Curtailing the Cudgel of "Coordination" by Curing Confusion: How States Can Fix What the Feds Got Wrong on Campaign Finance

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I. INTRODUCTION

> *Let me tell you what I wish I'd known when I was young and dreamed of glory: you have no control who lives, who dies, who tells your story. I know that we can win. I know that greatness lies in you. But remember from here on in: history has its eyes on you. History has its eyes on you!*[1]

The theory behind laws prohibiting coordinated communications is intuitive and simple. If a candidate for office, who is subject to statutory limits on the size of contributions he may lawfully accept from individual donors, collaborates on communications strategy and tactics with an outside group that spends and raises its *own* funds (often from the same pool of donors who give directly to the candidate), then any control the candidate exerts over the outside group's war chest is tantamount to skirting statutory contribution limits. Therefore, to account for the additional financial resources that a candidate controls in such a scheme, federal law treats coordinated communications like contributions to the candidate, and those contributions are subject to the same statutory limits as monetary contributions.[2] But coordination laws are problematic for four chief reasons.

First, they are ambiguous, vague, and overbroad.[3] Unwary candidates—perhaps first-time insurgents running for office in a

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1. CHRISTOPHER JACKSON ET AL., *History Has Its Eyes on You*, *on* HAMILTON: AN AMERICAN MUSICAL at 0:52–1:36 (Atlantic Records 2015).

2. *See generally* 11 C.F.R. § 109.20 (2017); *see also* Bradley A. Smith, *Super PACs and the Role of "Coordination" in Campaign Finance Law*, 49 WILLAMETTE L. REV. 603, 607–09 (2013) [hereinafter Smith, *Super PACs*] (explaining the theory underlying coordination doctrine).

3. *See infra* Sections II.B, II.C.

populist wave election[4]—should not have to hire lawyers[5] to help them decipher dozens of pages of Federal Election Commission ("FEC") regulations and hundreds of advisory opinions.[6] Practically speaking, an inexperienced challenger candidate may need a campaign-finance-compliance attorney to help navigate this quagmire, but because the challenger lacks the ability to raise money relative to an incumbent,[7] he likely cannot afford that lawyer unless he is already wealthy.[8] It is

4. *See, e.g.*, Molly Ball, *The Republican Wave Sweeps the Midterm Elections*, THE ATLANTIC (Nov. 5, 2014), http://www.theatlantic.com/politics/archive/2014/11/republicans-sweep-the-midterm-elections/382394/; Amanda Terkel, *Blue Dog Coalition Crushed by GOP Wave Election*, HUFFINGTON POST (Nov. 3, 2010), http://www.huffingtonpost.com/2010/11/03/blue-dog-coalition-gop-wave-elections_n_778087.html; Griff Witte et al., *Trump's Win May Be Just the Beginning of a Global Populist Wave*, WASH. POST (Nov. 13, 2016), https://www.washingtonpost.com/world/trumps-win-may-be-just-the-beginning-of-a-global-populist-wave/2016/11/13/477c3b26-a6ba-11e6-ba46-53db57f0e351_story.html.

5. Citizens United v. FEC, 558 U.S. 310, 324 (2010) ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . or seek declaratory rulings before discussing the most salient political issues of our day.").

6. Learn Liberty, *Money in Politics*, YOUTUBE (Oct. 22, 2012), https://youtu.be/E8rvjq-Gdio (describing the effect of campaign finance laws as turning elections into "a specialized game for an elite group of people who know the ropes and can manipulate them to their advantage"); *see also* Bradley A. Smith, Josiah H. Blackmore II/Shirley M. Nault Professor of Law, Capital University Law School, and former FEC Chairman, Campaign Finance and Free Speech Panel Remarks at Columbia Law School to the Federalist Society National Student Symposium: The First Amendment in Contemporary Society (Mar. 4, 2017) [hereinafter Smith, Federalist Society National Student Symposium], https://youtu.be/4bryBZTY4_Y (observing that federal campaign finance law regulates 71 types of entities engaging in 33 different types of speech through a mix of statutes and 568 pages of regulations, all of which together is, on paper, 75% longer than Plato's *The Republic*, a seminal text in Western political philosophy); Chris Reeves, *Nuts & Bolts: Inside a Democratic Campaign—AAARGH! Campaign Finance*, DAILY KOS (July 30, 2016, 4:01 PM), http://www.dailykos.com/stories/2016/7/30/1554656/-Nuts-amp-Bolts-Inside-a-Democratic-Campaign-AAARGH-Campaign-Finance (highlighting "obvious" booby-traps in campaign finance that nevertheless result in "[g]iant mistake[s]" when new candidates run for office).

7. *See* MERRINER & SENTER, *infra* note 226 and accompanying text.

8. Learn Liberty, *supra* note 6.

difficult to reconcile such a result with the goal of leveling the campaign playing field that campaign finance law purports to achieve.

Second, Congress and the FEC premised federal statutory and regulatory coordination rules on quixotic objectives that, defying explanation, faulty Supreme Court reasoning continues to reinforce.[9] Since most states have enacted coordination statutes that mirror federal law, states have likewise erected their houses of coordination cards on porous foundations. States either follow the federal government's lead, and treat coordinated expenditures as contributions to a candidate that are subject to statutory limits, or they prohibit coordination between candidates and independent expenditure groups ("IE groups" or "IE committees") under the pain of varying degrees of civil and criminal penalties.[10] State statutes also fail to meaningfully define exactly what type of conduct constitutes prohibited coordination, which results in substantial overbreadth.[11]

Third, the federal government and the states employ a kaleidoscope of different enforcement regimes. This variance undermines, rather than restores, our faith in the political process, and could chill political participation—especially given how difficult it has become to separate innocent from illegal conduct.[12] States occupy a unique position in the American republican form of government that empowers them to drive broad-based reform in this problematic area of campaign finance law. Just as clearly drafted model rules in other areas of law have increased social and economic stability and predictability, a clearly drafted model conduct standard for what constitutes a prohibited coordinated communication would intuitively cure most of the problems with the prevailing regime.[13]

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9. *See infra* Section II.A.

10. *See infra* Sections III.A, III.B, III.C.

11. *See infra* Section III.B.

12. *See infra* Sections II.B, II.C, III.C, III.D.

13. In an ideal world, lawmakers in the States *and* Congress would repeal most campaign finance laws, starting with coordination prohibitions and contribution limits. After all, whereas some think money in politics will destroy democracy as we know it—see LESSIG, *infra* note 21, and Wertheimer, *infra* note 30, for example—campaign finance went largely unregulated in the first two centuries of the Republic's existence. Bradley A. Smith, *Campaign Finance Regulation: Faulty Assumptions and Undemocratic Consequences*, 238 CATO INST. POL'Y ANALYSIS 1, 2 (1995) [hereinafter Smith, *Campaign Finance Regulation*]. During that time period, the

But fourth, state legislatures should not reach for just any conduct standard. If they did, they would make the same error they made when they haphazardly adopted the language of federal statutes and regulations. Rather, States should kill two birds with one stone by considering fundamental liberal values and civil liberties that coordination laws implicate before adopting a common conduct standard.[14] When considering fundamental values, lawmakers should also embrace, rather than ignore, practical realities of electoral politics that the law need not try to correct.[15]

Americans have had a love-hate relationship with money in politics since the founding era. On one hand, we fear that a flood of campaign resources will unduly manufacture an electoral outcome. The kind of politicking that induces this fear predates the American Revolution. It was common practice in the mid-eighteenth century in America, for example, for political candidates to bribe voters with alcohol in exchange for their support; even George Washington learned very quickly how to play the game of outright vote-buying when he was an up-and-coming politico.[16] Nevertheless, scholars and artists alike lionize Washington to this day as the Platonic form of an

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United States nevertheless managed to abolish slavery, extend the voting franchise to women and racial minorities, defeat the Nazis, pass the Civil Rights Act, and achieve a myriad of other pluralistic and democratic social reforms. Smith, Federalist Society National Student Symposium, *supra* note 6. Conceding that contemporary political headwinds will frustrate wholesale repeal of major pillars of American campaign finance law, I settle here for incremental change.

14. *See infra* Section IV.A.

15. *See infra* Sections IV.B, IV.C.

16. DENNIS J. POGUE, FOUNDING SPIRITS: GEORGE WASHINGTON AND THE BEGINNINGS OF THE AMERICAN WHISKEY INDUSTRY 16 (2011). By spending money liquoring up prospective voters, the nation's first president grew his voter base from 40 to 310 in consecutive campaigns for the Virginia House of Burgesses in the 1750s—an increase of 675%. *Id.* Lest the reader think this tale too quaint or anachronistic to have any current relevance, an assistant U.S. attorney in Tennessee indicted two individuals in early 2017 on 14 counts of conspiracy to buy votes and 13 counts of paying people to vote for a particular candidate in the 2014 U.S. Senate primary election in Tennessee. Jamie Satterfield, *Duo Accused of Paying for Votes in 2014 U.S. Senate Race*, THE TENNESSEAN (Feb. 28, 2017, 9:21 AM), http://www.tennessean.com/story/news/crime/2017/02/28/duo-accused-paying-votes-2014-us-senate-race/98518348/. *Cf.* Richard L. Hasen, *Vote Buying*, 88 CALIF. L. REV. 1323, 1327 (2000) (recounting that vote-buying persisted in America long after the founding era).

American statesman,[17] underscoring the "love" part of our love-hate relationship with money in politics: we seem to tolerate certain political tactics if the right person uses them.[18]

On the other hand, we fear that lawmakers forge our public policy on the anvils of bribery when monied interests can stroke large checks into candidates' campaign accounts. Campaign finance reform proponents often presume that financial contributions are prima facie evidence of quid pro quo corruption. One of the original co-sponsors of the Bipartisan Campaign Reform Act of 2002,[19] for instance, refers to campaign contributions as "legalized bribery."[20] Professor Lawrence Lessig, a prolific critic of the contemporary American campaign finance regime, also used a legalized-bribery conceptual framework for a recent, sweeping missive on the topic (although he uses the terms "economy of influence" and "engine of influence," which purportedly supply the conditions for and drive "a much more virulent . . . corruption" than bare criminal bribery).[21] The rise of

17. *See, e.g.*, Matthew Spalding, *American Statesman: The Enduring Relevance of George Washington*, HERITAGE FOUND. (Sept. 4, 2012), http://www.heritage.org/research/reports/2012/09/american-statesman-the-enduring-relevance-of-george-washington; *see also* JONATHAN GROFF, *I Know Him*, *on* HAMILTON: AN AMERICAN MUSICAL at 0:07–0:22, 1:00–1:08 ("They say George Washington's yielding his power and stepping away . . . I wasn't aware that was something a person could do . . . *There's nobody else in their country who looms quite as large . . . Next to Washington, they all look small*." (emphasis added)).

18. To wit, despite his vote-buying earlier in his political career, delegates to the Constitutional Convention at Philadelphia in 1787 unanimously chose George Washington as convention president, and delegates on the Senate Title Committee proposed "that the president [of the new nation, likely Washington,] be addressed as 'His Highness, the President of the United States, and Protector of their Liberties'"—signs that Washington's contemporaries forgave his shortcomings and inadvertently white-washed his political indiscretions for posterity. GENE HEALY, THE CULT OF THE PRESIDENCY: AMERICA'S DANGEROUS DEVOTION TO EXECUTIVE POWER 15–16 (2008), https://object.cato.org/sites/cato.org/files/documents/cult-of-the-presidency-pb.pdf.

19. Pub. L. No. 107-155, 116 Stat. 81 (codified at 52 U.S.C. § 30101, *et seq.*).

20. David M. Primo, *Public Opinion and Campaign Finance: Reformers Versus Reality*, 7 INDEP. REV. 207, 213 (2002).

21. LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 7–8 (2012), http://lesterland.lessig.org/pdf/republic-lost.pdf. Professor Lessig also gives frequent public talks about "Lesterland," a view of America in which only 150,000 people—

"machine politics" in 19th century deserves some blame for our fear of "legalized bribery." The notoriously corrupt William M. "Boss" Tweed used the patronage system at Tammany Hall in New York to consolidate his personal power and permanently entrench the Democratic Party in municipal politics.[22]

The Watergate scandal, the Rosemary's-baby of unbridled political ambition,[23] may have undermined Americans' confidence in government forever.[24] To try to restore that faith in the system and level the political playing field, Congress enacted very aggressive campaign finance laws in the wake of the Watergate scandal and its ensuing political turmoil.[25] These reforms entailed prohibitions on coordination between candidates and outside groups.

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the same number of actual American citizens with the name "Lester"—control political outcomes in Congress through campaign donations, a "system of corruption that has now wrecked our government." Lawrence Lessig, *The U.S.A. Is Lesterland*, http://lesterland.lessig.org/ (last visited Mar. 6, 2018); *accord Lawrence Lessig: We the People, and the Republic We Must Claim*, TED, http://www.ted.com/talks/lawrence_lessig_we_the_people_and_the_republic_we_must_reclaim (last visited Mar. 6, 2018) (delivering a talk on "Lesterland" to a 2013 TED conference audience).

22. *See generally* Steven P. Erie & Vladmir Kogan, *Machine Bosses, Reformers, and the Politics of Ethnic and Minority Incorporation*, *in* THE OXFORD HANDBOOK OF AMERICAN IMMIGRATION AND ETHNICITY 1–3 (2014), http://u.osu.edu/kogan.18/files/2015/12/Oxford-13alpli.pdf (discussing the history of Boss Tweed).

23. *See* Jason Waggoner, *Crime and Ambition: Richard Nixon and Watergate*, RES PUBLICA (Apr. 1994), http://ashbrook.org/publications/respub-v5n1-waggoner/.

24. *Cf.* Lydia Saad, *Americans' Faith in Government Shaken but Not Shattered by Watergate*, GALLUP (June 19, 1997), http://www.gallup.com/poll/4378/americans-faith-government-shaken-shattered-watergate.aspx (observing that the percentage of Americans with "high trust" in government "to do what is right" dropped from over 50% between 1958 and 1972 to 36% in 1974, and noting that the percentage has remained below 50% ever since); *accord* Jeffrey M. Jones, *Americans' Trust in Executive, Legislative Branches Down*, GALLUP (Sept. 15, 2014), http://www.gallup.com/poll/175790/americans-trust-executive-legislative-branches-down.aspx (noting that the political branches of government enjoy the least amount of voter confidence, writing that "Americans' trust in the legislative branch fell six percentage points this year to a new low of 28%. Trust in the executive branch dropped eight points, to 43% . . . .").

