, NATIONAL REVIEW (Nov. 6, 2015); Bradley A. Smith, *Citizens United gives freedom of speech back to the people*, REUTERS (2015), http://blogs.reuters.com/great-debate/2015/01/16/citizens-united-gives-freedom-of-speech-back-to-the-people.

[96] *See* Campaign Finance Institute, *Independent Spending Dominated the Closest Senate and House Races in 2016*, http://www.cfinst.org/Press/PReleases/16-11-10/INDEPENDENT_SPENDING_DOMINATED_THE_CLOSEST_SENATE_AND_HOUSE_RACES_IN_2016.aspx; Ctr. For Responsive Politics, *Races in Which Outside Spending Exceeds Candidate Spending, 2018 Election Cycle*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/outvscand.php?cycle=2018 (listing 28 congressional and senate races in which outside spending exceeded candidate spending, sometimes by large percentages). There is a drop down box that lists previous election cycles going back to 2000 (when there were zero instances).

represent is only partially known. In the case of Super PACs, the names of individual donors are revealing, while some of the entity names are revealing, and others are not. Individuals, who are responsible for roughly two-thirds of the Super PAC receipts, can be identified using lists compiled by OpenSecrets.org and similar watchdog groups.[97] In contrast, as was noted earlier, exempt organizations are given great latitude to engage in campaign activities,[98] but they are not required to disclose their donors to the public. In general, then, the origin of the hundreds of millions of dollars spent by outside groups cannot be identified.[99]

It is impossible, therefore, to know if outside spending in fact makes possible the participation of a wide variety of voices that otherwise would not be heard, or would not be heard effectively. Based upon the fragmentary evidence available, it seems that much outside spending consists of voices already well represented in elections that are now able to be greatly amplified by means of unlimited contributions that are pooled in independent spending vehicles. The same evidence shows that outside spending vehicles are increasingly dominated by mega-donations contributed by a small number of high wealth individuals.[100] [finish–CED? Targeted impacts] It seems, then, that the rapid growth of outside spending coupled with the dominance of contributions by a tiny percentage of donors poses the risk that a handful of extremely wealthy

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[97] *See* Ctr. For Responsive Politics, *2018 Top Donors to Outside Spending Groups*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/summ.php?disp=D. By clicking on the "Cycle" box, one can access donor data as far back as 2004.

[98] *See supra* note 52 and accompanying text.

[99] *See* Ctr. For Responsive Politics, *Political Nonprofits (Dark Money)*, OPENSECRETS.ORG (showing the total amount of spending by groups with no disclosure of donors), https://www.opensecrets.org/outsidespending/nonprof_summ.php.

[100] *See supra* notes 76-78 and accompanying text.

people rather than citizens at large, or donors generally, will derive the benefit afforded by this new campaign finance phenomenon.

D. Issue Advocacy

When *Buckley* was handed down, the art of creating issue ads designed to influence an election without being subject to regulation[101] had not yet been refined, since it was the distinction drawn in *Buckley* between express advocacy and other campaign-related spending that spawned an industry devoted to crafting electoral advertising arguably motivated by discussing issues rather than candidates for elective office. An issue ad is a public communication addressing a subject of potential interest to the public, and it may be made to educate or persuade people about a subject, with or without the intent to influence their vote in an election. For example, in order to persuade people to use reusable shopping bags, an environmental group may run ads informing the public that discarded plastic bags end up in rivers and kill fish who ingest too many.

The *Buckley* Court emphasized that issue advocacy enjoys the highest level of First Amendment protection because discussion of issues is critical for ensuring an informed public and because the First Amendment protects free expression to the greatest extent possible. It ruled that only communications during campaigns containing express advocacy could be subject to regulation by the FEC because an attempt to regulate other forms of speech during elections would pose a threat to the pure discussion of issues, especially when the difference between issue

[101] Some issue ads can also be subject to regulation under provisions of the Internal Revenue Code prohibiting or restricting political campaign activity engaged in by exempt organizations as well as through FECA regulation. *See*, e.g., Rev. Ruls. 2004-6, 2006-1 C.B. 264, 2007-41, 2007-1 C.B. 1421.

advocacy and campaign advocacy was unclear.[102] After invalidating regulation of anything except express advocacy, the Court noted that good lawyers would have no trouble authoring messages that evaded FECA restrictions, since all they had to do was avoid words of express advocacy, such as "elect" or "defeat" Joe Smith, or their equivalents.[103] The Court was prescient, and in ensuing years, the phrase "sham issue advocacy" was coined to describe issue ads communicated with the intent to influence votes for candidates while evading FECA campaign restrictions imposed upon express advocacy, such as disclosure rules and rules requiring "hard" or PAC money to fund those communications.[104] Using the plastic bag example, urging people to stop using plastic bags because of the environmental harm is pure advocacy. A similar ad broadcast near an election that also notes which candidates support or oppose a "bag tax" may be intended to influence how people vote in that election, but it would not be subject to regulation, despite its motivation, because it lacks words explicitly calling for the election or defeat of a candidate.

In 2002, Congress sought to curb the unregulated use of issue ads likely aimed at influencing voters' choice of candidates by amending FECA to include a new category of

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[102] *Buckley*, 424 U.S. at 42-44.

[103] *Buckley*, 424 U.S. at 44, n.52 (setting forth the "magic words" test). Some commentators and courts have stated that few election ads contain express advocacy. *See McConnell*, 540 U.S. at 127; BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, STRAIGHT TALK ON CAMPAIGN FINANCE: SEPARATING FACT FROM FICTION, PAPER NO. 5, MAGIC WORDS (2009), https://www.brennancenter.org/sites/default/files/legacy/d/paper5.pdf. However, FEC data indicate that since *Citizens United* was decided, and probably because of it, the rate of spending on express advocacy has skyrocketed. *See* Magleby, *supra* note 73, at 5 (stating that total reported independent expenditures in 2016 were $1,631,002,075).

[104] *See* Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. Rev. 265 (2000). Brennan Center, 23-25, www.brennancenter.org/sites/default/files/legacy/d/download_file_10667.pdf.

campaign speech called "electioneering communications." The new category was defined to include communications using broadcast media (but not print or mail) that mention or otherwise refer to a specific federal candidate and that are made in the 30 days before a primary or 60 days before an election, if the ads target at least 50,000 members of the relevant electorate for that candidate.[105] The new provisions compelled the disclosure of the amounts and sources of electioneering communications and, if the funders of the communications were corporations or labor unions, the provisions required them to use PAC funds to pay for the ads.[106]

The electioneering provisions were upheld against a constitutional challenge in *McConnell v. FEC*.[107] However, in 2007, the Supreme Court revised and narrowed the definition of an electioneering communication so that it included little more than express advocacy.[108] In 2010, *Citizens United* held that corporations and unions could use treasury funds to pay for express advocacy and electioneering communications as long as the communications were not coordinated with a candidate or campaign.[109] The result of *Citizens United* was thus to restore corporations' ability to spend potentially unlimited amounts on issue ads intended to influence voting for specific candidates, even if they refer to the candidates and even if they are broadcast

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[105] *See* 52 U.S.C. §30104(f)(3). Electioneering communications are defined to include only ads using broadcast, cable, and satellite media, not print or other media. *Id.* at §30104(f)(3)(A)(I).

[106] The provision was part of a larger campaign finance reform effort. *See supra* note 19.

[107] McConnell v. Federal Election Comm'n, 540 U.S. 93 (2003).

[108] *See* Wisconsin Right to Life v. Federal Election Comm'n, 551 U.S. 449 (2007) (holding that the provision could only apply to electioneering communications that were the functional equivalent of express advocacy).

[109] *See Citizens United*, 558 U.S. at 365.

on the eve of primaries and elections, as long as the corporations do not coordinate with the candidates or their campaigns.

The amounts spent on issue ads intended to influence federal campaigns is difficult to capture since such spending is not in general disclosed in public records. However, *Wisconsin Right to Life* and *Citizens United* left undisturbed the disclosure rules pertaining to the original definition of electioneering communications, so that individuals and groups that fund issue ads mentioning or otherwise identifying a candidate in the period before a primary or election must continue to report to the FEC.[110] In that event, the identities of individuals and groups who finance such communications will become public, as will the amounts they give for that purpose. However, since the definition does not include ads in print media, mail, or social media (even in the period before a primary or election) and it only covers broadcast advertising during that time frame,[111] most election-related advocacy will not need to be disclosed. Thus, most amounts spent on issue ads targeted to influence elections but not subject to reporting as independent expenditures cannot be known with any precision.[112] Spending on issue ads in the 1997-1998 congressional election cycle has been estimated at between $135 million and $150 million.[113] The

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[110] *See Citizens United*, 558 U.S. at 368-71. On the standards for coordination, see *infra* Part II.B.5.

[111] *See supra* note 20.

[112] For a detailed discussion of disclosure rules that apply to certain issue ads, see *What Super PACs, Non-Profits, and other Groups Spending Money Must Disclose about the Source and Use of their Funds*, OPENSECRETS.ORG, https://www.opensecrests.org/outsidespending/rules.php.

[113] Jeffrey D. Stanger & Douglas G. Rivlin, *Issue Advocacy Advertising During the 1997-1998 Election Cycle*, http://library.law.columbia.edu/urlmirror/CLR/100CLR620/report.htm.

Annenberg Public Policy Center estimated that $509 million was spent on broadcast issue ads alone in 2000.[114] In 2010, according to OpenSecrets.org, tax-exempt social welfare organizations spent $127 million on ads and other electoral activities, and they spent $308 million in 2012.[115] They are not, however, in general required to reveal the identities of their contributors, and even when they make required disclosures for independent expenditures, they may not be required to disclose the identities of donors unless the donors earmarked their contributions specifically for reportable expenditures.[116] Similarly, figures for "political ad" spending are not helpful because they include numerous kinds of campaign advertising other than issue advocacy intended to

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[114] JOSEPH E. CANTOR, CONG. RESEARCH SERV., REPORT NO. 97-91, SOFT AND HARD MONEY IN CONTEMPORARY ELECTIONS: WHAT FEDERAL LAW DOES AND DOES NOT REGULATE 5 (Mar. 15, 2007).

[115] *See* https://www.opensecrets.org/resources/10things/03.php. Organizations exempt under sections 501(c)(4)-(6) of the I.R.C. can engage in various kinds of campaign activity as long as such activity (combined with other activities not components of their exempt purpose) does not become their primary activity. *See*, e.g., 26 C.F.R. §1.501(c)(4)-1(a)(2).