25. John Blake, *Forgetting a Key Lesson from Watergate?*, CNN POLITICS, http://www.cnn.com/2012/02/04/politics/watergate-reform/ (last updated Feb. 4, 2012, 2:28 PM) ("Many Americans may not remember, but public outrage over

Activists, lawmakers, and commentators have recently taken renewed interest in—and expressed concern over—coordination laws in the era of so-called super political action committees ("super PACs"). Super PACs are a relatively new species of IE committee that can raise and spend unlimited sums of money on political communications calling for the election or defeat of a candidate, and are organized for the sole purpose of making independent expenditures ("IEs").[26] Evidence of alarm has manifested in activists filing an FEC complaint in 2016 against former Secretary Hillary Clinton's presidential campaign, alleging that it illegally coordinated with the Correct the Record super PAC.[27] In 2015, U.S. Senate Judiciary Committee Ranking Member Patrick Leahy and U.S. House Representative David Price introduced legislation in their respective chambers specifically targeting coordination between campaigns and super PACs.[28] Also in 2015, the U.S. Department of Justice prosecuted its first criminal coordination case when Tyler Harber, serving as both campaign manager and general consultant to a candidate, and as the director of a super PAC, coordinated $325,000 in expenditures by the super PAC to help the candidate's ultimately doomed effort.[29] If we

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Watergate led to the enactment of a series of campaign finance reforms designed to restore the country's faith in government.").

26. *See generally* Smith, *Super PACs*, *supra* note 2; *Super PACs*, OPENSECRETS, http://www.opensecrets.org/pacs/superpacs.php (last visited Jan. 23, 2018). Super PACs emerged in American politics following the U.S. Supreme Court's decision in *SpeechNow.org v. FEC*. 599 F.3d 686 (D.C. Cir. 2010), *cert. denied*, 562 U.S. 1003 (2010). The term "super PAC" has become a term of art in campaign finance law, but it originated in the Fourth Estate. *See generally* Dave Levinthal, *Genesis of a Super Name*, POLITICO, https://www.politico.com/story/2012/01/genesis-of-a-super-name-071285 (last updated Jan. 10, 2012, 1:41 PM).

27. Chris White, *FEC Complaint Accuses Clinton Campaign of Illegally Coordinating with David Brock Super PAC*, LAW & CRIME (Oct. 6, 2016, 1:08 PM), http://lawnewz.com/high-profile/fec-complaint-accuses-clinton-campaign-of-illegally-coordinating-with-david-brock-super-pac/.

28. Stop Super PAC-Candidate Coordination Act, S. 1838, 114th Cong. (2015) (as introduced and referred to S. Comm. on Rules and Admin., July 22, 2015); Stop Super PAC-Candidate Coordination Act, H.R. 425, 114th Cong. (2015) (as referred to H. Comm. on H. Admin., Jan. 21, 2015).

29. Press Release, U.S. Justice Dep't Office of Pub. Affairs, Campaign Manager Pleads Guilty to Coordinated Campaign Contributions and False Statements (Feb. 12, 2015), http://www.justice.gov/opa/pr/campaign-manager-pleads-guilty-

do not prevent coordination between campaign and super PACs, the emerging conventional wisdom says, then not only could candidates build avenues around contribution limits, but they could have access to unlimited sums of cash,[30] thus effectively eviscerating $2,700 contribution limits.[31] Alarm bells have rung in the academy, too.[32]

Scholars' disagreement over how to measure corruption complicates the analysis of whether or to what extent we should regulate campaign contribution.[33] Some monied interests no doubt have corrupt motives for giving, but some donors do not want anything in return for their check; they just want to *feel* like a mover or shaker,

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coordinated-campaign-contributions-and-false-statements; Russ Choma, *DOJ Announces First Prosecution for Illegal Coordination Between Candidate and Super PAC*, OPENSECRETS BLOG (Feb. 12, 2015), http://www.opensecrets.org/news/2015/02/dojs-announces-first-prosecution-for-illegal-coordination-between-candidates-and-super-pacs/.

30. Fred Wertheimer, *A Reform Agenda to Counter Big Money in American Politics*, HUFFINGTON POST (Jan. 21, 2016, 11:18 AM), http://www.huffingtonpost.com/fred-wertheimer/a-reform-agenda-to-counte_b_9040154.html ("Individual-candidate Super PACs support one candidate, are controlled by close associates of that candidate and raise and spend unlimited contributions to support that candidate. They allow a candidate and the candidate's supporters to *circumvent the $2,700 limit* [per contributor] per election on the amount a candidate's campaign can receive. They give a candidate the direct benefit of *unlimited contributions* spent on their behalf." (emphasis added)); *see also* Editorial, *The Line at the "Super PAC" Trough*, N.Y. TIMES (Feb. 15, 2014), https://www.nytimes.com/2014/02/16/opinion/sunday/the-line-at-the-super-pac-trough.html ("This election year will be the moment when individual candidate super PACs—a form of legalized bribery—become a truly toxic force in American politics.").

31. $2,700 is the current ceiling on contributions a candidate may permissibly accept from a donor. *Contribution Limits*, FEC, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits-candidates/ (last visited Jan. 23, 2018).

32. *See generally, e.g.*, Brent Ferguson, *Beyond Coordination: Defining Indirect Contributions for the Super PAC Era*, 42 HASTINGS CONST. L.Q. 471 (2015) (calling for a broader definition of indirect contributions to candidates to mitigate influence of money in politics in the super PAC era).

33. *See, e.g.*, Anna W. Jacobs, Greasing the Skids: How Corporate Elite Campaign Donations Shape State-Level Collective Bargaining Legislation 38–47 (May 2017) (unpublished Ph.D. dissertation, Vanderbilt University) (on file with author) (arguing that substantial flaws exist in much of the conventional literature attempting to quantify the influence of campaign donations).

like someone in Washington will pick up the phone *if* the donor ever decides to call.[34] Furthermore, differing legal standards in our federal republican system, wherein a federal Congress and fifty sovereign states each have the power to enact their own laws, that in turn leave voters, the media, first-time candidates, scholars, judges, attorneys, and laymen alike to guess at what is against the law,[35] also complicate the analysis.

Several commentators have tackled problems with coordination doctrine, each wrestling with certain features of *federal law* and proposing solutions to various problems as they see them.[36] This Note

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34. *See generally* MEET THE DONORS: DOES MONEY TALK? (HBO Documentaries 2016) [hereinafter MEET THE DONORS] (interviewing "mega-donors" on the American left and right of politics to probe why they give money to political candidates). I concede that, if any donor profiled in Ms. Pelosi's documentary in fact has corrupt motives, they would not likely say so with a camera recording their remarks.

35. *See, e.g.*, Brian Resnick, *How to Make Sense of America's Wildly Different, Confusing Patchwork of Gun Control Laws*, THE ATLANTIC (Dec. 17, 2012), https://www.theatlantic.com/politics/archive/2012/12/how-to-make-sense-of-americas-wildly-different-confusing-patchwork-of-gun-control-laws/454299/ ("[T]he ease of gun ownership varies widely across the country."); *see also Despite Changes, Landscape Remains Confusing for Practicing Law in Other Jurisdictions*, ABA NEWS (Mar. 2016), https://www.americanbar.org/news/abanews/aba-news-archives/2016/02/despite_changes_lan.html (noting that divergent state ethics rules and developing reform proposals make it difficult for attorneys to know how or whether to practice in a foreign jurisdiction). *Cf.* Cassy Arsenault, *Cannabis Confusion: Officials Hope to Clear Up New State Law*, FOX 17 WEST MICHIGAN (Feb. 6, 2017, 10:18 PM), http://fox17online.com/2017/02/06/cannabis-confusion-officials-hope-to-clear-up-new-state-law/ (reporting that Michigan law enforcement agencies are struggling to develop enforcement practices as municipalities in Michigan develop disparate medical marijuana dispensary licensing regulations under an ambiguous state statute).

36. *See, e.g.*, Robert F. Bauer, *The Right to "Do Politics" and Not Just to Speak: Thinking About the Constitutional Protections for Political Action*, 9 DUKE J. CONST. L. & PUB. POL'Y 67 (2013) [hereinafter Bauer, *Do Politics*] (arguing that privileging non-coordinated speech in the law inhibits associations and coalitions that are essential to public participation); Michael D. Gilbert & Brian Barnes, *The Coordination Fallacy*, 43 FLA. ST. U. L. REV. 399 (2016) [hereinafter Gilbert & Barnes, *Fallacy*] (positing that coordination regulations may violate the Constitution); Richard L. Hasen, *Super PAC Contributions, Corruption, and the Proxy War over Coordination*, 9 DUKE J. CONST. L. & PUB. POL'Y 1 (2014) [hereinafter Hasen, *Proxy War*] (arguing that, until the Supreme Court's definition of "corruption" changes,

is the first contribution to the campaign finance literature to comprehensively survey and critique *state coordination statutes*, and consequently it is the first to argue for state-level reforms that will drive liberalization of the problematic federal campaign finance law regime. Drafted without clear standards for what conduct gives rise to a violation, this Note argues that federal and state coordination laws—coupled with political actors using the specter of coordination as a rhetorical cudgel[37] against opponents—fuel confusion and undermine confidence in American elections. With the problem thus framed, this Note then argues that states should, at a minimum, amend their coordination statutes with a narrow model conduct standard that would offer clarity and certainty to candidates, IE groups, judges, scholars, media, voters, and laymen alike.

Part II surveys the development of federal coordination law and applies it to historical and hypothetical examples of campaign conduct to highlight the ambiguity, vagueness, and substantial overbreadth of

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statutory reforms to police coordination in the super PAC era are likely to fail); Meredith A. Johnston, *Stopping "Winks and Nods": Limits on Coordination as a Means of Regulating 527 Organizations*, 81 N.Y.U. L. REV. 1166 (2006) (calling on Congress to reform the Internal Revenue Code to stop coordination between candidates and soft money groups). *See also* Amanda G. Altman, Note, *Party Poopers: The Supreme Court Overlooks the Party in* Federal Election Commission v. Colorado Republican Federal Campaign Committee, 46 ST. LOUIS L.J. 1001 (2002) (examining the relationship between coordination doctrine and political parties in the context of three Supreme Court cases); Daniel W. Butrymowicz, Note, *Loophole.com: How the FEC's Failure to Fully Regulate the Internet Undermines Campaign Finance Law*, 109 COLUM. L. REV. 1708, 1724–40 (2009) (arguing that the FEC should more aggressively police coordination online in the federal elections context); Craig A. Defoe, Note, *Regulating Coordinated Communications: How the FEC Rules Restrict Business Communications and Benefit Incumbents*, 40 IND. L. REV. 119 (2007) (arguing that coordination rules are overbroad and should be reformed to protect legitimate business communication interest); Mark E. Klepner, Note, *When "Testing the Waters" Tests the Limits of Coordination Restrictions: Revising FEC Regulations to Limit Pre-Candidacy Coordination*, 84 FORDHAM L. REV. 1691 (2016) (advocating for tighter coordination rules to prevent coordination between candidates and super PACs that support them before the candidate declares her candidacy).

37. *See* Smith, *Super PACs*, *supra* note 2, at 606. See also *infra* notes 228–230 and accompanying text for a theoretical explanation of how opaque campaign finance laws rationally incentivize candidates to over-consume political capital by exploiting voters' misunderstanding and how this results in inefficient representation.

the doctrine. Part III examines the States' coordination statutes, probes their inherent defects that often result from ambiguities, and posits that the lack of consistency across the States undermines, rather than safeguards, our politics. Part IV parses some of the more important and fundamental legal and philosophical underpinnings of Western liberal political theory that should heavily color a model statute for policing coordination. Finally, Part V concludes by, first, examining Professor Brad Smith's favored proposal for defining coordination conduct at the federal level, and, second, proposing a tightened model standard for states' coordination laws that could help restore confidence in our system of elections—the very reason Congress first enacted comprehensive campaign finance laws.

II. FEDERAL COORDINATION DOCTRINE

To appreciate the scope of the problems with coordination doctrine, it is important to survey the federal campaign finance laws that States have used as templates for their own analogues. For a long time in American history, nobody did much of anything to regulate campaign finance. Although some states enacted disclosure laws and prohibitions on corporate contributions in the 19th century, and Congress experimented with campaign finance laws in the first half of the 20th century, the Federal Election Campaign Act of 1971 and its subsequent amendments in 1974 were Congress's first real attempts to regulate money in politics.[38]

A. Establishing the Regime

1. The Federal Election Campaign Act and *Buckley*'s Curious Dual Anti-Corruption Rationale

Congress took a relatively hands-off approach to regulating campaign finance prior to Watergate.[39] Since then, however, a combination of federal statutes, regulations, and case law have worked together to develop coordination doctrine.[40] The Federal Election

38. Smith, *Campaign Finance Regulation*, *supra* note 13.

39. *Id.*

40. For an additional synopsis of the development of federal coordination law, see Robert F. Bauer, *The McCain-Feingold Coordination Rules: The Ongoing*

Campaign Act of 1971 ("FECA")[41] was Congress's first real attempt "[t]o promote fair practices in the conduct of election campaigns for Federal political offices."[42] FECA defined two terms—"contribution" and "expenditure"—that have become common vernacular in both federal and state coordination law.[43] FECA's definitions of "contribution" and "expenditure" persist in federal statutory law today, almost half a century later, with very little amendment occurring in the intervening period.[44] The 1974 amendments to FECA established hard statutory caps on both contributions that a candidate for federal office could accept and expenditures his campaign could make in connection with his bid for office.[45]

Following the 1974 amendments, FECA saw its first facial challenge on First Amendment grounds in *Buckley v. Valeo*.[46] The U.S. Supreme Court ultimately invalidated FECA's post-1974 *expenditure* limits because

> [t]he distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information *has made these expensive*

Program to Keep Politics Under Control, 32 FORDHAM URB. L.J. 507, 509–21 (2005) [hereinafter Bauer, *McCain-Feingold Coordination Rules*].

41. Federal Election Campaign Act, Pub. L. No. 92-225, 86 Stat. 3 (1971).

42. Federal Election Campaign Act pmbl., 86 Stat. at 3; *see also* Smith, *Campaign Finance Regulation*, *supra* note 13.

43. Federal Election Campaign Act § 201, 86 Stat. at 8–9. These terms have relatively plain meanings: a contribution is money or resources a campaign receives through donations in connection with an election, and an expenditure is money or resources a campaign spends in connection with an election. *See id.*

44. *Compare id.*, *with* 52 U.S.C. §§ 30101(8)(A)(i)–(ii), (9)(A)(i) (2012).

45. Smith, *Campaign Finance Regulation*, *supra* note 13, at 2.

46. 424 U.S. 1 (1976) (per curiam). In *Buckley*, candidates for President of the United States and U.S. Senate, a potential donor, two state political parties, a national political party, and four outside groups filed suit against the Secretary of the U.S. Senate and Clerk of the U.S. House (both of whom were ex officio FEC members), the FEC, the U.S. Attorney General, and the U.S. Comptroller General, seeking a declaratory judgment that several provisions of FECA and its 1974 amendments violated the Federal Constitution and an injunction against enforcement of FECA. *Id.* at 7–9.

> *modes of communication indispensable instruments of effective political speech*.[47]

Because resources are but-for causes of constitutionally protected political speech, FECA's expenditure limits thus "represent[ed] *substantial* rather than *merely theoretical* restraints on the quantity and diversity of political speech."[48] This reasoning is particularly relevant in an economy in which candidates have no control over fluctuating prices for print, web, and television advertising services.[49] Under the *Buckley* court's reasoning, when other advertisers bid higher on a 30-second airtime slot on a local television network than either a campaign can afford or statutory expenditure limits will allow, a candidate who must forego television advertising suffers an impermissible restraint on his speech. That is, the other advertisers may effectively silence the candidate by pricing him out of speaking on the airwaves. The best remedy is to remove artificial restrictions on the candidate's ability to participate in the bidding for airtime to the extent he is willing to engage.

It is true that campaigns can spend money on a variety of advertising methods, and in the absence of television advertising, other channels are available.[50] But if a statute limits a candidate's advertising choices to channels that are largely *in*effective in communicating persuasive messages to voters, the statute in effect forces a candidate to forego advertising at all, which is tantamount to

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47. *Id.* at 19 (emphasis added); *accord* Justice Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 252 (2002) ("Money is not speech, it is money. But the expenditure of money enables speech; and that expenditure is often necessary to communicate a message, particularly in a political context. A law that forbids the expenditure of money to convey a message could effectively suppress that communication.").

48. *Buckley*, 424 U.S. at 19 (emphasis added).

49. *Cf.* MAGID ABRAHAM, COMSCORE, THE ECONOMICS OF ONLINE ADVERTISING 5–7 (Linda B. Abraham & Andrea Vollman eds., 2012) (on file with author) (explaining how the market forces of supply and demand determine the prices that advertisers that must pay to media platforms that in turn promote their ads).

50. For this proposition, I rely on my professional experience as a communications strategist for political, non-profit, and industry clients in the years preceding my legal education. *See* George Scoville, LINKEDIN, https://www.linkedin.com/in/ScovilleLaw (last visited Feb. 20, 2018) [hereinafter Scoville, LINKEDIN].

a restraint on political speech in the *Buckley* Court's view. To wit, industry analyses are yet inconclusive as to whether online advertising is as effective as television advertising.[51] Although the First Amendment does not guarantee access to effective advertising channels by its terms,[52] locking a candidate in an empty room where no voters can hear him, and saying with a shrug, "well, he *can* still speak," would be (or ought to be) repugnant to constitutional values.[53]

While the *Buckley* Court rightly invalidated expenditure limits, it nevertheless curiously established a dual anti-corruption rationale that undergirds contribution limits in modern campaign finance law. In its strict-scrutiny analysis, the *Buckley* Court ruled that Congress has a compelling governmental interest in "limit[ing] the actuality *and appearance of* corruption resulting from large individual financial contributions," and it upheld FECA's contribution limits.[54] The Court defined "appearance of corruption" as "public awareness of the opportunities for abuse inherent in a regime of large individual

51. *Compare, e.g.*, Jason Lynch, *ABC Study Makes the Best Case Yet That TV Advertising Is Still Superior to Digital*, ADWEEK (May 17, 2016), http://www.adweek.com/tv-video/abc-study-makes-best-case-yet-tv-advertising-still-superior-digital-171510/, *with U.S. Digital Ad Spending to Surpass TV This Year*, EMARKETER (Sept. 13, 2016), https://www.emarketer.com/Article/US-Digital-Ad-Spending-Surpass-TV-this-Year/1014469.

52. *See* U.S. CONST. amend. I.

53. *Cf.* Citizens United v. FEC, 558 U.S. 310, 326 (2010) ("While some means of communication may be less effective than others at influencing the public in different contexts, any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the court's own lawful authority."); *cf. also* Colo. Republican Fed. Campaign Comm. v. FEC (*Colorado I*), 518 U.S. 604, 644 (1996) (Thomas, J., dissenting) ("[T]hat other modes of expression remain open to regulated individuals or groups does not mean that a statute is the least restrictive means of addressing a particular social problem."); Smith, Federalist Society National Student Symposium, *supra* note 6 (observing that, while "money" is not categorically "speech," serious constitutional issues would arise from a law that prohibits a criminal defendant from spending all the money he could afford to obtain the most effective legal representation).

54. *See* Buckley v. Valeo, 424 U.S. 1, 26–29 (1976) (emphasis added) ("We find that . . . the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling.").

financial contributions."[55] Moreover, the Court postulated that this awareness would undermine voters' faith in democratic government "to a disastrous extent" if left unchecked; thus, it held that the Constitution did not bar Congress from enacting laws designed to prevent the mere "appearance of corruption."[56] This is a problematic line of reasoning.

First, the liberal political theory buttressing America's charters of liberty presupposes that man is inherently fallible,[57] and thus the Framers drafted a Constitution that divided power horizontally and vertically, replete with checks and balances, to protect liberty from tyranny and corruption.[58] In this regard, it is unlikely that any legislation *could* wipe an "appearance of corruption" from the public consciousness, even if incumbents desired to do so, and it is bizarre that the Court permitted Congress to go forward with such a doomed project on such unstable footing. Second, in practical terms, American attitudes about whether elected officials *really* work for them have largely soured in recent decades[59]—which evidences Congress's abject failure to prevent an appearance of corruption, even if it has the Court's blessing to try.

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55. *Id.* at 27.

56. *Id.* (citing Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548, 565 (1973)).

57. *See generally* THE FEDERALIST NO. 51 (James Madison) ("If *angels* were to govern men, *neither external nor internal controls on government would be necessary*. In framing a government which is to be administered *by men* over men, *the great difficulty* lies in this: you must first enable the government to control the governed; and in the next place *oblige it to control itself*." (emphasis added)); *cf.* THE FEDERALIST NO. 10 (James Madison) (decrying the "mischiefs of faction"). When Madison wrote about the "mischiefs of faction," he was writing from personal experience: from his days at Princeton through the publication of the *Federalist Papers* and into the new republic, the father of the Virginia Plan and architect of the United States Constitution was a special-interest specialist. *See* Burdett A. Loomis, *Learning to Lobby: Groups, Venues, and Information in Eighteenth-Century America*, *in* INTEREST GROUP POLITICS 45–47 (Allan J. Cigler & Burdett A. Loomis eds., 8th ed. 2012).

58. *See generally* U.S. CONST. arts. I–III; *see also* U.S. CONST. amend. X.

59. *See* Saad, *supra* note 24 and accompanying text; *see also infra* notes 251–252 and accompanying text.

In upholding FECA's *contribution* limits, the Court concluded that Congress had narrowly tailored FECA to this anti-corruption end, reasoning that

> [a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. . . . At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money *a person* may give to a candidate or campaign organization thus involves little direct restraint on *his* political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe *the contributor's freedom to discuss candidates and issues* [in ways other than directly contributing to a candidate].[60]

As Professor Smith notes,[61] we can infer from the final clause of this passage that a separate, constitutionally protected category of political spending exists: the IE.

The *Buckley* Court also "tolerat[ed] restraints on a form of *associational conduct*" when it construed FECA's 1974 amendments and upheld the contribution limits contained therein, paying particular attention to whether an election-related expenditure was truly independent, or whether the law should treat the IE as a contribution to the candidate.[62] Through the lens of its anti-corruption principle, the Court opined that "[t]he absence of prearrangement and coordination of an [independent] expenditure with the candidate . . . alleviates the danger that [truly independent] expenditures will be given as a quid pro quo for improper commitments from the

60. Buckley v. Valeo, 424 U.S. 1, 21 (1976) (emphasis added) (citations omitted).

61. Smith, *Super PACs*, *supra* note 2, at 612.

62. *Id.* (emphasis added). The *Buckley* Court's toleration of an encroachment on associational freedom is particularly problematic in the coordination context, in light of related First Amendment jurisprudence that had existed for over a decade when the Court decided *Buckley*, and which remains good law to this day. *See infra* Section IV.A.3.

candidate."[63] Because there is no risk of quid pro quo corruption when a candidate has no involvement with an expenditure, the Court held that FECA's limits on IEs violated the First Amendment.[64] Thus, federal coordination doctrine was born: expenditures that *do* arise from coordination between candidates and IE groups *can* violate FECA's contribution limits.

Federal courts have since added contours to federal coordination laws that underscore FECA's focus on whether a given financial transaction results in quid pro quo corruption or creates the appearance thereof. In the *Colorado Republican* cases, for example, the U.S. Supreme Court first held in a plurality opinion that political parties can legally make expenditures independently of the candidates they back.[65] Then, on remand, the Tenth Circuit invalidated limits on expenditures coordinated between political parties and the candidates they support.[66] Relying on *Colorado I*, the *Colorado II* Court reasoned that coordination between candidates and political parties is uncontroversial because political parties exist for the precise function of recruiting and electing candidates to office; there is no valid anti-corruption rationale for banning coordination between them.[67]

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63. *Buckley*, 424 U.S. at 47. Inversely, then, in the Court's logic, prearrangement is what introduces the danger of quid pro quo corruption. *Cf. infra* Section V.B (explaining the rationale for the proposed model standard advanced in this discourse).

64. *Id.* at 47–48, 51.

65. Colo. Republican Fed. Campaign Comm. v. FEC (*Colorado I*), 518 U.S. 604, 622–23 (1996). The FEC brought the case in *Colorado I* under FECA's limits on expenditures by a political party in a general election, after the Colorado Republican Party paid for a series of radio ads attacking Democratic candidate Timothy Wirth. *Id.* at 608. The Court rejected the FEC's theory that the expenditures at issue were impermissibly coordinated because "a party and its candidate are identical, i.e. the party, in a sense, 'is' its candidates," reasoning instead that, if a party *is* its candidates, then the party necessarily cannot corrupt its candidates, and there is no compelling interest in regulating the expenditures. *Id.* at 622–23.

66. FEC v. Colo. Republican Fed. Campaign Comm. (*Colorado II*), 213 F.3d 1221, 1232 (2000) ("[W]e conclude that the Party Expenditure Provision constitutes a 'significant interference' with the First Amendment rights of political parties." (quoting *Buckley*, 424 U.S. at 25)).

67. *Id.* at 1233 (writing that the FEC "has not demonstrated on remand that coordinated spending by political parties corrupts, or creates the appearance of corrupting, the electoral process," and thus the ban on expenditures that political

2. The Bipartisan Campaign Reform Act, the FEC's Coordination Regulations, and Recent Cases

After a scandal-ridden decade of Democratic control between the mid-1980s and mid-1990s, Republicans undertook sweeping ethics reforms of the House and Senate,[68] and Congress enacted the first major campaign finance legislation since FECA: the Bipartisan Campaign Reform Act of 2002 ("BCRA").[69] Commentators attribute several purposes to BCRA, including that Congress thought the legislation would "provide for 'equality' in the political process, help reduce the total amount of money in the political process, reduce the fundraising demands on federal officials, and limit negative campaigning."[70] Section 214 of BCRA directed the FEC to "promulgate new regulations on coordinated communications[,] paid for by persons other than candidates," that address

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parties and their candidates coordinated was not narrowly tailored to serve a compelling governmental interest).

68. *See* JULIET EILPERIN, FIGHT CLUB POLITICS: HOW PARTISANSHIP IS POISONING THE HOUSE OF REPRESENTATIVES 2, 11 (2006) (recounting the causes and outcomes of the Newt Gingrich-led "Republican Revolution" of 1994); *see also* THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK 77–80, 94–95 (2006). Consecutive scandals, including a congressional ethics panel implicating 269 representatives in the over-drafting of checks in the House bank and the mismanagement of funds in the House post office, weighed on the 1992 election cycle. *Id.* at 77–80. Seventy-seven incumbents implicated in the bank scandal retired or lost reelection in 1992, with 110 freshman members winning House seats. *Id.* at 79. The scandals ultimately led to a hyper-focus on legislative ethics heading into the 1994 election cycle. *Id.* at 94–95.

69. Pub. L. No. 107-155, 116 Stat. 81 (codified at 52 U.S.C. § 30101, *et seq.*). With respect to the level of contribution limits, BCRA preserved FECA's limits, indexed for inflation to account for changing macroeconomic conditions. *See* 52 U.S.C. § 30116 (2012). It also maintained FECA's contribution/expenditure dichotomy. *See supra* notes 43–44 and accompanying text.

70. Robert F. Bauer, *When "The Pols Make the Calls":* McConnell*'s Theory of Judicial Deference in the Twilight of* Buckley, *in* Symposium, The Law of Democracy: Campaign Finance after McCain-Feingold, 153 U. PA. L. REV. 5, 28 (2004) [hereinafter Bauer, *When "The Pols Make the Calls"*]. *See also* JOHN SAMPLES, THE FALLACY OF CAMPAIGN FINANCE REFORM 3–6 (2006) (excerpting passages in the Congressional Record from speeches given on the U.S. Senate floor during debates).

> (1) payments for the republication of campaign materials;
> (2) payments for the use of a common vendor;
> (3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and
> (4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.[71]

BCRA also provided that these new rules "shall not require agreement or formal collaboration" to establish prohibited conduct,[72] and the FEC promulgated a final rule in December 2002.[73] In the notice accompanying the final rule, the FEC defined expenditures as "coordinated" if they are "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents."[74]

Representatives Chris Shays and Patrick Meehan, the Republican co-sponsors of the House version of BCRA, took issue with the FEC's final regulation. After they and their fellow co-sponsors failed to shape the FEC's rule by way of public comment during the agency's informal rulemaking, they sued the agency for failing to implement BCRA's statutory commands.[75] The trial court held that several of the FEC's regulations were impermissible, either under a *Chevron* analysis, or for failure of compliance with the

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71. Bipartisan Campaign Reform Act § 214(c)(1)–(4), 116 Stat. at 95.

72. *See* § 214(c). This language, "shall not require formal collaboration," was a mistake. *See infra* Section V.B.