[116] This area is in flux. The existing regulation, 11 CFR §109.10(e)(1)(vi), only mandated reporting of donors if the donors made contributions earmarked for a specific independent expenditure. In August of 2018, this regulation was struck down as inconsistent with the underlying statute, but enforcement was stayed 45 days to give the FEC time to publish an interim regulation consistent with the broader reach of the statute (52 U.S.C. §30104(c)). *See* CREW v. FEC, 316 F. Supp. 3d 349 (D.D.C. 2018). Plaintiffs' request for a stay of the decision pending its appeal was denied. 904 F.3d 1014 (D.C. Cir. 2018); *aff'd* Crossroads Grassroots Policy Strategies v. CREW, 201 L. Ed. 2d 1128, 2018 U.S. LEXIS 4208 (Sept. 18, 2018). The merits of the issue remain to be decided. In the meantime, the FEC has not provided adequate guidance and only a small portion of groups reporting expenditures to the FEC have also reported the identities of their donors. *See* Brendan Fischer & Maggie Christ, *New Reports Show Why the FEC Needs to nlarify Disclosure Requirements for Dark Money Groups–and Why Congress Should Go Even Further*, CAMPAIGN LEGAL CENTER (Feb. 6, 2019), https://campaignlegal.org/update/new-reports-show-why-fec-needs-clarify-disclosure-requirements-dark-money-groups-and-why.

influence votes on candidates.[117]

In short, although there may have been campaign-oriented issue advocacy at the time *Buckley* was litigated, there are no precise (or even imprecise) estimates of the amounts spent on such activity then. Similarly, it is impossible to quantify such issue advocacy today. Because outside group spending has skyrocketed since *Citizens United*, and much spending by outside groups appears to be campaign-oriented, the phenomenon of campaign ads masquerading as issue advocacy, which *Buckley* predicted,[118] has contributed to record campaign spending by commercial and non-commercial interests, whether funded by individuals or groups.

E. Conclusion

Hard data relating to many contemporary campaign practices is difficult or impossible to obtain, largely because of the absence of disclosure requirements in existing law, but also because of stratagems adopted by those who wish to influence the outcome of elections by injecting large amounts of money while remaining invisible. Despite this, there is an abundance of evidence that there has been rapid growth in the relative size of money attributable to business interests in the total mix of campaign spending and even more massive increases in the amounts spent by high wealth individuals who spend millions or tens of millions of dollars to influence the outcome of federal campaigns. These changes have profound implications for policymakers and lawmakers that are beyond the scope of the present analysis. These changes may also have consequences for

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[117] *See*, e.g., Open Secrets News, *Low transparency, low regulation online political ads skyrocket* (Mar. 7, 2018) (summarizing spending on both broadcast and online ads since 2010), https://www.opensecrets.org/news/2018/03/low-transparency-low-regulation-online-political-ads-skyrocket/.

[118] *See Buckley*, 424 U.S. at 44, 45.

the application of the legal doctrines and reasoning set forth in the *Buckley* decision more than forty years ago. It is the latter concerns that Parts II-III and the *Buckley 2.0* thought experiment address.

II. The Evolution of Campaign Finance Doctrine

The main issues discussed in *Buckley* were limits on campaign contributions, limits on independent expenditures, aggregate limits, public financing, and the creation and operation of the Federal Election Commission (FEC).[119] Although much could be said about all of these subjects,[120] *Buckley 2.0* will focus on the first two, which constitute the largest part of the campaign finance discussion today.

A. Contributions to Candidates

The contribution question in *Buckley* was whether the newly enacted $1,000 cap on contributions to candidates and their campaign committees was constitutional.[121] The challengers argued that the caps impermissibly burdened their freedom of speech and especially their freedom of political expression. The Supreme Court upheld the limits. It argued, first, that the burden on individuals unable to give candidates more than $1,000 per primary and an additional $1,000 in the general election was real but "only a marginal restriction" on their free speech and, second, that the government interest in preventing corruption or the appearance of corruption was "a

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[119] Buckley v. Valeo, 424 U.S. 1, 7 (per curiam) (1976).

[120] *See* Liz Kennedy & Seth Katsuya Endo, *The World According to, and After* McCutcheon v. FEC, *and Why It Matters*, 49 Val. U. L. Rev. 533 (2015); *Note: Eliminating the FEC: The Best Hope for Campaign Finance Regulation?*, 131 Harv. L. Rev. 1421 (2018).

[121] *Buckley*, 424 U.S. at 23. The cap also applied to contributions to intermediaries if earmarked for candidates. *Id*. at 24.

constitutionally sufficient justification" for imposing this burden.[122] The Court considered the limit a marginal restriction for two reasons. First, it viewed contributions as symbolic speech[123] since they show general support for a candidate, but do not translate directly into an expression of support for specific views or reasons.[124] A candidate can, for example, use contributed funds for ads or activities relating to issues not important to the donor; thus, the political expression funded would be a choice made by the recipient of the money rather than the donor. The highest degree of First Amendment protection goes to the donor's own speech rather than that of the recipient of the donor's largesse.[125] *Buckley* also stated that contribution limits are a marginal burden because they do not "in any way infringe the contributor's freedom to discuss candidates and issues,"[126] since contributors can still make independent expenditures, join political groups, and volunteer to advance their political views.[127]

One question *Buckley 2.0* would consider today is whether the current limit on individuals' contributions to candidates is unconstitutionally small. The maximum contribution to a candidate at the time of *Buckley* was $1,000 per primary or election,[128] which would be $4,486 for each in

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[122] *See Buckley*, 424 U.S. at 20-21, 26-27.

[123] *See Buckley*, 424 U.S. at 21, 24.

[124] *See Buckley*, 424 U.S. at 21 (noting that a contribution indicates support for a candidate, but without "communicat[ing] the underlying basis for the support").

[125] *See Buckley*, 424 U.S. at 21 (stating that contributions involve "speech by someone other than the contributor").

[126] *See Buckley*, 424 U.S. at 21, 24.

[127] *See Buckley*, 424 U.S. at 22, 28.

[128] *See* FECA Amendments of 1974, Pub. L No. 93-443, §101(a), 88 Stat. 1263.

2016 dollars. The maximum that individuals could contribute to a candidate in a primary or a general election in 2015-2016 was $2,700,[129] or roughly 60% of the *Buckley* era inflation-adjusted amount. Current contribution limits have not kept pace with the *Buckley* era limits because Congress did not initially peg them to inflation. It was not until 2002 that Congress increased the maximum individual contribution to candidates for primaries and elections from $1,000 to $2,000 and also provided for an inflation adjustment to that amount by election cycle.[130]

The $1,000 limit on contributions was challenged in the original *Buckley* as unconstitutional because larger contributions would not raise the threat of corruption, which was the government's justification for imposing the limits.[131] The Court first stated that Congress could constitutionally conclude that some limit is necessary to avoid corruption or its appearance.[132] It then conceded that Congress could have created a different standard, but held that its failure to do so did not make the provision invalid as long as the limit chosen was narrowly tailored to prevent the harm described.[133] The Court also quoted with approval the appellate court's statement that it is not for a court to decide whether the limit should be $2,000 or $1,000,

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[129] FEC, *Contribution limits for 2015-2016*, https://www.fec.gov/updates/contribution-limits-for-2015-2016. Individuals can give additional amounts to federal PACs, national party committees, and state/district/local party committees. *See* https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits.

[130] *BCRA, supra* note 19, §307(a), (d).

[131] *Buckley*, 424 U.S. at 30.

[132] *Buckley*, 424 U.S. at 27-28.

[133] *Buckley*, 424 U.S. at 28-29.

once Congress found that some limit was necessary to avoid corruption or its appearance.[134] For the *Buckley* Court, the test was whether the contribution limits "prevented candidates and political committees from amassing the resources necessary for effective advocacy."[135] All candidates need sufficient resources, but the effective advocacy standard is especially critical for challengers who hope to replace incumbents but are hampered because of the many tangible and intangible benefits of incumbency their opponents enjoy.[136] The *Buckley* Court exhibited an attitude of deference to the legislature's judgments when it upheld the $1,000 limit, explaining that the limit would not have "any dramatic adverse effect" on raising campaign funds, and it indicated that Congress was free to choose $1,000 rather than $2,000 since the former did not preclude effective advocacy by candidates.[137]

Buckley 2.0 would apply the effective advocacy test of the original *Buckley* to assess the validity of the contribution cap for individuals ($2,700 for each primary and election in 2015-2016), which will be adjusted for inflation regularly.[138] It would likely start by reviewing judicial decisions since *Buckley* that addressed challenges to contribution caps. The most recent and relevant such case, *Randall v. Sorrell*, itself summarized the history of state and federal challenges

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[134] *Buckley*, 424 U.S. at 30, citing Buckley v. Valeo, 519 F.2d 821, 842 (D.C. Cir. 1975).

[135] *See Buckley*, 424 U.S. at 21, 22. The *Buckley* Court found that the plaintiff had failed to produce evidence that contribution limits "in themselves" discriminate unfairly between challengers and incumbents. *Id*. at 31-33.

[136] *See Buckley*, 424 U.S. at 30-32; Shrink v. Missouri Mo. Gov't PAC, 528 U.S. 377, 403-404 (2000); Randall v. Sorrell, 548 U.S. 230, 248-49 (2006).

[137] *Buckley* 424 U.S. at 21.

[138] *See* https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits. The cap is $2,800 per election, per candidate, for 2019-2020.

to contribution limits. It noted that "the Court has consistently upheld contribution limits."[139] At the same time, even cases upholding contribution limits have cautioned that low limits can have the effect of making it difficult for challengers to challenge incumbents successfully.[140]

In *Randall*, which examined Vermont's contribution limits relating to several state-wide offices, the Court held that the limits were unconstitutional. It emphasized that its ruling did not rest exclusively on the "extremely low" dollar limits of $200-$400, depending upon the office; rather, the state had also imposed severe restraints on political parties and volunteers.[141] Further, the dollar limits were not indexed for inflation.[142] Thus, the Court suspended its usual deference to lawmakers' assessments of what is necessary to avoid the threat of corruption or its appearance when very low dollar limits were combined with associated campaign constraints in such a way as to make effective advocacy difficult.

Buckley 2.0 would certainly apply the doctrinal norms these cases reflect to the empirical reality of contemporary campaign funding. Several watchdog groups and nonpartisan organizations have gathered and analyzed data about the sources of campaign contributions and the characteristics of donors that would aid the Court in reaching a decision. In the last three

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[139] *Randall*, 548 U.S. at 247 (citing *Shrink*, *supra* note 136, and California Medical Assn. v. FEC, 453 U.S. 182 (1981)).

[140] *Randall*, 548 U.S. at 247-48.

[141] *Randall*, 548 U.S. at 253. The Vermont contribution caps were among the lowest in the nation, and they were a small fraction of the limits approved in *Buckley*, almost thirty years earlier. *Id.* at 250-51. For example, the statute required volunteers to treat their expenses as contributions, *id.* at 259-60, which could severely restrict how much volunteering people could do if, for example, they incurred transportation costs.