73. Coordinated and Independent Expenditures, 68 Fed. Reg. 421 (Jan. 3, 2003) (to be codified at 11 C.F.R. pt. 109). With this rule, the FEC updated the regulatory framework for coordination after receiving a mere twenty-seven public comments from only twenty-one people, and after a public hearing at which only fourteen witnesses testified. *Id.*

74. *Id.* at 425. Like the contribution-expenditure dichotomy in FECA, many state statutes have embraced this cooperation-consultation-concert-request-suggestion regulatory language. *Compare id.*, *with* Section III.B, *infra*.

75. *See* Shays v. FEC, 337 F. Supp. 2d 28, 35, 38 (D.D.C. 2004), *aff'd*, Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005).

Administrative Procedure Act ("APA").[76] On appeal, the D.C. Circuit affirmed as to the FEC's noncompliance with the APA,[77] and the FEC subsequently reopened comments to revise the content-related provisions of its coordinated communications regulations.[78]

Current FEC rules establish a three-pronged test for a coordinated communication and provide for treatment of such as a contribution *to* the candidate *from* the person making the expenditure, *and* as an expenditure *by* the candidate who benefits from it.[79] The three-pronged test examines whether the communication expenditure (1) was "paid for, in whole or in part, by a person other than the candidate," (2) falls into one of five content categories, and (3) arises out of one of six categories of conduct.[80] The content categories include: (1) electioneering communications;[81] (2) public communications[82] that transmit materials prepared by a campaign; (3)

76. *Id.* at 130–31. *See generally* 5 U.S.C. §§ 551–559 (2017) (providing rules an agency must follow when promulgating regulations); Chevron U.S.A., Inc. v. Nat'l Res. Defense Council, 467 U.S. 837 (1984) (establishing a two-pronged test to determine when a court construing an ambiguous provision of an organic statute should defer to an agency's reasonable interpretation of the same).

77. *Shays*, 414 F.3d at 98–100.

78. Coordinated Communications, 71 Fed. Reg. 33,190, 33,192–93 (June 8, 2006) (to be codified at 11 C.F.R. pt. 109).

79. What Is a "Coordinated Communication"?, 11 C.F.R. § 109.21(a)–(b) (2017).

80. 11 C.F.R. § 109.21(a)(1)–(3). It is theoretically possible that an expenditure will fall into more than one content or conduct category.

81. FEC regulations define "electioneering communication" as

> any broadcast, cable, or satellite communication that: (1) Refers to a clearly identified candidate for Federal office; (2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and (3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

11 C.F.R. § 100.29(a)(1)–(3) (2017).

82. A "public communication" is a "general public political advertising" in almost any medium except the Internet, unless someone has paid to have a candidate's content posted on someone else's website. 11 C.F.R. § 100.26 (2017).

public communications that expressly advocate[83] the election or defeat of a federal candidate; (4) public communications that refer to (a) a House or Senate candidate in her district within 90 days of an election, (b) a presidential or vice presidential candidate in any jurisdiction within 120 days of a primary election, (c) a political party, but not a candidate, in a jurisdiction where that party has one or more candidates on the ballot, or (d) both political parties and candidates in a jurisdiction where those parties have candidates on the ballot; and (5) any public communication "that is the functional equivalent of express advocacy."[84] The conduct provisions of the regulation classify a communication as "coordinated" under the following circumstances: (1) the candidate requests or suggests the expenditure;[85] (2) the candidate is materially involved in various aspects of a communication;[86] (3) the candidate has substantial discussions with the IE group regarding an expenditure;[87] (4) the IE group hires a vendor to produce the communication within 120 days of that vendor providing certain services to the candidate;[88] (5) somebody in the IE group has been an employee or agent of the candidate within 120 days of the expenditure;[89] or (6) the IE group disseminates, distributes, or republishes campaign material.[90] Some of the conduct standards carve out exceptions where the IE group making a communications expenditure bases the content of the communication on publicly available information.[91] In these situations, we can safely intuit that

83. Express advocacy under the rule is either the use of language like "vote/re-elect/support/cast your ballot for Candidate X" or other similar language that cannot reasonably mean anything other than a solicitation of the listener's vote, or a communication taken in context (like its proximity to an election) that can reasonably mean only that the speaker is soliciting the listener's vote. *See* 11 C.F.R. § 100.22 (2017).

84. 11 C.F.R. § 109.21(c)(1)–(5) (2017); *cf. id.* (defining express advocacy).

85. 11 C.F.R. § 109.21(d)(1).

86. 11 C.F.R. § 109.21(d)(2).

87. 11 C.F.R. § 109.21(d)(3).

88. 11 C.F.R. § 109.21(d)(4).

89. 11 C.F.R. § 109.21(d)(5).

90. 11 C.F.R. § 109.21(d)(6).

91. *See, e.g.*, 11 C.F.R. § 109.21(d)(4)(iii) ("[The common-vendor conduct standard] is not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the commercial vendor [that

there should be no presumption of coordination because it is reasonable to believe that publicly available information can inspire a political communication with no collaboration between an IE group and a candidate. Suffice it to say, the FEC and Congress have labored extensively, sometimes with the assistance of judicial review, to develop federal coordination doctrine as we know it today.

Recent First Amendment cases that did *not* arise out of coordination doctrine nevertheless give campaign finance reform advocates heartburn about coordination. Following the birth and increased use of super PACs after *Speechnow.org v. FEC*[92] and the unrestricted IEs that resulted from the Court's ruling in *Citizens United v. FEC*,[93] a renewed parallel animus toward money in politics and an interest in policing coordination have arisen.[94] If we can infer anything

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the campaign and the IE group both used within 120 days of each other] *was obtained from a publicly available source*." (emphasis added)).

92. 599 F.3d 686 (D.C. Cir. 2010), *cert. denied*, 562 U.S. 1003 (2010) (invalidating FECA's limits on contributions to truly independent committees 9-0, thus giving its blessing to super PACs). Despite winning, one of the individual co-plaintiffs in *SpeechNow.org* appealed the D.C. Circuit's ruling; despite losing, the FEC declined to do so. Smith, *Super PACs*, *supra* note 2, at 604. In any event, the U.S. Supreme Court denied certiorari. 562 U.S. at 1003.

93. 558 U.S. 310, 371–72 (2010) (holding chiefly that the First Amendment forecloses Congress from regulating the independent expenditures of organizations, even when those organizations raise funds from corporations).

94. *See, e.g.*, Stop Super PAC-Candidate Coordination Act, S. 1838, 114th Cong. (2015) (as introduced and referred to S. Comm. on Rules and Admin., July 22, 2015); Stop Super PAC-Candidate Coordination Act, H. 425, 114th Cong. (2015) (as introduced and referred to H. Comm. on H. Admin., Jan. 21, 2015). *See also* Benjamin Oreskes, *Clinton Pledges Constitutional Amendment to Overturn* Citizens United *Ruling*, POLITICO (July 16, 2016, 1:28 PM), http://www.politico.com/story/2016/07/hillary-clinton-citizens-united-225658 ("Hillary Clinton committed Saturday to introducing a constitutional amendment to overturn the *Citizens United* decision within her first 30 days in office, if she's elected president."); Press Release, The White House, Remarks by the President in State of the Union Address (Jan. 27, 2010), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-state-union-address ("[L]ast week the Supreme Court reversed a century of law [in *Citizens United*] that I believe will open the floodgates for special interests . . . to spend without limit in our elections. . . . I don't think American elections should be bankrolled by America's most powerful interests . . . ."). *But see* The Center for Competitive Politics, *What* Citizens United *Didn't Say*, YOUTUBE (July 1, 2011), https://youtu.be/Zh1SfOwE7dU (rebutting former President Obama's "bizarre" claims about *Citizens United*'s chief holding).

from recent legislative activity in the States, it is that further enhancement of coordination doctrine—particularly lengthening the reach of certain legal presumptions, broadening the span of conduct covered, and strengthening the severity of penalties—may be the next front in the battle to control campaign finance.[95]

B. Hypos Showing Ambiguity in Federal Conduct Standards

To underscore how difficult it can be to identify a prohibited coordination, consider the following hypothetical scenarios. The first hypothetical establishes a baseline understanding of prohibited coordinated communications by describing conduct that would clearly violate the federal rules. The second and third hypotheticals describe circumstances that may make a casual political observer uneasy, but which are perfectly legal under the prevailing rules.

1. The Coffee Shop Hypo

Suppose Candidate A invites the director of Super PAC A to a coffee shop and asks her to bring Super PAC A's budget for the first quarter of the upcoming election year. When they meet, Candidate A unfolds a map, spreads it out on the table, and pulls *his* campaign's budget and recent fundraising reports out of a briefcase. The director of Super PAC A gets her Q1 budget out of her briefcase, and they compare the relative financial health of their respective organizations; the super PAC clearly has more funds on-hand than the campaign does. Turning back to the map, Candidate A says, "I will direct my communications team to run a television ad about my energy policy platform, asking people to vote for me, in quadrants two and four in the fifth and sixth weeks of Q1, because that's all I think we can afford at our current fundraising pace. Will you run your energy policy television ad in quadrants one and three in the seventh through eleventh weeks of Q1, and make sure it includes a voiceover asking people to vote for me? That will help me extend my slim budget by helping me cover more territory for a longer period of time than my resources

95. *See generally infra* Section III.B.

alone will allow." The director of Super PAC A agrees,[96] and the two part ways. They subsequently execute the strategy exactly as Candidate A proposed.

When applying the federal coordination test, this is about as obvious an example of a prohibited coordinated communication as one is likely to find. The energy policy television ads that super PAC A purchases are paid for, in full, by a person other than the candidate. The ads constitute express advocacy because they call for the election of Candidate A. And Super PAC A purchased the television ad slots at the direct request of Candidate A. It is difficult to imagine a candidate and super PAC so flagrantly and flippantly coordinating their expenditures in real life,[97] but this hypothetical at least provides a crystal-clear picture of what constitutes prohibited behavior under the federal rules. Yet as the next few hypotheticals demonstrate, it is not always so easy to identify a prohibited coordinated communication.

2. The Photo Hypo

Suppose Campaign B pays a photographer to shoot pictures of a steel mill for use in Candidate B's direct-mail solicitations, on the campaign website, and as B-roll[98] in web video or television ads. Once it receives the digital image files from the photographer, Campaign B uploads them to Candidate B's website; but rather than displaying

96. Bipartisan Campaign Reform Act § 214(c), 116 Stat. 81, 95 (2002) (stating that FEC coordination regulations promulgated pursuant to BCRA "shall not require formal agreement or collaboration"). The FEC embodied this principle in its regulations. 11 C.F.R. § 109.21(e) (2017) ("Agreement or formal collaboration between the person paying for the communication and the candidate clearly identified in [it] . . . is not required for a communication to be a coordinated communication.").

97. *See supra* note 50; *see also infra* note 106.

98. "B-roll" is still or moving photography that helps enrich a story someone is trying to tell by adding another dimension to a speaker's voice. *See* Rachel Jellinek, *What Is B-Roll and Why Is It So Valuable?*, CONTENT MARKETING INST. (Oct. 10, 2011), http://contentmarketinginstitute.com/2011/10/what-is-b-roll-and-why-is-it-so-valuable/. For an example of B-roll and its effective use in advertising, see ASPCA, *We Are Animal People – Shop with Your Heart*, YOUTUBE (July 5, 2016), https://youtu.be/voexPcQ96Ho (advertising a public affairs campaign to help prevent cruelty to farm animals, using still and moving B-roll with a voiceover and text captioning).

them on any public-facing post or page, Candidate B's website stores the image files in an unprotected directory that anyone can access using appropriate search engine operators.[99] Suppose then that Super PAC B's communications team searches Candidate B's campaign website directories for all steel-mill image files, finds the repository of recently purchased and uploaded photos, downloads a number of them, and uses the photos in its own paid commercials that rake Candidate C over the proverbial coals for failed industrial policy within 60 days of the general election. Would Candidate B have illegally coordinated with Super PAC B?

Turning to the three-pronged federal coordination test, Super PAC B—not Campaign B—paid for the television airtime, and the message shaming Candidate C is an electioneering communication because it mentions Candidate C by name in advertisements targeted to the relevant electorate within 60 days of the general election. But even though Super PAC B's communications extend the reach of Candidate B's messaging, and expand Candidate B's budget, none of the conduct prohibited by the coordination regulation exists on the face of the fact pattern. There was no request by Candidate B that Super PAC B make the expenditure. Candidate B was not materially involved in the creation of Super PAC B's anti-Candidate C ads. There were no substantial discussions between Candidate B and Super PAC B, and so on. To the contrary, the steel mill photos were publicly available, if not immediately public-facing. Therefore, this hypothetical does not likely reflect an illegally coordinated communication.

3. The Polling Hypo

Suppose Candidate D wants to tacitly signal to Super PAC D that Super PAC D should buy airtime for ads on climate change policy in City D's media market. Campaign D pays for public opinion polling

99. If a user searches for "gnash site:nhl.com" on the Google homepage, and navigates to the "Images" tab above the search results, one can see all the images of Gnash, the greatest mascot in the National Hockey League, on the nhl.com server at the time of the search, so long as the image files have the term "gnash" in their file names or metadata, regardless of whether the images are currently displayed anywhere on the public-facing Nashville Predators or NHL website. *See generally* GOOGLE, http://bit.ly/2i5dYOl (last visited Feb. 20, 2018).

on incumbent Candidate E's performance in office, and then it pitches the topline results of the poll to a political reporter as a story on how the public feels about the race.[100] Campaign D's creative team then develops a negative ad about Candidate E based on the results of its internal poll, and pitches a 30-second preview of the ad as an exclusive story to another political reporter.[101] Campaign D also pitches a story announcing a forthcoming expenditure to run the negative ad about Candidate E in City E's media market.[102] Suppose then that the creative directors at Super PAC D read these two stories in the media, and they build Super PAC D's negative communications strategy by drawing themes from the topline results of Campaign D's internal poll results and Campaign D's teaser ad attacking Candidate E. Super PAC D then produces a separate-but-similar negative ad about Candidate E and, knowing Campaign D has City E covered, buys airtime in City D's media market within 60 days of a general election. Like the Photo Hypo, this, too, seems like an end-run around contribution limits in that Campaign D has managed to double its reach by sending covert signals through the media to Super PAC D. But would Campaign D and Super PAC D have illegally coordinated their expenditures within the meaning of federal campaign finance law?

Turning again to the three-pronged test for coordination, Super PAC D—not Candidate D—paid independently to place its ads about Candidate E in City D's media market, and the advertisement clearly falls within the purview of either an electioneering communication or

100. *See, e.g.*, Theodoric Meyer, *GOP Internal Poll: Jolly, Crist Tied in FL-13*, POLITICO (Sept. 19, 2016, 10:00 AM), http://www.politico.com/tipsheets/morning-score/2016/09/gop-internal-poll-jolly-crist-tied-in-fl-13-216385. For evidence of a more cynical—but completely legal—practice, see Chris Moody, *How the GOP Used Twitter to Stretch Election Laws*, CNN (Nov. 17, 2014, 10:55 AM), http://www.cnn.com/2014/11/17/politics/twitter-republicans-outside-groups/ (explaining how Republicans and super PACs publicly traded polling information through a series of tweets, posted from anonymous Twitter accounts, that would look like gibberish to an unsophisticated bystander).

101. *See, e.g.*, Alex Seitz-Wald, *Exclusive: Tough New Sanders Ad Takes Aim at Clinton*, MSNBC (Apr. 15, 2016, 11:27 AM), http://www.msnbc.com/msnbc/exclusive-tough-new-sanders-ad-takes-aim-clinton.

102. *See, e.g.*, John DiStaso, *Hillary Clinton Campaign Reserves $4.1 Million in Airtime in New Hampshire*, WMUR, http://www.wmur.com/article/hillary-clinton-campaign-reserves-4-1-million-in-airtime-in-new-hampshire/5201999 (last updated July 17, 2015, 2:04 PM).

express advocacy (or both) because it mentions a clearly identified candidate for office within 60 days of a general election and is targeted to the relevant electorate. And even if it does not expressly say, "therefore, vote for Candidate D," it is nonetheless the functional equivalent of doing so under the time and geographical circumstances. But here again, conduct is lacking on the face of the hypothetical to evince an illicit coordination finding, no matter how bothered we might feel by what has transpired. Super PAC D based its messaging strategy on publicly available information.

C. Trapping the Unwary: Hypos and Historical Examples

The reader should not mistake the Photo and Polling Hypos as a basis to advocate for more aggressive laws policing coordination.[103] To the contrary, "vague laws [like coordination conduct standards] may . . . 'trap the innocent.'"[104] Consider now some other plausible hypotheticals that demonstrate how an unsophisticated candidate can run afoul of coordination rules by conduct that is facially innocent, but is nonetheless likely prohibited by the rules, and how the press and other political actors misidentify *innocent* conduct as prohibited coordination to the detriment of our political discourse. In circumstances where the complexity of campaign finance law functions as a trap for an unwary candidate, and punishes her for innocuous conduct, it should not be unusual for a court to conclude that coordination laws are both vague and substantially overbroad.[105] In other instances, where the conduct is innocent both on its face and under the law, but the unsophisticated bystander or belligerent political operative reaches for the coordination cudgel as a matter of strategic course, the quality and character of our politics also diminishes, and

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103. *See supra* note 13.

104. Buckley v. Valeo, 424 U.S. 1, 41 n.48 (1976) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972)).

105. *See generally* Broadrick v. Oklahoma, 413 U.S. 601, 607 (1973) (stating that a statute fails to pass constitutional muster if it is "so vague that 'men of common intelligence must necessarily guess at its meaning'" (quoting Connally v. Gen. Construction Co., 269 U.S. 385, 391 (1926))); *see also* DAVID L. HUDSON, JR., THE FIRST AMENDMENT: FREEDOM OF SPEECH § 2:7 (2012) ("A law is unconstitutionally overbroad if it sweeps too broadly and invades the area of protected expression. In other words, an overbroad law does the job too well and overkills the problem.").

campaign finance laws cease to restore the faith in the electoral system as Congress intended.

1. Mia Love's 2012 Fundraising Flap (with New Facts)

Representative Mia Love of Utah is new to the national political scene. To wit, prior to her election in 2014, Love first ran for U.S. House in 2012.[106] Before 2012, Love's only political experience included serving on the Saratoga Springs, Utah city council beginning in 2004[107] and as the city's mayor after a subsequent election.[108] When reporter McKay Coppins interviewed Love in August 2012, she naïvely asked him if his employer, BuzzFeed, a nonpartisan news outlet, would embed a fundraising ticker on its website to help her raise money to defeat Jim Matheson, her Democratic opponent (Coppins demurred).[109]

106. Disclosure: I served as a consultant to Mia Love's 2012 campaign for United States House in Utah's Fourth District, which the state legislature had just created when it re-drew its electoral districts following the 2010 Census. *See generally* Lee Davidson, *Utah's Census Gains Give It Fourth Seat in U.S. House*, THE SALT LAKE TRIBUNE (Dec. 22, 2010, 11:18 AM), http://archive.sltrib.com/story.php?ref=/sltrib/home/50917087-76/utah-census-decade-growth.html.csp. At the beginning of the 2012 election cycle, I held the position of Director of Political Intelligence and Public Relations at the CRAFT | Media/Digital ("CRAFT") firm in Washington, D.C. Scoville, LINKEDIN, *supra* note 50. Then-candidate Love retained CRAFT early in the 2012 election cycle for various communications and fundraising services. *Cf.* Grace Wyler & Brett LoGiurato, *The Digital 50: The 50 Hottest People in Online Politics*, BUSINESS INSIDER (Feb. 21, 2013, 9:55 AM), http://www.businessinsider.com/digital-50-politics-tech-obama-republicans-2013-2?op=1 (noting CRAFT's role in making Mia Love a national figure and a darling of Republican activists across the country in the 2012 election cycle).

107. *See generally* Sharon Haddock, *Political Novice Lovin' It*, DESERET NEWS (Sept. 27, 2004, 12:00 AM), http://www.deseretnews.com/article/595094224/Political-novice-lovin-it.html.

108. Donald W. Meyers, *Mia Love: Race Not a Factor for Utah's First Black Female Mayor-Elect*, THE SALT LAKE TRIBUNE (Nov. 9, 2009, 12:29 AM), http://archive.sltrib.com/story.php?ref=/news/ci_13741120.

109. McKay Coppins, *Meet the Republican Blogosphere's Favorite Candidate*, BUZZFEED NEWS (Aug. 1, 2012, 3:29 PM), https://www.buzzfeed.com/mckaycoppins/meet-the-republican-blogospheres-favorite-candida.

Now, let's change the facts: suppose that it was not BuzzFeed that Love asked to embed a donation widget for her campaign on its website, but a pair of activist bloggers who receive donations through a virtual "tip jar"[110] to cover the operating expenses of a website that promotes one party's candidates while attacking others. Suppose Love agreed to let the bloggers keep $1 of every donation under $25 that the donation widget generated.[111] Suppose also that one of the bloggers, a former political reporter, brought a substantial readership to the website, helping to bring in sizeable aggregate donations through the tip jar that allowed him to hire another blogger to help run the website full-time.[112] Suppose the blogging duo received donations large enough, and spent enough money producing partisan web content, to require them to organize as a political action committee under federal law.[113] Now suppose that the bloggers paid a graphic designer $3,000

110. *See generally* Joan Stewart, *3 Ways to Add a Tip Jar to Your Blog*, THE PUBLICITY HOUND (Mar. 4, 2015), https://publicityhound.com/blog/3-ways-to-add-a-tip-jar-to-your-blog.

111. It is not uncommon for online fundraising agreements between vendors and candidates to include provisions granting the vendor a percentage of every donation under a predetermined dollar threshold (for example, the digital fundraising consultant receives 50% of every dollar up to $50.00; irrespective of donation size, the most the consultant would ever keep is $25.00 in such a scenario). *See supra* notes 50 & 106.

112. This is, more or less, the story of conservative blogger and author Robert Stacy McCain, who left mainstream reporting to blog full-time for himself, using his website to undermine, as he sees fit, various progressive causes, activists, and Democratic candidates and politicians. *See generally About Robert Stacy McCain*, THE OTHER MCCAIN, http://theothermccain.com/about/ (last visited Feb. 20, 2018); *see also About Smitty*, THE OTHER MCCAIN, http://theothermccain.com/about-smitty/ (last visited Feb. 20, 2018).

113. *See* 11 C.F.R. §§ 100.5(a), 102.1(d) (2017); *see also* 52 U.S.C. §§ 30101(4)(A), (8)–(9) (2012 & Supp. 2015). *But see* Internet Communications, 71 Fed. Reg. 18589 (Apr. 12, 2006) (to be codified at 11 C.F.R. pts. 100, 110 & 114) (excepting "uncompensated individual Internet activities" from campaign finance regulation). One recently departed FEC Commissioner thinks Congress and the Commission should re-think its approach to regulating online political communications because, she argues, the technologies have been too disruptive, and thus too effective, in altering the political landscape. *See* Statement of Reasons of Vice Chair Ann M. Ravel, Checks and Balances for Economic Growth, MUR 6729 (FEC Oct. 24, 2014), http://eqs.fec.gov/eqsdocsMUR/14044363872.pdf; *see also* Ann M. Ravel, *How the FEC Turned a Blind Eye to Foreign Meddling*, POLITICO (Sept. 18, 2017), http://www.politico.com/magazine/story/2017/09/18/fec-foreign-

to develop a flashy, animated donation ticker—which seems steep, but maybe it was an animated Huey Lewis that would pop up and sing "That's the power of Love!"[114] when a user donated—to embed on their website to help Mia Love raise money. Now imagine that all of this took place approximately eight weeks before the general election in her district.

Should the facts in this hypothetical—a novice candidate asking two moderately successful partisan bloggers with ideological axes to grind to help her raise money in a first-time race for U.S. House—count as a coordinated communication made in violation of federal law? Indeed, would anyone that contributed to the bloggers' virtual tip jar have impermissibly corrupted Love within the meaning of *Buckley* to the extent that an expenditure exceeded $2,700?

Under the federal rules, unfortunately, this likely *would* count as a prohibited coordinated communication. Turning again to the test for coordination, an entity separate from the candidate is spending $3,000 on an advertisement constituting the functional equivalent of express advocacy—given the communication's proximity to the 2012 general election and that there are only two candidates left in the race—at the direct request of the candidate. Federal coordination law, sanctioned by the *Buckley* framework, presumes this conduct is corrupt, or at least that it appears corrupt, notwithstanding that we ought to be sympathetic to and amused by political Keystone-coppery of this kind. This hypothetical thus demonstrates the substantial

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meddling-russia-facebook-215619 (criticizing her counterparts on the FEC for stymieing efforts to regulate Internet advertisements when she still served on the Commission). Similar criticisms echo in the academy. *See, e.g.*, Butrymowicz, *supra* note 36. The FEC seems to be up to the task: it recently voted unanimously to explore regulations for disclosure of the identities of online ad buyers. Kenneth P. Doyle, *FEC Votes to Explore Disclosure Rules for Online Ads*, BLOOMBERG BNA (Sept. 14, 2017), https://www.bna.com/fec-votes-explore-n57982087935/. Furthermore, members of Congress have also introduced legislation that, if enacted, would compel disclosure of sources of online ad spending. *See, e.g.*, Honest Ads Act, S. 1989, 115th Cong. (as introduced and referred to S. Comm. on Rules and Admin., Oct. 19, 2017) ("The purpose of this Act is to enhance the integrity of American democracy and national security by improving disclosure requirements for online political advertisements in order to uphold the United States Supreme Court's well-established standard that the electorate bears the right to be fully informed.").

114. HUEY LEWIS AND THE NEWS, *The Power of Love*, *on* BACK TO THE FUTURE: MUSIC FROM THE MOTION PICTURE SOUNDTRACK (MCA Records 1985).

overbreadth inherent in federal coordination doctrine. But the problems do not stop there: mere allegations of wrongdoing, especially when the conduct is legal under the prevailing rules, can have tangible, negative political and legal consequences when malicious actors lob them into the fray.

2. A Disgruntled Former Staffer with a Scam PAC

One emerging phenomenon in American politics is the "scam PAC." As the moniker suggests, a scam PAC is a political action committee that unscrupulous political operatives form and operate to defraud small-time activists and donors by raising funds in the name of (or in opposition to) a political candidate whom the operatives running the PAC do not intend to actually support (or defeat). In fact, instead of supporting the candidate in whose name they raise funds, they funnel money from the PAC to themselves through a series of expenditures they pay to their own consulting firms.[115] These scam PACs pose unique legal and practical political problems vis-à-vis federal coordination doctrine, as the following hypothetical demonstrates.

Suppose Candidate F hires Campaign Manager G, promising that, if Candidate F wins the election, Campaign Manager G will become Chief of Staff G of Representative F's Capitol Hill office. But then the campaign does not unfold as planned, and Candidate F decides to "shake up" the campaign[116] by firing Campaign Manager G and replacing her with Campaign Manager H. Deciding that her days of slaving away for high-maintenance candidates who cannot make up their minds,[117] and that she should get even for Candidate F's betrayal,

115. *See generally, e.g.*, Kenneth P. Vogel, *The Rise of "Scam PACs"*, POLITICO (Jan. 26, 2015, 5:35 AM), http://www.politico.com/story/2015/01/super-pac-scams-114581 (explaining how scam PAC operators siphoned $43 million away from Republicans' donor base in the 2014 election cycle, keeping close to $40 million for their own purposes).

116. *See, e.g.*, Benjy Sarlin, Katy Tur & Ali Vitali, *After Campaign Shake-Up, It's Trump Versus the World*, NBC NEWS (Aug. 17, 2016, 4:47 PM), http://www.nbcnews.com/politics/2016-election/after-campaign-shake-it-s-trump-versus-world-n633046.

117. *Cf. generally* Jonathan Martin, *Hurricane Sarah*, POLITICO (Oct. 21, 2010, 4:49 AM), http://www.politico.com/story/2010/10/hurricane-sarah-043936 ("According to multiple Republican campaign sources, the former Alaska governor

Campaign Manager G forms a scam PAC. Armed with knowledge of Candidate F's communications strategies, Campaign Manager G starts cutting ads that she bases on creative ideas that only someone in Candidate F's campaign would know. Campaign Manager G then buys radio ads in the relevant media market within weeks of her hiring, *calling for* Candidate F's election. Soon thereafter, Campaign Manager G anonymously tips off a political reporter[118] who, none the wiser, writes a story alleging that Candidate F may have illegally coordinated with the scam PAC, which looks like a legitimate PAC to the general public.[119] The negative news coverage prompts Candidate I—who is Candidate F's opponent in the race—to file a complaint with the FEC.[120] How should the FEC respond?

Let's apply the federal test for coordination. Campaign Manager G paid for the radio advertisements independently of Candidate F. The ads constituted express advocacy in that they called for Candidate F's election. And Campaign Manager G, a former employee of Candidate F's, made the ads using non-public knowledge of strategy inside of 120 days of her discharge from Candidate F's

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[Sarah Palin] wreaks havoc on campaign logistics and planning. She offers little notice about her availability, refuses to do certain events, is obsessive about press coverage and sometimes backs out with as little lead time as she gave in the first place.").