[142] *Randall*, 548 U.S. at 252.

presidential election cycles, there were wide variations in the percentage of total contributions to candidates that were small ($200 or less) or larger, up to the election or election cycle limit.[143] The Court would undoubtedly note the dramatic increase in the number of individual contributors to federal campaigns,[144] while the inflation-adjusted average contribution per individual has decreased.[145] This suggests that current contribution limits have not discouraged participation by individuals in elections, which was a concern of *Buckley*.[146] In fact, internet platforms that comply with FEC contribution regulations, like ActBlue, have facilitated the growth of small and medium-sized donations to candidates.[147]

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[143] *See* MALBIN & GLAVIN, *supra* note 61, 31-33 (Tables 1-4A- 1-4C) (individual contributions to all presidential candidates in primaries); 41 (Table 1-8) individual contributions to general election presidential candidates); 13-14, 61-62 (Tables 2-8, 2-9) (individual contributions to House and Senate candidates). The statistics for Congressional candidates are less revealing because contributions of $1,000 or more are not further subdivided. For example, in 2012, roughly 50% of Mitt Romney's receipts from individuals were less than the $2,500 cap in that election cycle, compared with 78% for Barack Obama. *Id.* http://www.cfinst.org/pdf/federal/2016Report/pdf/CFI_Federal-CF_16_Table1-08.pdf. *See also infra* note145.

[144] *See* Persily, Bauer, & Ginsberg, *supra* note 72, at 22-23 (noting that 3.2 million people made contributions to federal campaigns in 2016 compared to roughly 66,000 in 1982); Zachary Albert, *Trends in Campaign Financing, 1980-2016*, REPORT FOR THE CAMPAIGN FINANCE TASK FORCE 16-17, Oct. 12, 2017 (noting that the number of individual contributors increased 487% during this period).

[145] *See* Albert, *supra* note 144, at 17 (noting that the average total contribution from each individual "has declined sharply since 1982" and that the average individual contribution was less in 2016 than in any election since 1982). The figures are direct contributions from individuals to all candidates per election, and not to each candidate. *Id.*

[146] *See Buckley*, 424 U.S. at 28-29, 36.

[147] In 2018, ActBlue raised over $1.2 billion for 145 Democratic House and Senate candidates. Lisa Lerer, *ActBlue, the Democrats' Not-So-Secret Weapon*, N.Y. Times (Nov. 16, 2018), https://www.nytimes.com/2018/11/16/us/politics/on-politics-actblue-democrats.html. Of this amount, $296 million was in small donations. *Id.* ActBlue raised a total of $1.6 billion in 2018; it raises money for state and federal candidates, and it also raises money for party committees and other organizations. *See* ActBlue, *2018 Election Cycle in Review*,

Because many sources aggregate a donor's contributions to candidates, parties, and other recipients, it is difficult to determine whether $2,700/$5,400 per candidate per election cycle (or $2,800 for 2019-2020) is too low, since it may be only one piece of a donor's giving. As was true when the original *Buckley* was decided, donors can also give to party committees of various kinds,[148] in addition to outside groups such as PACs, super PACs, and exempt organizations. As a consequence, whether the limits on contributions to candidates are large enough to make possible effective advocacy by candidates cannot be determined in a vacuum, i.e., without reference to other campaign rules, including those that have emerged since the original *Buckley*. Among other things, *Buckley 2.0* would review the holdings in *Citizens United* and *McCutcheon* before reaching a conclusion about the appropriateness of the limits on contributions by individuals to candidates, measured by effective advocacy.

The original *Buckley* had expressed the view that independent spending on behalf of a candidate by third parties could be significantly less helpful to the candidate than the candidate's own spending and that outside spending could even undermine or otherwise harm the candidate's message.[149] *Buckley 2.0* might, then, view the huge sums of outside spending in recent elections[150] as a threat to a candidate's effective advocacy. In that event, the Court could find caps on contributions by individuals to candidates too low in the current campaign finance environment to

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https://report.actblue.com. Almost 64% of donors on ActBlue were first-time donors, and their contributions were 37% of the money raised on the platform. *See id.*

[148] *See* FEC, *Contribution limits*, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits.

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

[150] *See supra* Part I.C.

enable candidates themselves to raise enough money to control their campaign's message. It would note that in some races, the amount of outside spending exceeds the amount of spending by the candidate.[151] Alternatively, *Buckley 2.0* might conclude that many Super PACs, especially single-candidate Super PACs, are "outside" groups in name only since the alleged barrier between the group and the candidate is so porous that much, if not most, single-candidate Super PAC spending will clearly supplement or be the equivalent of candidate spending.[152]

Buckley 2.0's final conclusion regarding individual contribution limitations, then, must await its assessment of other aspects of the contemporary electoral landscape, both empirical and doctrinal.[153] For the present, *Buckley 2.0* is likely to conclude that pre-*McCutcheon* aggregate limits had the effect of depressing the amounts individuals could give to multiple candidates because the aggregate cap created a zero sum game in which giving the maximum contribution to nine candidates would make it impossible to contribute to others. In that event, taking into account the failure of contribution limits for individuals to keep pace with inflation, the rate of increase in the cost of campaigns, and the ability of outside spending to overwhelm candidate spending, *Buckley 2.0* may well find the pre-*McCutcheon* contribution limits on individual contributions to candidates unconstitutionally small, despite its acknowledged deference to Congress regarding appropriate restrictions to guard against corruption or its appearance. The

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[151] *See supra* note 96.

[152] *See infra* notes 214-222 and accompanying text (on coordination).

[153] For example, the statistics quoted for the 2015-2016 election cycle may reflect the impact of *McCutcheon*, which removed aggregate caps per election. *Buckley 2.0* might also envision the implications for effective advocacy if *Citizens United* ans *SpeechNow.org* were no longer good law.

reason would be that the original *Buckley* also established effective advocacy as an independent principle guiding its deliberations. By the same token, if *Buckley 2.0* finds the *McCutcheon* decision valid in light of contemporary campaign practices, it would likely leave intact the current rates coupled with FECA's formula for raising dollar amounts on a regular basis.

B. Contributions to Independent Spending Groups

The original *Buckley* invalidated FECA's limits on independent expenditures, that is, amounts spent on expressly advocating the election or defeat of specific candidates for federal office. Although it did not consider unlimited contributions to independent expenditure groups, the *Buckley* decision will inform *Buckley 2.0*'s analysis through its reasoning about the relationship between the threat of corruption and the character of independent actors.

1. *The genesis of unlimited contributions to independent spending groups*.

Unlimited donations to independent spending groups were first authorized by *SpeechNow.org,* an appellate court decision in 2010.[154] The court relied upon the *Citizens United* Court's assertion that independent corporate spending could never give rise to corruption or the appearance of corruption and extended that holding to contributions made by individuals or groups to independent spending entities.[155] Some commentators and courts have challenged *SpeechNow.org*'s holding.[156] The Supreme Court, however, has never reviewed the decision or

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[154] *See SpeecNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc)..

[155] *See SpeechNow.org*, 599 F.3d at 692-95.

[156] *See* Albert W. Alschuler, Laurence H. Tribe, Norman L. Eisen, Richard W. Painter, *Why Limits on Contributions to Super PACs Should Survive Citizens United*, 86 FORDHAM L. REV. 2299 (2018); Albert W. Alschuler, *Limiting Political Contributions after McCutcheon, Citizens United, and SpeechNow*, 67 FLA. L. REV. 390, 471-476 (2015). *See also* Richard L. Hasen, *Super PAC Contributions, Corruption, and the Proxy War over Coordination*, 9 DUKE J.

the central issue.[157]

In *Citizens United*, the Court challenged the FECA provision requiring corporations, unions, and certain other institutions to fund their campaign contributions and their independent expenditures with money amassed in PACs rather than with general revenues derived from their business revenues (treasury funds).[158] The restrictions imposed by FECA on raising PAC money meant that these entities would likely have less to spend on campaign activities than would have been available from their treasury funds. The *Citizens United* Court concluded that the rules prohibiting campaign spending from treasury funds were unconstitutional if corporations or unions act independently of candidates because independent action precludes the possibility of corruption, which can only exist if there is a quid pro quo arrangement between candidates and those who act on their behalf.[159] In short, absent coordination, no quid pro quo; absent quid pro quo, no possibility of corruption.

The same year, the appellate court in *SpeechNow.org* held that it was unconstitutional for the government to cap contributions that individuals and others make to organizations involved in campaigns, if the organizations act independently of candidates and their campaigns.[160] The

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CONST. L. & PUB. POL'Y 1, 15 (2014) (stating that "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"). A few courts have also resisted the holding. *See* Alschuler, Tribe, Eisen & Painter, at 2308-10, 2311.

[157] *Cf*. Hasen, *supra* note 156, at 11.

[158] The plaintiffs in *Citizens United* originally challenged the constitutionality of the electioneering communication as applied to them; however, the Court initiated the larger issue and had the case re-briefed. *See Citizens United*, 558 U.S. at 321-22.

[159] *Citizens United*, 558 U.S. at 360-61.

[160] *See supra* note 154.

SpeechNow,org court argued that in *Citizens United*, the Supreme Court held that "the government has *no* anti-corruption interest in limiting independent expenditures."[161] As the *SpeechNow.org* court noted, to reach its conclusion *Citizens United* relied upon the observation made in *Buckley* that the absence of coordination between a candidate and someone spending money to help the candidate "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."[162] "Alleviates," however, means reduces; it does not mean precludes or prevents. Therefore, the *Buckley* Court added the further observation that advocacy funded by independent expenditures "does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."[163] The implication of "presently" is that it is in principle possible that independent spending could at some time come to pose a danger of real or apparent corruption equal to that of large contributions. Noting this implication, the *SpeechNow.org* court pointed out that the Supreme Court in *First National Bank of Boston v. Bellotti* had stated in a footnote that Congress might present evidence that independent corporate expenditures on behalf of a candidate could present "a danger of real or apparent corruption,"[164] even though *Bellotti* also held that no such danger existed in that case because the *challenge* concerned a ballot initiative rather than an election

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[161] 599 F.3d at 693.

[162] *SpeechNow.org*, 599 F.3d at 693, citing *Citizens United*, 558 U.S. at 357, quoting *Buckley*, 424 U.S. at 47. The result would be the same if the money was spent to defeat a candidate's opponent.

[163] *Buckley*, 424 U.S. at 46. *See SpeechNow.org*, 599 F.3d at 693 (using "diminishes" to refer to the *Buckley* Court's caveat).

[164] 435 U.S. 765, 788 n.26 (1978).

involving candidates potentially subject to corruption.[165] The *SpeechNow.org* court also mentioned two subsequent decisions by the Supreme Court that upheld laws designed to prevent corruption associated with independent corporate spending.[166]

Despite these precedents, the *SpeechNow.org* court, following *Citizens United*, concluded that Congress had no interest at all in limiting contributions by the plaintiff groups in its own case because *Citizens United* had held as "a matter of law" that independent expenditures could never pose a threat of corruption or the appearance of corruption.[167] The *SpeechNow.org* court thus presented *Citizens United*'s rationale as a conceptual or logical argument, namely, that the *definition* of corruption presupposes parties acting in a concerted way, while an independent group is by definition not acting in concert with the candidate. Further, the *SpeechNow.org* court also noted that *Citizens United* had asserted that corruption means quid pro quo corruption for campaign finance purposes and that quid pro quo means agreement by one party to do something specific for another party in exchange for financial or other support by the other party on the first

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[165] *SpeechNow.org*, 599 F.3d at 693-94. The observation was in a footnote, but it was dictum in any event because the case challenged a law preventing corporations spending general funds to influence a ballot initiative, not the election of a candidate.

[166] *See SpeechNow.org*, 599 F.3d at 693-94 (referring to Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 654-55 (1990), upholding a state prohibition on corporate independent expenditures, and McConnell v. FEC, 540 U.S. 93, 203-09 (2003), upholding the federal prohibition on corporate expenditures for electioneering communications enacted in 2002). Both decisions were overturned by *Citizens United*.

[167] *SpeechNow.org*, 599 F.3d at 694. *See* Douglas M. Spencer and Abby K. Wood, *Citizens United, States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L. J. 315, 318-19 (2014) (calling *Citizens United*'s assertion a "legal fiction" that reveals the Court's complete indifference to what *actually* causes corruption as an empirical matter in favor of a blanket assertion without evidentiary support).

party's behalf.[168]

The *SpeechNow.org* court also traced the history of Supreme Court decisions incorporating a broader understanding of corruption than *quid pro quo* arrangements as construed in *Citizens United*, namely, the view that corruption includes gaining influence with or access to an official, in addition to obtaining a specific benefit. *Citizens United* rejected the broader understanding in favor of a narrow definition that implies the impossibility of independent expenditures corrupting as a matter of law.[169] The *SpeechNow.org* court then concluded that, based upon this position of *Citizens United*, the government could also have no interest in regulating independent electoral spending by persons other than corporations, including contributions by individuals to independent expenditure organizations, because there was zero threat of corruption to balance against the fundamental interest of political speech in the form of contributions to such organizations.[170] The *SpeechNow.org* decision thus articulated as a constitutional right unlimited giving to electoral entities as long as those entities operate independently of candidates for public office.

Buckley 2.0 would evaluate these developments with the benefit of hindsight. In particular, in addition to applying the doctrines it set forth in the original *Buckley* opinion to contemporary electoral practices, it would have eight years of history with which to assess the impact of *Citizens United* and *SpeechNow.org* on those practices. Since the original *Buckley* repeatedly used statistics to support its arguments, it is reasonable to assume that *Buckley 2.0* would also consider

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[168] *See SpeechNow.org*, 599 F.3d at 694.

[169] *See SpeechNow.org*, 599 F.3d at 694, referencing *Citizens United*, 558 U.S. at 357-59.

[170] *See SpeechNow.org*, 599 F.3d at 695 (stating that "the First Amendment cannot be encroached upon for naught").

empirical evidence in reaching its conclusions today.

2. *Buckley 2.0 's analysis of unlimited contributions and the threat of corruption-new facts on the ground*.

There are several areas in which *Buckley 2.0* might reach a different conclusion than the court reached in *SpeechNow.org*. The first of these is the *SpeechNow.org* court's conclusion that the government's interest in regulating contributions to independent spending groups is a "naught" because independent or uncoordinated spending simply does not pose a threat of corruption or the appearance of corruption.[171]

Buckley 2.0 would identify significant problems with this conclusion. As has been noted by several constitutional law scholars, it does not follow logically from the fact that groups are themselves engaged in independent spending (and, thus, may pose no threat of corruption, using the *Citizens United* definition) that contributions to these groups by individuals or other entities also pose no threat of corruption or the appearance of corruption.[172] The fallacy, they argue, is the failure to recognize that "[i]t is the six- seven-, and eight-figure donations to super PACs that create the appearance (and likely the reality) of corruption, not the *groups*' expenditures" because ordinary people recognize that office holders reward with legislation or other favors those who write the large checks, not the recipient groups.[173] For example, in the eight years since *Citizens*

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[171] *See supra* note 170.

[172] *See* Alschuler, Tribe, Eisen & Painter, *supra* note 156, at 2308-12.

[173] *See* Alschuler, Tribe, Eisen & Painter, *supra* note 156, at 2311-12. They mention as examples sugar subsidies, tax provisions, and arms deals that Congress approves, even if agency staff oppose such acts of favoritism. *Id.* They also argue that if the independence of a recipient organization necessarily precluded or cleansed possible corruption taint associated with donors to independent spending groups, there would be no reason to have laws barring contributions by

United was decided, a mere eleven donors contributed more than $1 billion to Super PACs, which was 20% of all the money raised by those groups during that time.[174] The largest donor gave almost $78 million to Republican candidates in 2016, which included $20 million to a single candidate running for President.[175]

Buckley 2.0 would likely assess empirically the proposition that contributions to Super PACs or other independent expenditure groups cannot lead to corruption or the appearance of corruption by taking into account the extraordinary size of such contributions. Super PACs, dark money groups that receive earmarked contributions, and section 527 organizations all are required to disclose the names of their donors and the amounts of their donations, which then become a matter of public record.[176] As a result, the 100 contributors of the largest amounts in each election cycle are listed on the website of OpenSecrets.org.[177] Since roughly half of Super PACs are single-

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government contractors or foreign persons. *See id*.

[174] *See* Michelle Ye Hee Lee, *One-fifth of all super-PAC money, from just eleven pockets*, Washington Post (Oct. 27, 2018), A14. *See also supra* notes 73-78 (documenting the small number of donors responsible for two-thirds or more of contributions to Super PACs).

[175] Lee, *supra* note 174. The constitutional scholars cited above also argue that *Citizens United*'s claim that independent spending poses no threat of corruption as a matter of law was actually dictum in the case, since it was unnecessary to reach a decision in the case after the Court concluded that "the First Amendment prohibits 'restrictions distinguishing among different speakers, allowing speech by some and not by others.'" Alschuler, Tribe, Eisen & Painter, *supra* note 156, at 2312, quoting *Citizens United*, 558 U.S. at 340, which was paraphrasing First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978). The authors also argue that the Court resolved the case a second time when it stated that only quid pro quo corruption counts as corruption. *Id*.

[176] *See supra* note 116. However, earmarked contributions are rarely reported. *See id.*

[177] *See* https://www.opensecrets.org/outsidespending/summ.php?disp=D (2018); https://www.opensecrets.org/outsidespending/summ.php?cycle=2016&disp=D&type=V&superonly=N (2016). The names listed are of individuals. As was noted earlier, the names of groups can be unrevealing (at least to the public).

candidate organizations,[178] candidates can easily know, for example, which individuals or entities have each contributed millions of dollars to support them or defeat their opponents. Even in the case of dark money groups that do not disclose their donors to the public, candidates are likely to know which individuals and entities are contributing huge amounts because, although such groups cannot coordinate their activities with candidates, no law prohibits them from disclosing the names of their donors and the amounts donated to candidates, if they choose. Thus, the public is in the dark; but the beneficiary candidates undoubtedly will not be.

In 2008, the last election before *Citizens United* was decided, only three individuals and four entities gave sums in excess of $1 million to outside groups.[179] Regardless of whether the Supreme Court's claim that independent spending could pose no threat of corruption was accurate at that time, the explosion of unlimited spending in the decade after *Citizens United* makes that assumption no longer tenable. For example, it is difficult to decouple one donor's $20 million contribution to Donald Trump's campaign from various actions the Trump administration has taken that were specifically requested by that donor.[180] Although there is probably no way to

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[178] *See supra* notes 99-101 and accompanying text.

[179] *See Top Individuals Funding Outside Groups*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/summ.php?cycle=2008&disp=D&type=V&superonly=N, *Top Organizations Funding Outside Spending Groups*, OPENSECRETS.ORG, https://www.opensecrets.org/ outsidespending/summ.php?cycle=2008&disp=D&type=O&superonly=N.

[180] *See* Jeremy W Peters, *Sheldon Adelson Sees a Lot to Like in Trump's Washington*, N.Y. Times (Sept. 22, 2018), https://www.nytimes.com/2018/09/22/us/politics/adelson-trump-republican-donor.html. For example, the recognition of Jerusalem as the capital of Israel and decision to move the U.S. embassy from Tel Aviv to Jerusalem, both urged by Adelson, occurred even before other Trump campaign promises, such as moving forward on building a wall between the United States and Mexico, which energizes the vast majority of Trump's most ardent supporters. The timing suggests that the priority he gave to the move, if not the inclination to make the move in the first place, can be traced to the campaign

prove the impact of huge campaign contributions on a recipient,[181] in many instances the appearance of a connection is obvious.

In short, when assessing the proposition that independent expenditures preclude a threat of corruption as a matter of law, *Buckley 2.0* would take into account new facts on the ground, namely, the vast sums injected into campaigns on an ostensibly independent basis. These are facts that did not exist in 2010 and that the justices making that decision could not have anticipated. *Buckley 2.0* would ask whether at some point what begins as a matter of degree becomes a matter of kind. *Buckley 2.0* would also consider whether the emergence of single-candidate independent expenditure Super PACs, responsible for almost two-thirds of a billion dollars in the 2015-2016 election cycle alone and accounting for an increasingly large percentage of total campaign spending, has led to a circumstance where the formal independence of expenditures can no longer be presumed to alleviate the threat of corruption. Finally, focusing specifically on the holding of *SpeechNow.org*, *Buckley 2.0* would find that nothing in the law prevents the *contributors* to independent expenditure groups from coordinating with candidates, even if the groups themselves do not.[182]

3. *Buckley 2.0 's analysis of the meaning of corruption and quid pro quo.*

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contribution and Adelson's influence. Trump also acted quickly on tax cuts favoring the wealthy over the middle class, which may also reflect the influence of large donors to the campaign.

[181] Some argue that those who donate huge sums do so because the candidate already is committed to the policies the donor favors. Anthony Fowler & Haritz Garro, *When Corporations Donate to Candidates, Are They Buying Influence?* KELLOGG INSIGHT (2018), https://insight.kellogg.northwestern.edu/article/do-corporate-campaign-contributions-buy-influence. While undoubtedly true, it is not credible that the fact of huge contributions would not affect the priority the recipient assigns to his or her campaign promises.

[182] *See supra* notes 172-173 and accompanying text.