118. *See, e.g.*, *Share Tips Securely & Anonymously*, BUZZFEED NEWS, https://contact.buzzfeed.com/ (last visited Feb. 20, 2018) (providing a portal for secure and anonymous news tips for journalistic investigation). *Cf.* Joshua Green, *Playing Dirty*, THE ATLANTIC (June 2004), https://www.theatlantic.com/magazine/archive/2004/06/playing-dirty/302960/ (describing some of the tactics used in the applied politics sub-field of opposition research).

119. *See, e.g.*, Joe Cunningham, *Meanwhile: Hillary's Campaign May Have Illegally Coordinated with a Super PAC*, REDSTATE (Oct. 8, 2016, 10:00 AM), http://www.redstate.com/joesquire/2016/10/08/meanwhile-hillarys-campaign-may-illegally-coordinated-super-pac/.

120. *See generally Filing a Complaint*, FEC (June 2008), http://www.fec.gov/pages/brochures/complain.shtml (last visited Feb. 20, 2018). The FEC has statutory authority under BRCA to both rulemake and adjudicate civil campaign finance complaints. 52 U.S.C. §§ 30106(b)(1)–(2), 30109(a) (2012 & Supp. 2015). Both BCRA and federal regulations outline penalties for civil violations. *See generally* 52 U.S.C. § 30109(d) (2012 & Supp. 2015); 11 C.F.R. § 111.24 (2017). The FEC's general counsel has further statutory powers to file civil actions in Article III courts. 52 U.S.C. § 30107 (2012 & Supp. 2015).

employ. Candidate F has done absolutely nothing wrong, but strict application of the test nonetheless requires a finding of prohibited conduct on these facts. As a practical matter, too, while the FEC or a reviewing court may ultimately vindicate Candidate F of any wrongdoing for prudential reasons, the proverbial toothpaste exits the tube the moment the reporter writes a story raising the specter of coordination, and Candidate I files an FEC complaint (which would invariably result in yet further negative news coverage[121]).

The ease with which coordination laws and FEC procedures permit observers to file meritless claims can thus have a chilling effect on candidates who do nothing wrong, even if a subsequent adjudication vindicates them. The media play a large role in this perverse dynamic in their attempts to police alleged campaign finance violations by reporting on them. But because members of the press have terrible power to shape political narratives,[122] *even and especially when they get the story wrong*, the media's relationship to coordination doctrine is the focus of the next two thought experiments.

3. Wisconsin Public Radio's 2016 Walker Whiff

There are other instances in which conduct should not cause anyone to think "corruption" when they see it, but because of a

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121. *See, e.g.*, Leigh Ann Caldwell, *Democratic PAC Files FEC Complaint over Melania Trump's RNC Speech*, NBC NEWS (July 21, 2016, 11:16 AM), http://www.nbcnews.com/storyline/2016-conventions/democratic-pac-files-fec-complaint-over-melania-trump-s-rnc-n614131; Mark Hensch, *O'Keefe Files FEC Complaint Against Clinton Camp, DNC*, THE HILL (Oct. 21, 2016, 11:26 AM), http://thehill.com/blogs/ballot-box/presidential-races/302178-okeefe-files-fec-complaint-against-clinton-camp-dnc; Caitlin MacNeal, *Watchdog Groups File FEC Complaint over Trump Emails to Foreign Pols*, TALKINGPOINTSMEMO (June 29, 2016, 1:56 PM), http://talkingpointsmemo.com/livewire/fec-complaint-trump-emails-foreign-fundraising.

122. *See* KATHLEEN HALL JAMIESON & PAUL WALDMAN, THE PRESS EFFECT: POLITICIANS, JOURNALISTS, AND THE STORIES THAT SHAPE THE POLITICAL WORLD 95 (2003) (quoting DOUGLAS CATER, THE FOURTH BRANCH OF GOVERNMENT 7 (1959)); KATHLEEN HALL JAMIESON, EVERYTHING YOU THINK YOU KNOW ABOUT POLITICS . . . AND WHY YOU'RE WRONG 155 (2000) (citing, inter alia, Robert S. Erikson, *The Influence of Newspaper Endorsements in Presidential Elections: The Case of 1964*, 20 AM. J. POL. SCI. 207–33 (1976)) (recapping the influence of newspaper endorsements on voting behavior in various contexts).

contemporary, popular allergy to money in politics, coupled with widespread illiteracy about campaign finance law (and perhaps a business or political agenda in news rooms[123]), sometimes the press seeks to punish elected officials for "coordination" when there is no reason to do so. For example, when the U.S. Supreme Court denied a petition for certiorari in a coordination case on appeal from the Wisconsin Supreme Court,[124] a Wisconsin public radio station published a story suggesting that Governor Scott Walker had illegally coordinated with the non-profit Wisconsin Club for Growth:

> At the heart of the case was whether Walker and his campaign coordinated too closely with conservative groups during Wisconsin's recall elections. [An article in the British newspaper The Guardian] showed Walker had an *especially close relationship with the Wisconsin Club for Growth*, an ostensibly independent group that *the governor and his campaign referred to in emails as if it were their own*. Walker's campaign *encouraged donors to give to the group*, noting that it could accept unlimited contributions and keep donors' names secret. The Wisconsin Club for Growth *was run in part by R.J. Johnson, a longtime Walker confidante who simultaneously advised the governor's campaign*.[125]

Based on this skeletal account of the facts, it is difficult to conclude whether an illegally coordinated communication took place.

In the underlying case out of Wisconsin, a special prosecutor had commenced five "John Doe" investigations to identify and prosecute illegal coordination between candidates and issue advocacy groups.[126] One of those investigations resulted in the discovery of

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123. George Scoville, *Fake News? Physician, Heal Thyself*, THE TENNESSEAN, Jan. 15, 2017, at 1H (lamenting how issues of editorial bias and arcane business models in mainstream media shape political coverage to the detriment of news consumers).

124. State *ex rel.* Two Unnamed Petitioners v. Peterson, 866 N.W.2d 165 (Wis. 2015), *cert. denied*, 137 S. Ct. 77 (2016).

125. Shawn Johnson, *Republicans Applaud End of John Doe Investigation*, WIS. PUB. RADIO (Oct. 3, 2016, 8:45 AM) (emphasis added), http://www.wpr.org/us-supreme-court-wont-hear-john-doe-2-appeal.

126. *Peterson*, 866 N.W.2d at 176–77.

emails in the Milwaukee County Executive's Office suggesting that "there may have been coordination of fundraising between campaign committees and other related, independent groups."[127] Further search warrants and subpoenas, issued on the prosecutor's theory that "independent groups became mere subcommittees of the candidate's committee . . . and . . . coordinated *issue advocacy* amounts to an unlawful in-kind contribution" under state regulations, led to discovery of "[m]illions of documents, both in digital and paper copy . . . business papers, computer equipment, phones, and other devices."[128]

The Wisconsin Supreme Court set out to first resolve "whether the statutory definitions of 'committee,' 'contributions,' 'disbursements,' and 'political purposes'" under Wisconsin law "encompass the conduct of coordination between a candidate or a campaign committee and an independent organization that engages in *issue advocacy*," and, second, what constitutes prohibited coordination if the statutory language, construed by the court, applies to *issue advocacy*.[129] The Wisconsin Supreme Court never reached the second question, holding instead that Wisconsin's coordination statute applied only to *express advocacy* (or its equivalent) as the *Buckley* court defined it.[130] Thus, with only Wisconsin Club for Growth's *issue advocacy* remaining, there was no basis to investigate Governor Walker any further.[131] But that did not stop a Wisconsin public radio station from crying foul—or at least tendentiously insinuating as much.[132]

Members of the public and candidates who rely on media reports for accurate information did not get it from WPR in Wisconsin on October 3, 2016. Thus, in addition to being a trap for the unwary candidate, coordination laws become a hazard to the unsophisticated voter, who, over time, can begin to think *everything* is coordination, even when the conduct is perfectly legal, because the media frames its campaign-finance coverage in a way that caters to popular allergies to

127. *Id.* at 180–81.

128. *Id.* at 181, 183, 190 (emphasis added).

129. *Id.* at 178 (emphasis added).

130. *Id.* at 179. *Cf. id.* at 181 (describing the prosecutor's theory of coordinated *issue advocacy*).

131. *See id.* at 186.

132. *See* Johnson, *supra* note 125.

money in politics. While there is a nontrivial argument that the distinction between issue advocacy and express advocacy is a distinction without a difference,[133] the fact is that Congress and the FEC have chosen to police only express advocacy. Campaign finance law does not mean whatever campaign finance reform proponents want it to mean. Misunderstanding and misapplying the law, even in lay vernacular or discourse, can have dire practical consequences for the character of our politics, undermining Congress's original purpose in enacting FECA, in that such an ontological framing undermines faith in the political process. Partisan actors seem to know this, and they are not afraid to exploit it, as the next example demonstrates.

4. Duck Uncovered

Mainstream media outlets and their dutiful employees are not the only sources of misinformation about coordination. Self-appointed partisan watchdogs also like to use "coordination" as a bogeyman to undermine their political opponents' credibility in the court of public opinion. Take one of conservative provocateur James O'Keefe's infamous "sting" videos,[134] for example.

As Election Day 2016 drew near, one of O'Keefe's collaborators surreptitiously recorded an executive from a progressive group saying that the Clinton campaign had asked the group to pay someone to dress in a duck costume outside President Trump's campaign rallies and hold a sign that said, "TRUMP DUCKS RELEASING HIS TAX RETURNS."[135] In a spooky voiceover, O'Keefe insisted that the progressive group had illegally coordinated with Secretary Clinton's campaign.[136] But O'Keefe, a well-known

133. *See generally Frontline: Washington's Other Scandal*, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/scandal/etc/ads.html (last visited Aug. 20, 2017) (describing the distinction as a "loophole").

134. *See generally* Philip Elliott, *Everything We Know About the Latest James O'Keefe Video Sting*, TIME (Oct. 19, 2016), http://time.com/4536212/james-okeefe-project-veritas-video-democrats/.

135. Project Veritas Action, *Rigging the Election – Video III: Creamer Confirms Hillary Clinton Was Personally Involved*, YOUTUBE (Oct. 24, 2016), https://youtu.be/EEQvsK5w-jY.

136. *Id.*; *see also* Allan Smith, *Experts: Actions of Democratic Operatives in Latest Undercover James O'Keefe Video Are Likely Not a Violation of the Law*, BUS.

bête noire of progressives,[137] was mistaken.[138] Even if the progressive group paid for the duck-adorned street-theater entirely independently of the Clinton campaign, and at the direct request of Secretary Clinton herself, the communication does not fall within any of the proscribed content standards of federal law.

With all of these issues raised and framed with historical examples and hypothetical thought experiments and examples in this Part, the next Part broadly explores state statutes confronting the "problem" of coordination. The States' differing approaches to preventing corruption via coordination compound the issues raised in this Part.

III. STATE STATUTORY COORDINATION LAW: A COMPARATIVE VIEW

States approach the coordination problem in numerous ways. Some states have done nothing to confront coordination, as evidenced by a vacuum of statutory provisions pertaining to it in their respective election codes. Other states embrace the contribution-expenditure dichotomy of FECA and BRCA, the cooperation-consultation-concert-request-suggestion framing of FEC regulations, or both. Some states police coordination with civil administrative actions. Other states have adopted criminal penalties ranging from mild to harsh in their applications. Further still, some states provide for a range of fines which, if levied, especially incorrectly or improperly, could adversely affect candidates' abilities to make expenditures otherwise protected by the First Amendment. Many states have updated their campaign finance laws in the super PAC era. One can divine even further nuances distinguishing states' statutory coordination schemes. This overlapping patchwork of disparate state laws, reflecting varying appetites for regulating campaign finance, only serves to compound the issues raised in the previous Part. Candidates, the media, voters, judges, practitioners, and scholars must be able to clearly identify

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INSIDER (Oct. 25, 2016, 12:08 PM), http://www.businessinsider.com/james-okeefe-project-veritas-hillary-clinton-donald-duck-2016-10 [hereinafter Allan Smith, *James O'Keefe*].

137. *See generally* David Weigel, *The Left Jousts with James O'Keefe*, WASH. POST (Feb. 3, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/02/03/the-left-jousts-with-james-okeefe/.

138. Allan Smith, *James O'Keefe*, *supra* note 136.

prohibited conduct if we are to stabilize our politics and begin restoring confidence in government and our system of elections. States should thus adopt a uniform conduct standard for coordinated communications to resolve ambiguities in the language, cure substantial overbreadth, reduce chilling effects, and eliminate traps for the unwary.

A. States That Have Done Nothing

Although most states have attempted to regulate this area of campaign finance, not every state has enacted statutory law to rein in coordinated activity for the purpose of preventing corruption or the appearance thereof.[139] This may be at least a small testament to the contrarian notion that coordination is perhaps not as big a problem as campaign finance reform proponents postulate.[140] Ideally, other states would follow these states' leads and repeal their coordination statutes altogether.[141] Suffice it to say that these states' laws would probably not blush at any of the historical or hypothetical examples presented in Part II—perhaps even the Coffee Shop Hypo, which illustrated a baseline example of clear wrongdoing under *federal* law—regardless of one's comfort level about their fact patterns.

B. States That Embrace Federal Conduct Standards

Most state statutes embrace some variant of the contribution-expenditure dichotomy of FECA and BCRA, the cooperation-consultation-concert-request-suggestion language of FEC regulations, or both, in their statutes, and they treat coordinated expenditures like a contribution to the candidate, usually subject to contribution limits established elsewhere in their respective elections codes.[142] Courts

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139. Specifically, the elections codes of Alabama, Idaho, and Indiana do not address coordinated communications.

140. *Cf. supra* note 73 (observing that fewer than two dozen people participated in the FEC's notice-and-comment rulemaking on coordination pursuant to BCRA, and that only fourteen people testified in administrative hearings on the rule).

141. *See supra* note 13 (describing the purpose of this Note by reference to a best-possible-worlds outcome).

142. *See generally* COLO. CONST. art. XXVIII, §§ 2(5)(a), 2(8)(a), 2(9), 3, 5 (2016 West, Westlaw through 2017 Legis. Sess.); *see also* ALASKA STAT. §

15.13.400(4), (6), (10) (West, Westlaw through 2017 First Regular Session); ARIZ. REV. STAT. ANN. §§ 16-901(11), (13)–(14), (25), (31), 16-922(B)–(C), (E) (West, Westlaw through 2017 First Reg. Sess. of 53rd Leg.); ARK. CODE ANN. § 7-6-201(4)(A), (8), (11) (West, Westlaw through 2017 Reg. Sess.); CAL. GOV'T CODE §§ 82015(b)(2), 85500(b) (West, Westlaw through Ch. 2 of 2018 Reg. Sess); COLO. REV. STAT. § 1-45-103(6)(a), (10)–(11) (West, Westlaw through Ch. 2 of Second Reg. Sess. of 2018 Gen. Assemb.); CONN. GEN. STAT. §§ 9-601b(a), -601c(a), -601c(b)(1)–(3), (5), (7)–(9) (West, Westlaw through 2017 Jan. Reg. Sess.); DEL. CODE ANN. tit. 15, §§ 8002(8), (12)–(13), 8012(f) (West, Westlaw through 81 Laws 2018); FLA. STAT. § 106.011(5), (8)(a), (10)(a), (12)(a) (West, Westlaw through 2017 First Reg. Sess.); GA. CODE ANN. § 21-5-3(7), (12), (15) (West, Westlaw through 2017 Sess. of Ga. Gen. Assemb.); HAW. REV. STAT. §§ 11-302, -363(a)–(b) (West, Westlaw through Act 3 of 2017 1st Spec. Sess.); 10 ILL. COMP. STAT. 5/9-1.15, -1.4, -8.6 (West, Westlaw through P.A. 100-578 of 2018 Reg. Sess.); IOWA CODE § 68A.404 (West, Westlaw through 2017 Reg. Sess.); KAN. STAT. ANN. §§ 25-4143(e), (g), 25-4148c(d)(2) (West, Westlaw through 2017 2017 Reg. Sess. of Kan. Leg.); KY. REV. STAT. ANN. §§ 121.015(6), (12), 121.150 (West, Westlaw through 2017 Reg. Sess.); LA. STAT. ANN. § 18:1483(6), (9) (West, Westlaw through 2017 2d Extraordinary Sess.); ME. REV. STAT. ANN. tit. 21, § 1015(5) (West, Westlaw through 2017 1st Reg. Sess.); MD. CODE ANN., ELEC. LAW § 1-101(o), (aa)–(bb) (West, Westlaw through 2018 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 55, §§ 1, 7A (West, Westlaw through Chapter 175 of 1st Ann. Sess.); MICH. COMP. LAWS §§ 169.204(1), 169.206(1), 169.209(2), 169.270 (West, Westlaw through 2018 Reg. Sess. of 99th Leg.); MINN. STAT. §§ 10A.01(18), 211A.01(5) (West, Westlaw through 2017 Reg. & 1st Spec. Sess.); MISS. CODE ANN. § 23-15-801(e)–(f), (j) (West, Westlaw through 2017 Reg. & 1st Extraordinary Sess.); MO. REV. STAT. § 130.011(12), (16) (West, Westlaw through 2017 1st Reg. Sess.); MONT. CODE ANN. § 13-1-101(9), (17), (24) (West, Westlaw through 2017 Sess.); NEB. REV. STAT. §§ 49-1415, -1419, -1428 (West, Westlaw through 1st Reg. Sess. of 105th Leg.); NEV. REV. STAT. §§ 294A.007, .0075, .0077 (West, Westlaw through end of 79th Reg. Sess.); N.H. REV. STAT. ANN. §§ 664:2(VIII)–(IX), (XI), 644:4 (West, Westlaw through Ch. 4 of 2018 Reg. Sess.); N.J. STAT. ANN. § 19:44A-3(d) (West, Westlaw through 2017); N.M. STAT. ANN. §§ 1-19-26(F), (J), 1-19-34.7(C) (West, Westlaw through Ch. 1 of 2d Reg. Sess. of 53d Leg.); N.Y. ELECTION LAW §§ 14-100(9), (15), 14-107(a), (d) (West, Westlaw through 2018); N.C. GEN. STAT. § 163A.1411(13), (20), (22), (51), (53) (West, Westlaw through 2017 Reg. Sess.); N.D. CENT. CODE § 16.1-08.1-01(5), (7), (9) (West, Westlaw through 2017 Reg. Sess. of 65th Leg. Assemb.); OHIO REV. CODE ANN. §§ 3517.01(5)–(6), (16)–(17), 3517.1011(A)(5)(a), (G) (West, Westlaw through File 42 of 132d Gen. Assemb.); OKLA. STAT. tit. 74, § 257:1-1-2 (West, Westlaw through 2013); OR. REV. STAT. § 260.005(3), (8), (10) (West, Westlaw through 2017 Reg. Sess.); 25 PA. CONS. STAT. § 3241(b), (d)–(e) (West, Westlaw through 2018 Reg. Sess.); R.I. GEN. LAWS §§ 17-25-3(4), (6), (16), 17-25-23 (West, Westlaw through Ch. 480 of Jan. 2017 Sess.); S.C. CODE ANN. §§ 8-13-100(9), (14), 8-13-1300(17), (33) (West, Westlaw through 2017 Sess.); S.D.

have sometimes construed these states' coordination statutes to be consistent with the interpretation of FECA in *Buckley v. Valeo*.[143] Other states have blazed their own trails by aggressively defining coordination, going further than either Congress or the FEC have gone.[144] New York, for example, recently enacted legislation to try to

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CODIFIED LAWS § 12-27-1(6), (9), (11) (West, Westlaw through 2018 Reg. Sess.); TENN. CODE ANN. § 2-10-102(4), (6)(A) (2016); TEX. ELEC. CODE ANN. § 251.001(3), (7) (West, Westlaw through 2017 Reg. & 1st Sess. of 85th Leg.); UTAH CODE ANN. §§ 20A-11-101(6)–(7), (15), (24), 20A-11-1702(2)(a) (West, Westlaw through 1st Spec. Sess.); VT. STAT. ANN. tit. 17, §§ 2901(4), (7), (10), 2941, 2944(a)–(b) (West, Westlaw through 1st Sess. of 2017–18 Vt. Gen. Assemb.); VA. CODE ANN. §§ 24.2-945.1(A), 24.2-955.1 (West, Westlaw through 2017 Reg. Sess.); WASH. REV. CODE §§ 42.17A.005(13)(a), (20), (26), 42.17A.310(1), 42.17A.405 (West, Westlaw through 2017 3d Spec. Sess. of Wash. Leg.); W. VA. CODE §§ 3-8-1a(7), (16), 3-8-2b(i) (West, Westlaw 2017 3d Extraordinary Sess.); WIS. STAT. §§ 11.0101(8), (10), (16), 11.1101, 11.1203(1)–(3) (West, Westlaw through 2017 Act 136); WYO. STAT. ANN. § 22-25-102(k)(i) (West, Westlaw through 2017 Gen. Assemb. of Wy. Leg.).

143. *See, e.g.*, Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 496 (7th Cir. 2012) (construing the language of Illinois's coordination statute to be consistent with FECA's language as upheld in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *McConnell v. FEC*, 540 U.S. 93 (2003), and finding that "actual prior communication between the purchaser of the electioneering communication and the candidate" and "the supposedly independent group giv[ing] a candidate's campaign advance, secret notice of its planned advertising campaign to attack the opponent in a particular way, but without actually drawing an explicit response from the candidate's campaign" are both forms of prohibited coordination); *see also* Friends of Governor Tom Kean v. N.J. Election Law Enf't Comm'n, 552 A.2d 612, 615–16 (N.J. 1989) (per curiam) (concluding that advertising expenditures are not within the ambit of limits on expenditures in support of a gubernatorial candidate unless they were coordinated with the candidate).

144. *See, e.g.*, N.Y. ELEC. LAW § 14-107(d)(i) (2017) (providing that a candidate's mere presence at a fundraising event hosted by an IE group is prohibited coordination if the IE group has made an expenditure benefiting such candidate within two years of a primary, general, or special election of the candidate); *see also* N.Y. ELEC. LAW § 14-107(d)(iv) (2017) (presuming coordination where a person making an IE benefitting a candidate is a member of the candidate's family); UTAH CODE ANN. § 20A-11-101(7)(a), (d) (2016) (providing that, if he does not object to the expenditure, a candidate's mere prior knowledge of an expenditure, or an IE group's use of a candidate's official logo or slogans in a communication, can give rise to a finding of illegal coordination). *Cf.* CAL. CODE REGS. tit. 2, § 18225.7 (2017), http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/LegalDiv/Regulations/Index/Chapter2/18225.7.pdf (defining coordinated expenditures in regulations promulgated by the California Fair Political

limit the effects of *Citizens United v. FEC* in Empire State politics.[145] One can only speculate how much further it and other states may try to go in the coming years.

C. State Penalties for Prohibited Coordinated Communications

Statutes across the country provide varying penalties and enforcement procedures for violations of states' elections codes. Some create administrative bodies to regulate election conduct, including coordinated expenditures.[146] Some empower the state attorney general

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Practices Commission); *see also* Caleb P. Burns & Eric Wang, *California Cracks Down on Coordination Through New Rules*, NEWS & INSIGHTS | NEWSLETTERS (Wiley Rein LLP, D.C.), Nov. 2015, http://www.wileyrein.com/newsroom-newsletters-item-California-Cracks-Down-on-Coordination-Through-New-Rules.html (noting that a new state law will address almost exactly the kind of scenario raised by the Polling Hypo, *supra* Section II.B.3); Caleb P. Burns & Eric Wang, *Minnesota Campaign Finance Board Adopts Stricter Position on Super PAC Coordination*, NEWS & INSIGHTS | NEWSLETTERS (Wiley Rein LLP, D.C.), Mar. 2015, http://www.wileyrein.com/newsroom-newsletters-item-4912.html (reporting that the Minnesota Campaign Finance and Public Disclosure Board has adopted prohibitions on candidates appearing at super PAC fundraisers and candidates soliciting funds for friendly super PACs, neither of which the FEC has done).

145. *See* Press Release, Governor Andrew M. Cuomo, Governor Cuomo Signs First-in-the-Nation Legislation to Combat *Citizens United* (Aug. 24, 2016), https://www.governor.ny.gov/news/governor-cuomo-signs-first-nation-legislation-combat-citizens-united.

146. *See, e.g.*, COLO. CONST. art. XXVIII, § 9(2) (2016); *see also* ARK. CODE ANN. § 7-6-217(g) (West, Westlaw through 2017 Reg. Sess. & 1st Extraordinary Sess. of 91st Ark. Gen. Assemb.); CAL. GOV'T CODE § 84213(b) (West, Westlaw through Ch. 2 of 2018 Reg. Sess.); CONN. GEN. STAT. § 9-7b (West, Westlaw through 2017 Jan. Reg. Sess.); DEL. CODE ANN. tit. 15 § 8012(f) (West, Westlaw through 81 Laws 2017); HAW. REV. STAT. § 11-410 (West, Westlaw through Act 3 of 2017 1st Spec. Sess.); KAN. STAT. ANN. § 25-4181 (West, Westlaw through 2017 Reg. Sess. of Kan. Leg.); MISS. CODE ANN. § 23-15-809 (West, Westlaw through 2017 Reg. & 1st Extraordinary Sess.); N.J. STAT. ANN. § 19:44A-2.1 (West, Westlaw through 2017); N.C. GEN. STAT. §§ 163A-1439 (West, Westlaw through 2017 Reg. Sess.); TENN. CODE ANN. §§ 2-10-105, -110 (2016). *Accord* State *ex rel.* Two Unnamed Petitioners v. Peterson, 866 N.W.2d 165, 181 (Wis. 2015) (referring to an administrative coordination regulation promulgated by Wisconsin's Government Accountability Board), *cert. denied*.

to investigate and prosecute violations.[147] Some provide for fines and civil penalties.[148]

147. *See, e.g.*, HAW. REV. STAT. § 11-411 (West, Westlaw through Act 3 of 2017 1st Spec. Sess.); *see also* N.H. REV. STAT. ANN. § 664:18 (West, Westlaw through Ch. 4 of 2018 Reg. Sess.); N.M. STAT. ANN. § 1-19-36(B) (West, Westlaw through Ch. 1 of 2d Reg. Sess. of 53d Leg.); 25 PA. STAT. AND CONS. STAT. ANN. § 3257 (West, Westlaw through 2018 Reg. Sess.).

148. *See, e.g.*, COLO. CONST. art. XXVIII, § 9(2) (2016) (providing for administrative tribunals for alleged violations); CONN. GEN. STAT. § 9-601e (West, Westlaw through Supp. 2018) (providing joint and several liability for candidates and their agents to pay financial penalties levied by the State Elections Enforcement Commission); HAW. REV. STAT. § 11-410(a), (c) (West, Westlaw through Act 3 of 2017 1st Spec. Sess.) (vesting the Campaign Spending Commission with power to issue administrative fines for violations, enforceable by a court, ranging from $1,000 to three times the amount of the unlawful contribution or expenditure, and granting the Commission discretion to order a candidate found in violation of the elections code to personally pay such fines, as opposed to funds coming from the campaign account); KAN. STAT. ANN. § 25-4181 (West, Westlaw through 2017 Reg. Sess. of Kan. Leg.) (empowering the Governmental Ethics Commission to assess civil fines for violations of the elections code and to prohibit persons who have not paid these fines from running as candidates for state or local office until all fines have been paid); LA. STAT. ANN. § 18:1505.2 (West, Westlaw through 2017 2d Extraordinary Sess.) (providing, inter alia, financial penalties for violations of contribution limits equal to either 10% or twice the amount of the prohibited contribution, depending on circumstances); LA. STAT. ANN. § 18:1505.5 (West, Westlaw through 2017 2d Extraordinary Sess.) (providing additional civil penalties for knowing and willful violations of contribution limits); ME. REV. STAT. ANN. tit. 21-a, § 1004-A (West, Westlaw through 2017 1st Reg. & 1st Spec. Sess. of 128th Leg.) (establishing that acceptance of a contribution in excess of statutory limits results in a financial penalty not to exceed the amount of the excess); MD. CODE ANN., ELEC. LAW § 13-604 (West, Westlaw through Ch. 1 to 4 from 2018 Reg. Sess. of Gen. Assemb.) (assessing civil penalties even where a person makes a mistake of law with respect to contribution limits); MO. REV. STAT. § 130.072 (West, Westlaw through 2017 1st Reg. Sess. and 1st & 2d Extraordinary Sess. of 99th Gen. Assemb.) (providing a penalty for knowing violations of contribution limits equal to the excess above the contribution limit); N.C. GEN. STAT. § 163A-1451 (West, Westlaw through 2017 Reg. Sess.) (establishing civil penalties not to exceed three times the amount of a prohibited contribution or expenditure, and giving the State Board of Elections the discretion to pursue other remedies); OHIO REV. CODE ANN. § 3517.992 (West, Westlaw through File 48 of 132d Gen. Assemb.) (providing penalties equal to three times the amount of a prohibited contribution); TENN. CODE ANN. § 2-10-110 (2016) (authorizing the Registry of Election Finance to impose penalties for violations of the elections code); VA. CODE ANN. § 24.2-953(C) (West, Westlaw through 2017 Reg. Sess.) (establishing threshold civil penalties of $100 for persons who aid, abet, or participate

As a pure accounting matter, payment of fines reduces a candidate's available budget for expenditures. To the extent a candidate must pay a fine, pending judicial review of an administrative action, especially where she is in fact innocent, her capacity to communicate effectively diminishes. Such a situation could result in a constitutional quandary in the view of the *Buckley* Court, as the fine levied on an innocent party would operate as a de facto statutory limit on making expenditures.[149]

Other states provide criminal penalties for violations—both misdemeanors *and* felonies, depending upon the offender's mens rea—resulting in literally putting people convicted of wrongdoing into a cage.[150] One cannot overstate the chilling effects that the threat of

in the failure to properly report contributions and expenditures); VA. CODE ANN. § 24.2-953.1 (West, Westlaw through 2017 Reg. Sess.) (requiring candidates who fail to properly report contributions and expenditures to pay a civil fine of $500 for each violation); WASH. REV. CODE § 42.17A.750 (West, Westlaw through Ch. 3 of 2018 Reg. Sess. of Wash. Leg.) (providing civil remedies for violations of campaign finance laws ranging from election do-overs to various amounts of fines); W. VA. CODE § 3-8-7 (West, Westlaw through 2017 3d Extraordinary Sess.) (providing civil fines as a potential remedy for failure to make required contribution or expenditure reports); WIS. STAT. § 11.1400 (West, Westlaw through 2017 Act 136) (establishing civil fines of $500 per person per violation of campaign finance laws and treble damages for contributions in excess of statutory limits, and imputing a candidate's knowledge of wrongdoing to every person working for the candidate's campaign); WYO. STAT. ANN. § 22-25-102(c) (West, Westlaw through 2017 Gen. Sess. of Wy. Leg.) (establishing civil penalties for violations of contribution limits ranging from $5,000 for the first violation to $10,000 or any other amount a jury or court decides will deter repeated infractions).