In addition to reviewing the impact of unlimited giving on the original *Buckley*'s assumption that independent spending is unlikely to pose a threat of corruption, *Buckley 2.0* would certainly take issue with the definition of corruption assumed by *SpeechNow.org*, based upon *Citizens United*, i.e., that corruption refers exclusively to *quid pro quo* corruption, and not "[i]ngratiation and access."[183] This interpretation of *quid pro quo* corruption, *Buckley 2.0* would point out, misstates what the original *Buckley* said. When *Buckley* identified corruption with "political *quid pro quos*," it cited as support the opinion of the Court of Appeals and expressly cited footnotes in that decision summarizing parts of the record.[184] Both the appellate *Buckley* opinion and the footnotes cited there characterized *quid pro quo* situations in terms of influence as well as bribery or an exchange of a contribution for a specific favor by an office holder. In addition to describing the problem campaign finance law was addressing as "undue influence,"[185] the appellate court included among illustrative examples large contributions made "in order to gain a meeting with White House officials" and testimony that donors were "motivated by the perception that this ...would get us in the door and make our point of view heard."[186] To the same effect, the original *Buckley* mentions "improper influence," "undue influence," "the "appearance of

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[183] *See SpeechNow.org*, 599 F.3d at 694, quoting *Citizens United*, 558 U.S. at 360. On the changes in the meaning of corruption in Supreme Court opinions, see RICHARD L. HASEN, LEGISLATION, STATUTORY INTERPRETATION, AND ELECTION LAW: EXAMPLES AND EXPLANATIONS (2014).

[184] *Buckley*, 424 U.S. at 27, n.28, citing *Buckley* (D.C. Cir.), 519 F.2d at 839-840, and nn. 36-38.

[185] *Buckley*, 519 F.2d at 840.

[186] *Buckley* 951 F.2d at 840, nn. 36, 37. The footnotes cited by the *Buckley* Court also mentioned large donors who saw their contributions as necessary "to be actively considered" for ambassadorships. *Id*. at n.38.

impropriety," and "buy[ing] influence" repeatedly to describe the evils that Congress sought to counter with FECA, which suggests that the Court saw FECA as addressing problems beyond bribery or specific trades of money for concrete favors.[187] Further, the original *Buckley* explicitly rejected the plaintiffs' claim that the law's contribution limits were unconstitutional because bribery laws and disclosure requirements were a less restrictive means of treating *quid pro quo* arrangements.[188] The *Buckley* Court countered that "giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence government action,"[189] implying that "corruption" in the campaign finance context covers less blatant and specific attempts to affect official actions and policies.

Buckley 2.0 might also observe that *Citizens United* appears to understand corruption as discrete transactions in which contributors exchange large donations for specific acts by office holders,[190] whereas for the original *Buckley*, "the impact of the appearance of corruption stem[s] from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."[191] The notion of "a regime" of large contributions and the threat of "abuse inherent" in such a regime refers to more than occasional discrete acts of bribery; it suggests a

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[187] *See Buckley*, 424 U.S. at 27, 30, 45, 53, 58, 76. *See also id*. at 256-57 (characterizing the aim of FECA as countering "the risk of undue influence) (Chief Justice Burger, concurring in part and dissenting in part); *id.* at 260, 261(referring to the aim of contribution limits as "preventing undue influence" and "improper[] influence") (Justice White, concurring in part and dissenting in part).

[188] *Buckley*, 424 U.S. at 27-28.

[189] *Buckley*, 424 U.S. at 28.

[190] *See Citizens United*, 558 U.S. at 359-361 (distinguishing *quid pro quo* corruption from ingratiation and favoritism, which it equates with responsiveness to constituents).

[191] *Buckley*, 424 U.S. at 27.

climate in which the influence of those who make large contributions is pervasive. Thus, *Buckley 2.0* would likely conclude that when *Citizens United* ruled that the "fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt" and implied that favoritism by representatives is the equivalent of legitimate responsiveness, not corruption,[192] the *Citizens United* Court was disregarding the original *Buckley* and its broader understanding of corruption.

The original *Buckley*'s interpretation of the scope of *quid pro quo* corruption is consistent with, indeed, part and parcel of the original *Buckley*'s concern with preserving "the integrity of our system of representative government."[193] For the initial *Buckley*, corruption was problematic because it threatened the integrity of representative government. Eliminating corruption was thus a means to a more foundational end, the integrity of the electoral system that insures that the U.S. government will be truly representative. In fact, *Buckley 2.0* might well diagnose the main error of *Citizens United* as that Court's attempt to reduce *Buckley*'s focus on the integrity of the American electoral system to a single threat to its integrity, namely, *quid pro quo* corruption, and a narrowly construed version of *quid pro quo* corruption at that. The original *Buckley* had a much broader view of potential threats to the government's integrity in the eyes of voters. If integrity is the end, and elimination of corruption is a means, then curbing the influence of big contributions on the decisionmaking of public officials is a compelling interest because their decisions should be guided

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[192] *Citizens United*, 558 U.S. at 359. *Citizens United* quotes Justice Kennedy's opinion in *McConnell* as well, *id.*, but fails to note that Justice Kennedy was concurring in part with the decision's holding and concurring and dissenting in part with its reasoning. The portion quoted forms part of Kennedy's disagreement with the *McConnell* majority.

[193] *Buckley*, 424 U.S. at 26-27.

by some vision of the public interest and deliberation.

In sum, *Citizens United* could not legitimately cite *Buckley* as the basis for its holding because *quid pro quo* meant something more expansive for the *Buckley* Court than the meaning adopted by *Citizens United*. Had *Citizens United* recognized that the actual meaning of *quid pro quo* for the *Buckley* Court included influence or access, it would have confronted two choices. Either it would have acknowledged the need to overturn this aspect of *Buckley* explicitly. Alternatively, it would have realized the necessity of providing an independent justification for its claim that giving access and influence cannot constitute corruption as a matter of law, based upon considerations other than precedent.[194] Absent such a justification or explicit rejection of *Buckley*, *Citizens United*'s claim about the meaning of *quid pro quo* has no foundation other than an interpretive mistake. *Buckley 2.0* would thus reject this aspect of *Citizens United*, which, in turn, would weaken the claim that independent expenditures cannot pose a threat of corruption as a matter of law.

4. *Buckley 2.0's analysis of the appearance of corruption.*

Justice Kennedy states in *Citizens United* that "[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in democracy."[195] His support for his assertion is the further assertion that "ingratiation and access are not corruption" as a matter of

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[194] The *Citizens United* majority did rely on other precedents, but they were dissents in decisions where the majority opinion construed *quid pro quo* more broadly. There were numerous precedents in majority opinions, in contrast, supporting the *Buckley* majority's view.

[195] *Citizens United*, 558 U.S. at 360.

law[196] and the dictum that "it is our law and our tradition that more speech, not less, is the governing rule."[197]

Buckley 2.0 would observe that when the original *Buckley* stated that the appearance of corruption is "of almost equal concern" to the actuality of corruption, it immediately linked the appearance of corruption to "public awareness of opportunities for abuse inherent in a regime of large individual financial contributions."[198] It reasoned that "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical ... if confidence in the system of representative Government is not to be eroded to a disastrous extent.'"[199] The original *Buckley* thus agreed with *Citizens United* that preserving citizens' trust or faith in their government is the underlying issue, but it disagreed with the later decision about what causes citizens to lose trust or confidence in government. Further, the original *Buckley* specifically identified "the appearance of improper *influence*" (emphasis added) as a significant threat to confidence in representative democracy justifying certain campaign finance regulations.[200] These

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[196] *Citizens United*, 558 U.S. at 360. Kennedy adds that the fact that corporations make independent expenditures itself acknowledges "the ultimate influence" of voters. *Id.* Kennedy's comment does not prove what he thinks it does. The fact that donors fund independent expenditures to get a candidate elected or re-elected is wholly consistent with the donors' hope that the candidate, once elected, will be grateful and thus influenced in his agenda or official actions by the donors' wishes. Candidates also want to continue to inspire their large donors' generosity in future elections, and thus have an additional reason to please them while in office.

[197] *Citizens United*, 558 U.S. at 361.

[198] *Buckley*, 424 U.S. at 27. *See supra* notes 188-189 and accompanying text (discussing this sentence).

[199] *Buckley*, 424 U.S. at 27 (quoting CSC v. Letter Carriers, 413 U.S. 548, 565 n.29 (1973)).

[200] *Buckley*, 424 U.S. at 27.

statements are evidence that the original *Buckley* interpreted the appearance of corruption to include an ordinary person's predictable reaction to oversize contributions, i.e., that they would influence, even if they did not completely determine, a recipient's decisionmaking.

In addition, the *Buckley* approach reflects FECA's legislative history, in which lawmakers expressly linked contribution limits to the problem of influence and indebtedness, not just to bargains struck.[201] Although *Citizens United* also recognized that the touchstone of the integrity of government is citizens' trust in the system,[202] the Court seems to assume that the appearance of corruption is inextricably connected to bribery (as, in its view, corruption is)--as though public impressions of the influence of wealth on the agendas and attitudes of lawmakers short of bribery were of no legal consequence for the question of appearances.

In point of fact, empirical analysis shows otherwise. *Buckley 2.0* could bolster its interpretation of the original *Buckley* by citing numerous surveys showing that ordinary citizens equate gaining influence or buying access with corruption.[203] It is thus consistent with both the

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[201] *See*, e.g., 117 CONG. REC. 29291 (1971) (statement of Sen. Chiles) (emphasizing the need for measures to restore "public confidence in [...] the elective process); *Federal Election Campaign Act of 1971: Hearing on S. 1, S. 382, and S. 956 Before the Subcomm. on Communications, S. Comm. On Commerce*, 92nd Cong. 542 (1971) (statement of Sen. Frank E. Moss) (noting the "widespread cynicism" traceable to the "vast influence" of big contributors).

[202] *See* 558 U.S. at 360.

[203] *See* Ben Jacobs & David Smith, *'Politics are corrupt': fears about money and its influence on elections loom large,* THE GUARDIAN (2016), https://www.theguardian.com/ us-news/ 2016/jul/08/trump-clinton-sanders-super-pacs-election-money; William Alan Nelson II, *Buying the Electorate: An Empirical Study of the Current Campaign Finance Landscape and How the Supreme Court Erred in Not Revisiting* Citizens United, 61 CLEV. ST. L. REV. 443, 459-__ (2013); GALLUP, INC, TRUST IN GOVERNMENTGALLUP.COM, https://news.gallup.com/poll/ 5392/trust-government.aspx (finding that as of 2010, 55% think people running the government are crooked). *See also* Rebecca L. Brown & Andrew D. Martin, *Rhetoric and Reality: Testing the Harm of Campaign Spending*, 90 N.Y.U.L. REV. 1066, 1071-72 (2015) (describing the loss

Supreme Court's own precedents and empirical data to have a capacious definition of corruption in "the appearance of corruption," even were corruption per se construed narrowly. In short, the question of appearances cannot be decided as a matter of law. Thus, even if *Buckley 2.0* did not contest *Citizens United*'s definition of "corruption," it would likely reject that Court's narrow definition of the appearance of corruption when evaluating Congress's attempt to enact reforms addressing threats to citizens' trust in government owing to the appearance of corruption.

Buckley 2.0's likely conclusion concerning the appearance of corruption can be traced to the specific concern articulated by *Buckley* and subsequent decisions, namely, that people's "confidence in the system of representative government," i.e., the "integrity of our system," will be undermined by seeing large contributors obtaining special access to or favors from public officials.[204] Although some commentators have argued that large contributions are more often motivated by candidates' policies than the reverse, the vast majority of ordinary voters see large donations as corrupting influences because they give large contributors a disproportionate voice over legislation and public policies. Representative government, in contrast to other forms of democracy, presupposes the responsiveness of lawmakers to citizens in general, and not just to elites or interest groups. Although no individual or group can expect that its views will necessarily carry the day and be translated into government action, it is reasonable for them to believe that their views will be taken seriously and receive meaningful consideration and that the wishes of the majority of citizens will not be routinely disregarded in favor of the agendas of large contributors. If *ex ante* the views of donors of huge sums of money will determine legislative outcomes and

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of faith).

[204] *See Buckley*, 424 U.S. at 26-27.

executive actions, the resulting system does not deserve the label "representative." In short, *Buckley 2.0* would rest its interpretation on the perceptions of ordinary citizens because the original *Buckley* and the concept of representative democracy both require this.

5. *Buckley 2.0's analysis of the independence of contemporary independent expenditures.*

Citizens United invalidated existing restrictions on corporate spending using general corporate revenues as long as corporations are engaged in independent spending.[205] If their spending is coordinated with a candidate or a candidate's campaign, however, the amounts involved will be re-characterized as contributions and, thus, be subject to contribution limits.[206]

The original *Buckley*, which protected independent expenditures from limits enacted by Congress in 1971, involved independent spending by individuals or groups. As stated by the original *Buckley*, the reason Congress cannot constitutionally limit the amounts spent on independent expenditures is that such spending does not pose a threat of corruption because such spending is not controlled by a candidate and, thus, might be viewed by the candidate as unhelpful or even harmful.[207] As a consequence, the candidate would not feel indebted to or under an obligation to please the persons responsible for such independent spending.

In taking this position, the *Buckley* Court was not wholly naive; it conditioned its remarks

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[205] *See Citizens United*, 558 U.S. at 360. Parallel rules apply to unions. *See supra* note 27.

[206] *See Buckley*, 424 U.S. at 47. *See* 52 U.S.C. §30116(a)(7)(B), formerly 2 U.S.C. §441a(a)(7)(B); 11 C.F.R. §109.21(b). For the limited effectiveness of this rule, see *infra* notes 214-223 and accompanying text.

[207] *See Buckley*, 424 U.S. at 47.

on the independent spending being "totally" independent.[208] Otherwise the inference from the candidate's lack of control and potential for harm would not be warranted. Further, it noted that independent spending did "not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions,"[209] thereby suggesting that the Court did not rule out, as a matter of law or otherwise, the possibility that independent spending could at some time pose such a threat. For *Buckley*, independent spending was to be protected because of "its substantially diminished potential for abuse."[210] The task for *Buckley 2.0*, therefore, is to examine whether the threat posed by independent spending as practiced in the current environment is as diminished as it was in 1976. Depending upon the result, *Buckley 2.0*'s inquiry could affect independent spending by individuals as well as by corporations and other business interests, with ramifications for the constitutional status of unlimited contributions to independent expenditure groups as well.

FECA does not define "independent" or its opposite, "coordinated"; rather the terms are defined in FEC regulations.[211] Initially, the FEC's implementing regulations defined coordination in terms of a candidate engaging in "substantial discussion or negotiation" with a third party that resulted in "collaboration or agreement."[212] In 2001, Congress rejected that interpretation as too

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[208] *See Buckley*, 424 U.S. at 47.

[209] *Buckley*, 424 U.S. at 46.

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

[211] *See* 11 C.F.R. §109.20 (defining "coordinated" as "cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee").

[212] *See Shays v. FEC*, 337 F. Supp. 2d 28, 55-56 & n.25 (2004) (*Shays I*).

weak, and it directed the FEC to promulgate regulations covering a much wider range of interactions between candidates and third parties supporting their campaigns with allegedly independent spending.[213] The resulting new coordination regulations were successfully challenged in court three times for being too permissive to satisfy the Congressional mandate.[214]

That the current regulations are too permissive has been noted by reformers and members of both political parties because they do not classify as "coordinated" communications that would be considered coordinated "under any common sense definition."[215] Some aspects of the definition are vague. For example, a communication by a third party may only be considered coordinated if a candidate or staff member is "materially involved in decisions regarding the communications,"[216] with uncertain application of standards to determine materiality.[217] In addition, the rules

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[213] *See* BCRA, *supra* note 18, §214(c); 52 U.S.C. §30116(7)(B)(ii) note.

[214] The history of this litigation is described in Shays v. FEC, 528 F.3d 914, 918-919 (D.C. Cir. 2008).

[215] *See*, e.g., Democracy 21 and Campaign Legal Center, *Comments on REG 2015-04 re Independent Spending by Corporations, Labor Organizations, Foreign Nationals and others* 2 (Oct. 27, 2015). *See* Public Citizen, *Comments on Supplemental Notice 2010-01: Coordinated Communications* 4 (Feb. 24, 2010) (stating that there are "crippling weaknesses inherent in the 2007 coordination rule"); Brent Ferguson, *Beyond Coordination: Defining Indirect Campaign Contributions for the Super PAC Era*, 42 HASTINGS CONST. L.Q. 471 (2015). *See also* Bradley Smith, *SuperPACs and the Role of "Coordination" in Campaign Finance Law*, 49 WILLAMETTE L. REV. 603, 605-606 (2013) (quoting but disagreeing with lawmakers, academics, and party officials who deny the independence of independent entities like Super PACs).

[216] 11 C.F.R. §109.21(d)(2), (3). If the information in question was obtained from a publicly available source, however, coordination has not occurred. 11 C.F.R. §109.21(d)(3).

[217] According to the FEC, "'material' has its ordinary legal meaning, which is 'important; more or less necessary; having influence or effect; going to the merits.' . . . The term 'material' is included to safeguard against the inclusion of incidental participation that is not important to, or does not influence, decisions regarding a communication." 68 FED. REG. 434 (citing BLACK'S LAW DICTIONARY at 976 (6th ed. 1990)).

themselves are often lax: they permit independent expenditure entities to hire the same vendors, such as pollsters and advertising companies, as the candidate uses as long as a "firewall" is created between those in the company representing the candidate and those representing the independent expenditure entity.[218] In fact, a firewall is not necessarily mandatory: the FEC approved an exempt organization with both a traditional PAC and an independent expenditure Super PAC, even though the same individual was President of the exempt organization and Treasurer of both PACs, based upon the organization's simple representation to the FEC that the Super PAC would not engage in any coordinated activities.[219] Moreover, not infrequently, a member of a lawmaker's staff resigns from his or her staff position before an election and then establishes and operates an independent expenditure entity, even a single-candidate Super PAC, to help elect or re-elect the lawmaker,[220] bringing along a reservoir of inside information. One commentator has opined that a candidate's spouse can buy advertising urging the election of the candidate without violating the coordination rules as long as they do not "discuss[] the details of specific ad buys."[221] Further, communications

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[218] *See* 11 C.F.R. §109.21(d)(4), (5).

[219] *See* FEC Advisory Opinion 2010-09, 4 and n. 8 (July 22, 2010) (finding that the President's "overlap of duties" would not "compromise the Super PAC's independence because of the representations made by the organization), https://www.fec.gov/files/legal/aos/2010-09/AO-2010-09.pdf.

[220] *See*, e.g., FEC Advisory Opinion 2016-21 (Jan. 12, 2017) (discussing several situations in which a candidate's or party's former employee joins a hybrid PAC and concluding that the use of information acquired in previous position will be coordinated if it is material). *See also supra* note 219.

[221] *See* Paul S. Ryan, *Votes and Voices in 2012 Symposium: Two Faulty Assumptions* of *Citizens United and How to Limit the Damage*, 44 U. TOL. L. REV. 583, 586 (2013). Although the quoted statement may be an exaggeration, because the standard would be the materiality of the information transmitted, not specificity, nonetheless the less specific the information in question, the harder it would be to prove its materiality.

made in public are exempted from the definition of coordination, so candidates or their surrogates can, for example, state openly when interviewed on radio or television a campaign's "wish list" for additional advertising or get-out-the-vote efforts in specific locations.[222] Even a wink and a nod would be unnecessary for independent spending and campaigns to be coordinated in such instances without falling under the legal definition of coordination. For these and other reasons, the coordination rules have been repeatedly criticized for failing to ensure genuine independence, and the FEC has rarely found an ostensibly independent activity to be coordinated.[223]

In light of these provisions and practices, *Buckley 2.0* might well conclude that what satisfies the legal definition of independence is not in fact "totally" independent, as *Buckley* understood that concept in 1976. Such a finding would force *Buckley 2.0* to assess whether the absence of meaningful independence today is a sufficient reason for revising the blanket protection it gave independent expenditures by individuals in 1976 or for reversing *Citizens United*'s decision to allow corporations to fund independent spending with general treasury revenues and *SpeechNow.org*'s extension of that ruling to contributions to independent spending groups.

III. HAS THE TIME COME TO OVERRULE CITIZENS UNITED AND SPEECHNOW.ORG?

Buckley 2.0 will thus be forced to consider whether the time has come to overrule *Citizens United*, which would have the concomitant effect of invalidating *SpeechNow.org* insofar as it relies

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[222] *See* Alex Roarty and Shane Goldmacher, *They're Not Allowed to Talk. But Candidates and PACs Are Brazenly Communicating All the Time*, THE ATLANTIC (October 30, 2014); Kenneth P. Doyle, *FEC Drops Illegal Coordination Charges Against McGinty Campaign*, BLOOMBERG LAW (Dec. 20, 2016).

[223] *See* Rachael Marcus and John Dunbar, *Rules against Coordination between Super PACs, Candidates, Tough to Enforce*, CTR FOR PUBLIC INTEGRITY, Jan. 13, 2012, updated May 19, 2014, https://publicintegrity.org/federal-politics/rules-against-coordination-between-super-pacs-candidates-tough-to-enforce.

on the reasoning of *Citizens United* about the relationship between independent expenditures and corruption.

A. *Citizens United* and *Buckley 2.0*'s Review of Corporations' Right to Political Speech

In contemplating such a consequential action, *Buckley 2.0* would first step back to review the principles grounding the original *Buckley* decision. These are:

1. That the First Amendment affords a very high degree of protection to both political expression and political association.[224]

2. That neither of these protected rights is absolute. As stated in the original *Buckley*, "[e]ven a 'significant interference' with protected rights of political association" may at times be justified.[225]

3. That government restrictions on these rights must be subject to exacting scrutiny, more so in the case of political expenditures and somewhat less so in the case of political contributions.[226]

4. That exacting scrutiny requires the Court to assess the importance of the government's interest in regulating campaign speech and the relationship between the government's interest and the means chosen to effectuate that interest.[227]

5. That the interest of the government in regulating campaign contributions is primarily to prevent corruption of candidates and office holders owing to the influence of large contributions and also to prevent the appearance of corruption in the eyes of the citizens and voters.[228]

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[224] *See Buckley*, 424 U.S. at 14-15.

[225] *See Buckley*, 424 U.S. at 25. *See also supra* note 3.

[226] *See Buckley*, 424 U.S. at 44-45.

[227] *See Buckley*, 424 U.S. at 45-46, 64.

[228] *See Buckley*, 424 U.S. at 25-27. *See also id.* at 67.

6. That this interest can in principle justify imposing some burdens on political speech because the presence of corruption or its appearance threatens the integrity of representative government.[229] In a representative democracy, members of Congress and the President and Vice-President are elected by citizens at large with the understanding that they will act in the interest of the citizens and the public interest. While the content of the public interest is often contested, it is never legitimate for representatives to make decisions in their official capacity based, in whole or in part, on the consequences for their own electability, including the necessity to raise sufficient amounts of money to be competitive in an election. Thus, the government has an important interest in regulating campaign funding to preserve the integrity of representative government by reducing the threat of corruption or its appearance.

7. That, although preventing corruption and its appearance are the primary justifications for FECA's restrictions on campaign contributions, nothing in the original *Buckley* precludes Congress taking additional steps to protect the integrity of the system of representative government if they satisfy exacting scrutiny and promote the integrity of representative government.[230] For example, electoral integrity also depends upon an informed electorate.[231] Both the protection of political speech and disclosure rules are justified for the sake of facilitating an informed electorate.

8. That because confidence in elected officials' integrity when acting in their official capacity is essential to the integrity of the system of representative government itself, the original *Buckley*

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[229] *See Buckley*, 424 U.S. at 26-27.

[230] *See Buckley*, 424 U.S. at 26, where the Court refers to corruption and its appearance as FECA's primary purpose, not its exclusive purpose.

[231] *See Buckley*, 424 U.S. at 14-15, 49 n.55, 66-67. *See also Bellotti*, 435 U.S. at 785 n.21.

emphasized that preventing the appearance of corruption is almost as critical as preventing the actuality of corruption itself.[232]

9. That not interfering with the ability of candidates to have sufficient resources for effective advocacy is another condition of the integrity of representative government and, thus, the means government selects to address corruption, its appearance, an informed electorate, confidence in elected officials, or other threats to the integrity of representative government should not obstruct the possibility of effective advocacy by candidates for election or re-election.[233]

10. That it is inconsistent with the First Amendment to restrict the speech of some to assure that citizens at large have equal resources to make their voices heard.[234]

Buckley 2.0 would then examine the reasoning presented in *Citizens United* to justify its conclusion that it is unconstitutional to prevent corporations and unions from using general treasury funds for advocating the election or defeat of candidates in those cases if the entities do not coordinate with candidates or their campaigns. First, *Citizens United* asserted that those restrictions on corporations and unions "could not have been squared with the reasoning of *Buckley*,"[235] based largely on inferences *Citizens United* drew from what *Buckley* failed to say.[236]

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[232] *See Buckley*, 424 U.S. at 27. *See also id.* at 288 (Marshall, J., concurring in part and dissenting in part).

[233] *Buckley*, 424 U.S. at 21, 22.

[234] *Buckley*, 424 U.S. at 48-49, 56.

[235] 558 U.S. at 346.

[236] For example, when *Buckley* invalidated FECA's limits on independent expenditures, it did not make an exception for corporations and unions, so *Buckley* must have assumed they would be engaging in independent expenditures along with individuals and associations, which it did mention. *See Citizens United*, 558 U.S. at 346.

Citizens United buttressed its assertion that *Buckley* stood for the "principle" that "the Government cannot restrict political speech based on the speaker's corporate identity,"[237] by turning to *First National Bank of Boston v. Bellotti*, which invalidated a state ban on corporations spending to air messages on a controversial public issue.[238] *Bellotti* involved a Massachusetts statute banning independent contributions or expenditures by corporations and other business entities during a ballot initiative relating to the state's proposal for a graduated income tax. The *Bellotti* Court emphasized that the challenged statute threatened to prevent the airing of a point of view that might otherwise not be represented during the debate over the proposed legislation, in particular, a view opposed to the state's position on the ballot initiative.[239] In expressing its concern about the government using its legislative power to suppress opposition to its position, the *Bellotti* Court said that the First Amendment does not permit the government to prevent a class of speakers from contributing to the discussion of public issues.[240]

This is the statement that *Citizens United* cited for the proposition that the First Amendment categorically bars the government from preventing a class of speakers from engaging in political speech. However, *Buckley 2.0* would observe that neither the *Bellotti* holding nor its reasoning claimed to invalidate regulation of corporate political spending in general. Rather, the

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[237] *See Citizens United*, 558 US at 346.

[238] *See Citizens United*, 558 U.S. at 340, citing *Bellotti*, 435 U.S. at 784.

[239] The Court thus seems to have viewed this as a case of content discrimination, because the government sought to silence the view of business entities who opposed the state's proposed tax reform. *But see Citizens United*, 558 U.S. at 347 (asserting that *Bellotti* was not about viewpoint discrimination).

[240] *See Bellotti*, 435 U.S. at 784-785.

Bellotti Court explicitly distinguished the government's interest in restricting corporate speech during a ballot initiative from other situations, noting that its "consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office."[241] It reiterated that the "risk of corruption perceived in cases involving candidates "simply is not present" in a discussion of ideas to be decided by a referendum.[242] Because of *Bellotti*'s express distinction between discussion of issues relating to a referendum, on the one hand, and promoting candidates for election, on the other, *Buckley 2.0* would not find that *Bellotti* stands for a constitutional bar to singling out corporations with respect to spending in the elections of candidates or a presumptive right of corporate political spending outside the referendum context.

Buckley 2.0 would find *Citizens United*'s reliance upon *FEC v. Massachusetts Citizens for Life* (*MCFL*)[243] similarly misplaced. MCFL was an educational and advocacy nonprofit corporation devoted to promoting human life that, by virtue of being a corporation, was prohibited by the federal prohibition from spending its treasury funds on political advocacy.[244] The *MCFL* Court went to great lengths to distinguish MCFL from commercial corporations. It noted that MCFL was a small nonstock corporation that itself engaged in no commercial activities and, further, accepted no money from business entities or unions.[245] Indeed, it raised money from

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[241] *Bellotti*, 435 U.S. at 788 n.26.

[242] *Bellotti*, 435 U.S. at 790.

[243] Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238 (1986).

[244] *See MCFL*, 479 U.S. at 241-242.

[245] *See MCFL*, 479 U.S. at 241-242, 246.

contributions from individuals and from garage sales, bake sales, dances, raffles, and picnics.[246] The Court emphasized how burdensome requiring a small and unsophisticated nonprofit to establish a PAC would be, given the FEC regulations applying to PACs.[247] Despite *MCFL*'s restriction of its holding to a certain fact pattern, *Citizens United* cited the administrative burdens catalogued in *MCFL* as evidence that requiring corporations and unions of any size to fund express advocacy with PAC money would be unconstitutionally burdensome and would amount to an absolute prohibition against those entities engaging in this form of political speech.[248] By contrast, *MCFL* agreed with concerns raised about the influence of corporate wealth on campaigns.[249] It explicitly distinguished that situation from "*this* fund,"[250] concluding that the difference between MCFL and commercial corporations was one of kind and not merely degree.[251] For these reasons, and because *MCFL* expressly asserted that the situation of commercial corporations was a "question not before us,"[252] *Buckley 2.0* would find the analogy between MCFL-type corporations and commercial ones untenable. It would thus conclude that *MCFL* cannot be used as precedent for treating the speech rights of all corporations of whatever size and purpose as indistinguishable

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[246] 479 U.S. at 242.

[247] 479 U.S. at 253-255. Even so, the Court concluded that the burdens were not "insurmountable," and thus rested its holding on the lack of compelling government interest. *Id.* at 263.

[248] *See Citizens United*, 558 U.S. at 337-339.

[249] *See MCFL*, 479 U.S. at 257-260.

[250] *See MCFL*, 479 U.S. at 258.

[251] *See MCFL*, 479 U.S. at 263.

[252] *See MCFL*, 479 U.S. at 263. *See also id.* at 263-264 (outlining three features of the MCFL facts that support the Court's holding, none of which is true of commercial corporations).

from a First Amendment perspective.

In short, *Buckley 2.0* would argue that neither *Bellotti* nor *MCFL* can be cited as support for *Citizens United*'s absolutist position regarding corporate political spending. In addition, in reaching its holding, *Citizens United* ignored the weight of numerous Court precedents expressing concerns about corporate funding of campaign speech.[253] *Buckley 2.0* would thus find that *Citizens United* leaped without justification from language about a ballot initiative and a small advocacy organization funded by individual donations to an assertion of general political speech rights for corporations of whatever size and nature intervening in campaigns for public office.

In addition, *Buckley 2.0* would also question the inference drawn by *Citizens United* from its assertion of general political speech rights for corporations. *Citizens United* first argued that, because corporations in general have the same right to political expression as other speakers, it would be unconstitutional to restrict their use of their own resources (including treasury funds) unless the government could show that such restrictions are necessary to avoid corruption or its appearance. The Court then asserted that such a showing is impossible if corporations are not coordinating with candidates, relying upon the original *Buckley*'s statement that uncoordinated spending at that time did not pose a risk of corruption or its appearance. The original *Buckley*'s statement referred to independent spending by individuals (singly) or non-corporate groups or associations. However, *Citizens United* concluded that the same reasoning would apply equally to corporations acting independently of candidates and, thus, that the existing ban on corporations using treasury funds was a violation of the First Amendment's protection of a presumptive political

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[253] See the summary of "a century of congressional efforts to curb corporations' potentially 'deleterious influences on federal elections,'" in Federal Election Comm'n v. Beaumont, 539 U.S. 146, 152-156 (2003).

speech rights of corporations.

As was argued in Part II, *Buckley 2.0* will have several reasons to reject this aspect of the reasoning of *Citizens United*. First, as noted above,[254] *Citizens United*'s conclusion depended upon a narrow interpretation of quid pro quo as bribery or a concrete exchange between the person making the expenditure and a candidate, which would be impossible if the parties acted independently of one another. *Buckley 2.0*, in contrast, pointed out that the original *Buckley*'s understanding of quid pro quo included such things as influencing a candidate or obtaining access, and not just bribery. *Citizen United*'s misreading of this aspect of the original *Buckley* was significant because independent spending is not by definition inconsistent with the independent spender having influence on candidates, who are aware of the identity of those who make outsize expenditures, even in those instances when their identities are hidden from the public.

Second, *Buckley 2.0* concluded that the appearance of corruption could arise when big contributors influence or gain access to candidates and elected officials, since these signal corruption to ordinary citizens, as they did to those who enacted FECA.[255] *Buckley 2.0* reinforced the original *Buckley*'s observation with contemporary survey data linking people's perception of the influence of money on officials with their distrust of government.[256] Its conclusion was reinforced by the proliferation of dark money groups to which business interests can contribute unlimited sums without public knowledge despite the likelihood of candidates knowing and being

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[254] *See* Part II.B.3.

[255] *See* Part II.B.4.

[256] *See* Part II.B.4.

influenced by such spending.[257]

Third, as noted above,[258] the original *Buckley* claimed that independent spending poses no threat of corruption or its appearance only if the spending is totally independent. After reviewing current campaign finance regulations and practices, *Buckley 2.0* concluded that conformity with the legal test for independence does not guaranty total independence so as to preclude concrete exchanges between contributors and representatives, influence, or access. Especially telling for *Buckley 2.0* was the emergence and rapid increase in single-candidate Super PACS staffed by associates of a candidate and permitted to raise money with the active assistance of the candidate.[259] Moreover, *Buckley* 2.0 would note that the original *Buckley* assumed there would be disclosure to counter the risk of corruption,[260] but that increasingly campaign spending employs non-disclosing vehicles, uses non-revealing names, or engages in other strategies to prevent voters from knowing who is responsible for campaign messages.[261] *Buckley 2.0* would thus conclude that in contrast to the situation in 1976, independent spending does in fact "presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."[262]

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[257] *See* Part I.C (noting that the amount of money involved cannot be quantified because of the absence of disclosure).

[258] *See* Part II.B.5.

[259] *See supra* note 95 and accompanying text.

[260] *See Buckley*, 424 U.S. at 67-68.

[261] *See supra* notes 53-55 and accompanying text.

[262] *See supra* note 205 and accompanying text.

Finally, *Buckley 2.0* would have to consider whether, given contemporary campaign conditions, business interests would be able to engage in effective advocacy if they were prevented from using their treasury funds in pursuit of their electoral objectives. The empirical data detailed in Part I.A.1 demonstrated that business interests increased their campaign spending (contributions and other expenditures) eight and a half times (in constant dollars) between the 1975-1976 and the 2015-2016 presidential election cycles, without taking into account spending made possible by *Citizens United*, even though the cost of the elections in those years increased only four and a half times in constant dollars. In addition, invalidating *Citizens United*'s holding would leave corporations and related interests free to engage in unlimited issue advocacy targeting election outcomes using their treasury funds.[263] *Buckley 2.0* would thus conclude that business interests would continue to be able to engage in effective advocacy despite its overruling *Citizens United* because of the many avenues remaining for them to participate in the discussion of candidates during elections. Thus, in light of the greatly increased risk of corruption linked to unlimited spending by entities not truly independent of candidates, *Buckley 2.0* would conclude that *Citizens United* was wrongly decided and that returning to the status quo would be consistent with exacting scrutiny of the First Amendment political speech claims at issue.

B. *SpeechNow.org* and *Buckley 2.0*'s Analysis of Unlimited Contributions to Independent Spending Groups

If *Buckley 2.0* rejects *Citizens United*'s claims about the speech rights of corporations, the nature of quid pro quo arrangements, and the implications of FECA's independence standard as a matter of law, the holding of *SpeechNow.org* would not survive because of its dependence on

[263] *supra* Part I.D.

these doctrines. Even if *Buckley 2.0* does not invalidate the central teaching of *Citizens United*, however, it would likely find the appellate court's extension of the earlier decision illegitimate.

Buckley 2.0 would evaluate the constitutionality of limiting contributions to independent expenditure entities in light of the original *Buckley*'s analysis of independent expenditures and the developments in campaign finance law and practices since then. It would begin by reviewing empirical evidence regarding the nature and extent of spending by these entities and the role of unlimited contributions in funding them.

1. In the 2015-2016 election cycle, more than a fifth of the total (reported) election spending of $6.5 billion was traceable to independent expenditure outside spending groups, with Super PACs responsible for more than $1 billion of this amount.[264] Unreported spending by outside groups, including issue advocacy calculated to influence the election of specific candidates but not subject to reporting, cannot be estimated,[265] but clearly added hundreds of millions of dollars to these totals.

2. The amount of identifiable outside spending in the 2015-2016 election cycle represented an increase of almost 50 percent over the comparable amount in the previous presidential election cycle.[266]

3. The massive nature of such spending was not an aberration. In fact, because Donald Trump received an unusual amount of free publicity, experts believe that total spending in 2015-

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[264] *See supra* notes 89-90 and accompanying text.

[265] *See supra* notes 113-115.

[266] *See supra* note 94 and accompanying text.

2016 was significantly less than it would otherwise have been.[267] Further, outside spending for the 2018 mid-term elections was 60 percent greater than such spending for the 2014 mid-terms,[268] confirming that the trend is for rapid increases in outside spending.

4. Unlimited contributions accounted for almost 90 percent of receipts of Super PACs.[269]

5. Unlimited contributions also resulted in an unprecedented concentration of campaign spending by wealthy individuals, accounting for almost all of the funds raised by independent spending entities: almost 90 percent of contributions to Super PACs (more than $900 million) was attributable to 511 individuals, or 1 percent of donors.[270]

6. It was estimated that, combining unlimited contributions to Super PACs and other independent spending groups, only one percent of the top one percent (.01 percent) of adults were responsible for $2.3 billion in outside money raised during the 2015-2016 election cycle.[271]

Buckley 2.0 would first examine the consequences of recognizing that unlimited contributions are not themselves direct expenditures and, thus, are not entitled to the same level of constitutional protection as independent expenditures. When the original *Buckley* upheld a $1,000 cap on contributions by individuals to candidates, it argued that contributions are not entitled to the same degree of First Amendment protection as expenditures because the burden of a contribution cap is only a "marginal restriction" on the donor, since contributions are symbolic

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[267] *See* Sultan, *supra* note 13.

[268] *See supra* note 91 and accompanying text.

[269] *See supra* note 74 and accompanying text.

[270] *See supra* note 76 and accompanying text.

[271] *See supra* note 78 and accompanying text.

speech and the cap leaves individuals free to participate in elections in other ways, including making independent expenditures without dollar restrictions.[272] Eliminating *SpeechNow.org*'s validation of unlimited contributions would similarly leave individuals the ability to contribute up to $5,000 to individual PACs, make unlimited independent expenditures, engage in unlimited issue advocacy relevant to an election, and participate in the other ways listed by *Buckley*.[273] *Buckley 2.0* would thus conclude that subjecting contributions made to independent spending entities to dollar limits would not excessively burden individuals' speech rights in elections.

However, the original *Buckley* considered more than the extent of the burden from contribution limits. It upheld those limits because it found that the government interest in imposing dollar limits to reduce the threat of corruption was substantial. The unlimited contributions that *SpeechNow.org* validated are made to recipients other than candidates and their campaigns, so *Buckley 2.0* would have to examine the threat of corruption in this different context. It would explore whether unlimited contributions to independent spending groups are less prone to be corrupting than contributions to candidates because the groups are independent.

Buckley 2.0's conclusion would rest on a combination of factors. First, it would note again that the "totally" independent standard of *Buckley* is not satisfied in several kinds of outside spending groups because of the problematic character of the legal standard for independence.[274] Further, even if the groups are totally independent, those who contribute to them are not barred from acting in concert with candidates. *Buckley 2.0* would note, for example, that the FEC

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[272] *See supra* notes 123-127 and accompanying text.

[273] *See supra* note 127 and accompanying text.

[274] *See supra* Part II.B.5.

permits candidates themselves to solicit contributions at fundraising events hosted by legally independent spending groups as long as the candidates request contributions of no more than $5,000, even though the groups themselves can solicit sums of any size at the same event while the candidate is there as a guest or featured speaker.[275] Based upon these considerations, *Buckley 2.0* would conclude that the risk of corruption from large contributions is at least as great as, and probably greater than, the risk of corruption from contributions to candidates because of the close association of candidates to Super PACs and the unlimited size of the contributions.

In addition to reviewing the legal standards governing proximity between candidates and independent spending groups, *Buckley 2.0* would also review the statistics for unlimited outside fundraising since *Citizens United*. It would observe that the sums raised have been enormous and that the ability of high wealth donors to aggregate their contributions together in Super PACs and other groups has amplified their impact on elections far beyond what extremely large but uncoordinated independent expenditures by individuals could generate.[276] Taking into consideration the prevalence of single-candidate independent expenditure groups, the rate at which such spending is growing, and the close ties between candidates and legally independent groups, *Buckley 2.0* would conclude that regardless of whether the groups and candidates coordinate specific strategies and ad buys, the groups have become conduits enabling individuals to evade the caps on contributions to candidates. Moreover, because the sums raised are so great, the threat of corruption is correspondingly acute. The threat is further magnified by the ability of independent

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[275] *See, e.g.,* FEC Advisory Op. 2011-12 (June 30, 2011).

[276] *See supra* notes 73-78 and accompanying text.

spending groups funded by unlimited contributions to outspend candidates in targeted races.[277] In evaluating the significance of these statistics, *Buckley 2.0* would observe that post-*SpeechNow.org*, outside groups are now in a position to dictate the core of a candidate's governing agenda by threatening to withhold support in general elections or back competitors in primaries. In short, *Buckley 2.0* would conclude that facts on the ground and misinterpretations of law demonstrate that the *SpeechNow.org* court erred when it held that contributions to independent spending groups were incapable of coordination and corruption as a matter of law.

C. Conclusion

Since *Buckley* was decided in 1976, the campaign finance framework that it erected has been eroded by a series of decisions claiming to rest upon its foundations. During the same period, campaign financing has been transformed by the skyrocketing cost of campaigns, innovative campaign practices, rapid increases in the amount of money injected into elections by business interests, an increasingly small number of high wealth individuals accounting for an increasingly large percentage of campaign spending, and a trend toward employing dark money campaign vehicles and adopting other strategies to evade campaign finance disclosure rules.

Some of these changes were introduced or accelerated by the decisions in *Citizens United* and its progeny, *SpeechNow.org*. In important respects, each of these decisions made two important errors: they misrepresented the extent of their support in precedent and they disregarded empirical campaign realities in applying doctrines. The thought experiment *Buckley 2.0* has attempted to identify and shine a spotlight on these errors. The result is a more faithful reading of the original *Buckley* and a more honest recognition of campaign financing realities that threaten the

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[277] *See supra* note 96 and accompanying text.

integrity of representative government in America.