149. *See supra* notes 49–53 and accompanying text.

150. *See* ARK. CODE ANN. § 7-6-202 (West, Westlaw through 2017 Reg. Sess. & 1st Extraordinary Sess. of 91st Ark. Gen. Assemb.) (knowing violations are Class A misdemeanors); DEL. CODE ANN. tit. 15, § 8043(b), (h) (West, Westlaw through 81 Laws 2018) (unlawful contributions or expenditures result in a Class A misdemeanor, but a safe harbor for good-faith mistakes exists under certain circumstances); FLA. STAT. § 106.08(7)(a)–(b) (West, Westlaw through 1st Reg. Sess. & Spec. "A" Sess. of 25th Leg.) (a single knowing or willful violation of contribution limits is a first-class misdemeanor, but subsequent violations are third-degree felonies); GA. CODE ANN. § 21-5-9 (West, Westlaw through 2017 Sess. of Ga. Gen. Assemb.) (misdemeanor penalty); LA. STAT. ANN. § 18:1505.6 (West, Westlaw through 2017 2d Extraordinary Sess.) (up to six months incarceration, $500 fine, or both for knowing, willful, or fraudulent violation of contribution limits); ME. REV. STAT. ANN. tit. 21-A, § 1004 (West, Westlaw through 2017 1st Reg. Sess.) (knowing violation of

contribution rules is a Class E crime); MD. CODE ANN., ELEC. LAW § 13-603 (West, Westlaw through 2018 Reg. Sess. of the Gen. Assemb.) ($25,000 fine, a maximum of one year of incarceration, or both for knowing and willful violations of contribution limits); MICH. COMP. LAWS § 169.252(9) (West, Westlaw through 2018 Reg. Sess. of 99th Leg.) ($1,000 fine, 90 days incarceration, or both, for knowing violations of contribution limits); MINN. STAT. § 211A.11 (West, Westlaw through 2017 Reg. & 1st Spec. Sess.) (default misdemeanor penalty for campaign finance violations); MO. REV. STAT. § 130.081(1), (3) (West, Westlaw through 2017 1st Reg. Sess.) (misdemeanor penalties for purposeful violations of contribution limits); MONT. CODE ANN. § 13-35-103 (West, Westlaw through 2017 Sess.) (default misdemeanor penalty for knowing violations); NEV. REV. STAT. § 294A.100(3) (West, Westlaw through end of 79th Reg. Sess.) (willful violations of the contribution limits are category E felonies); N.J. STAT. ANN. § 19:44A-21(a) (West, Westlaw through 2017) (purposeful or intentional misrepresentations or concealment of contributions is a fourth-degree crime); N.M. STAT. ANN. § 1-19-36 (West, Westlaw through Ch. 1 of 2d Reg. Sess. of 53d Leg.) ($1,000 fine, up to one year incarceration, or both, for knowing and willful violations of the Campaign Reporting Act); N.Y. ELEC. LAW § 14-126(6) (West, Westlaw through 2018) (knowing and willful violations of contribution limits via coordinated expenditures results in a class E felony); N.D. CENT. CODE § 16.1-08.1-07 (West, Westlaw through 2017 Reg. Sess. of 65th Leg. Assemb.) (default class A misdemeanor penalty for violations of campaign finance rules); 25 PA. STAT. AND CONS. STAT. ANN. § 3260b(a) (West, Westlaw through 2018 Reg. Sess.) (authorizing the attorney general to prosecute violations of campaign finance rules); R.I. GEN. LAWS § 17-25-13 (West, Westlaw through Ch. 480 of Jan. 2017 Sess.) (misdemeanor penalties and fines for knowing and willful violations of the elections code); S.C. CODE ANN. § 8-13-1520 (West, Westlaw through 2017 Sess.) (default misdemeanor penalty for violations of the elections code); S.D. CODIFIED LAWS § 12-27-7 (West, Westlaw through 2018 Reg. Sess.) (misdemeanor penalties for violations of contribution limits); VT. STAT. ANN. tit. 17, § 2903(a) (West, Westlaw through 1st Sess. of 2017–18 Vt. Gen. Assemb.) (up to $1,000 fine, up to six months incarceration, or both, for knowing and intentional violations of contribution limits); VA. CODE ANN. § 24.2-953(D) (West, Westlaw through 2017 Reg. Sess.) (providing Class 1 misdemeanor penalties for willfully failing to report contributions); WASH. REV. CODE § 42.17A.750(2)(a)–(c) (West, Westlaw through 2017 3d Spec. Sess. of Wash. Leg.) (providing criminal sanctions for violations of campaign finance laws made with "actual malice," resulting in, alternatively, misdemeanor, gross misdemeanor, or Class C felony convictions depending on the nature or frequency of the conduct); W. VA. CODE § 3-8-12(f), (n) (West, Westlaw 2017 3d Extraordinary Sess.) ($1,000 fine, up to one year of incarceration, or both, for violations of statutory contribution limits). *Cf.* HAW. REV. STAT. § 11-411 (West, Westlaw through Act 3 of 2017 1st Spec. Sess.) (authorizing the Campaign Spending Commission to refer allegations of reckless, knowing, or intentional violations of the elections code to the state attorney general or county prosecutor); MISS. CODE ANN. § 23-15-809 (West, Westlaw through 2017 Reg. & 1st Extraordinary Sess.) (requiring

these particular sanctions is likely to have on political participation or communication.

D. Problems with Disparate Approaches Beg for Reform

Disparate approaches to regulating coordination compound the confusion-related issues this Note raises in Part II. Ironically, states with criminal sanctions for coordinated expenditures may contribute most to the decline in the public's faith in the American system of elections. Empirical research has shown, for instance, that "punitive sentiment" in America has grown steadily since the 1960s, especially when "presidents framed crime as a result of a permissive criminal justice system."[151] By way of analogy, former President Obama's naked contempt for money in politics, which he attributed to a system that was too lax in policing corruption,[152] has no doubt contributed to popular animus toward even merely *potential* coordination violations

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any person making an IE to submit a sworn statement to the Secretary of State under penalty of perjury that no expenditures made were coordinated with a candidate); N.H. REV. STAT. ANN. § 664:18 (West, Westlaw through Ch. 4 of 2018 Reg. Sess.) (empowering the state attorney general to investigate and prosecute alleged violations of the elections code); WASH. REV. CODE § 42.17A.904 (West, Westlaw through 2017 3d Spec. Sess. of Wash. Leg.) (instructing courts to construe campaign finance laws liberally "to effectuate [their] policies and purposes"); WIS. STAT. §§ 11.0505, 11.1001, 11.1401(c) (West, Westlaw 2017 3d Extraordinary Sess.) (requiring entities spending over $2,500 on a communication to swear under oath that it has not violated a statutory ban on coordinated activity, and establishing misdemeanor penalties of $1,000 fines, up to six months incarceration, or both, for intentional violations of statutory prohibitions on coordination).

151. NAZGOL GHANDNOOSH, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES 7–8 (2014), http://sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf.

152. *See* Press Release, The White House, Office of Press Sec., Remarks by the President in State of the Union Address (Jan. 27, 2010), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-state-union-address ("[L]ast week the Supreme Court reversed a century of law [in *Citizens United*] that I believe will open the floodgates for special interests . . . to spend without limit in our elections. I don't think American elections should be bankrolled by America's most powerful interests . . . ."). *But see* The Center for Competitive Politics, *What* Citizens United *Didn't Say*, YOUTUBE (July 1, 2011), https://youtu.be/Zh1SfOwE7dU (rebutting "one Constitutional Law professor['s]" "bizarre" claims about the landmark case's chief holding).

involving super PACs. "Give a small boy a hammer, and he will find that everything he encounters needs pounding."[153] In the state law context, it is thus intuitive that a citizen of a state that imposes criminal sanctions for coordinated political communications will tend to view all alleged coordination as an event deserving of harsh punishment, even perhaps where none is merited.

One's attitude toward the seriousness of an infraction may also shift in light of the perceived source of political funding.[154] Notably, Professor Smith observes that even casual statements like "[e]verybody knows the big super PACs coordinate with candidates" foster

> a cynicism among the general public, which understands that Super PACs are clearly working to elect particular candidates, and therefore does not see them as "independent" in the sense of being "disinterested" or somehow unknown to the candidate. *This is particularly true when these claims are combined with rhetoric that suggests that the conduct skirts the law or openly flouts it*.
>
> The problem is that the behaviors just noted in these accusations do not, in fact, amount to illegal coordination. . . . There is, indeed, *a great deal of confusion* about what coordination prohibits and why.

153. ABRAHAM KAPLAN, THE CONDUCT OF INQUIRY: METHODOLOGY FOR BEHAVIORAL SCIENCE 28 (4th ed. 2009).

154. *Cf.* DONALD J. REBOVICH ET AL., THE NATIONAL PUBLIC SURVEY ON WHITE COLLAR CRIME 7 (2000), https://static.prisonpolicy.org/scans/nw3c/research_monograph.pdf (finding that, in the bribery context, three times as many survey respondents were concerned when they perceived the source of funds to be a corporation than when they perceived the source of funds to be an individual). One cannot overstate this comparison's significance to the campaign finance debate, given that corporations can contribute to super PACs and that the notion that all campaign contributions are necessarily quid pro quo corruption is a very popular, if wrong, idea. *See supra* notes 20–21 and accompanying text; *see also* Citizens United v. FEC, 558 U.S. 310, 371–72 (2010) (holding chiefly that the First Amendment forecloses Congress from regulating the independent expenditures of organizations, even when those organizations raise funds from corporations).

> At times, *allegations of coordination are nothing more than an opposing campaign's propaganda efforts to discredit their opponents.*[155]

Partisans love having the rhetorical cudgel of "coordination" in their communications arsenal because it empowers them to exploit the law's vagueness and ambiguity[156]—but doing so only worsens the public's confusion about what qualifies as prohibited conduct, and it thus undermines the public's faith in the political process.

As a practical matter, the states would invariably treat the hypotheticals in Part II differently. To wit, Alabama, Idaho, and Indiana, whose elections codes do not police coordinated communications, would not likely budge to correct any of the scenarios. South Carolina would likely treat both the Photo and Polling Hypos as truly independent expenditures—not coordination—because there was no actual arrangement between the candidates and super PACs in either scenario.[157] Florida's code contains more gray area,[158] but applying it would likely result in a similar analysis as South Carolina when a court employed the *esjudem generis* or *noscitur a sociis* canons of construction.[159] Specifically, when employing these canons, a court could read the expression "coordinated with" in Florida's independent expenditure definition[160] as requiring some kind

155. Smith, *Super PACs*, *supra* note 2, at 605–06 (emphasis added).

156. *See supra* Sections II.C.3 & II.C.4.

157. *See* S.C. CODE ANN. § 8-13-1300(33) (West, Westlaw through 2018 Act No. 130) ("'Coordinated with' means *discussion or negotiation between a candidate* and [an IE group or its agent]" (emphasis added)).

158. *See* FLA. STAT. § 106.011(12)(a) (West, Westlaw through 1st Reg. Sess. & Spec. "A" Sess. of 25th Leg.) ("'Independent expenditure' means an expenditure by a person for the purpose of expressly advocating the election or defeat of a candidate . . . which expenditure is not *controlled by, coordinated with, or made upon consultation with*, any candidate . . . ." (emphasis added)).

159. *Noscitur a Sociis*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A canon of construction holding that the meaning of an unclear word or phrase, esp. one in a list, should be determined by the words immediately surrounding it."); *Esjudem Generis*, LEGAL INFO. INST., CORNELL UNIV. L. SCH., https://www.law.cornell.edu/wex/ejusdem_generis (last visited Mar. 2, 2018) (describing the canon of construction that helps courts give meaning and effect to ambiguous statutory language in an ordinal list by inferring meaning from other terms in the list).

160. FLA. STAT. § 106.011(12)(a).

of agreement between the candidate and IE group, given the active, participatory character of the phrases "controlled by" and "upon consultation with" that surround it in the statutory text. Louisiana law may treat Super PAC D's expenditure in the Polling Hypo like a contribution to Candidate D if a prosecutor in Louisiana could mount a persuasive argument that, by pitching the topline results of its internal polling to a reporter and releasing an exclusive teaser for a negative ad about Candidate E, Candidate D either passively *cooperated with* Super PAC D's conduct, or that Candidate D *suggested* to Super PAC D what Super PAC D's communications strategy should be.[161] If this contribution exceeded statutory limits,[162] Candidate D could be subject, depending on how we choose to tweak the facts, to a range of sanctions.[163] Furthermore, the facts giving rise to the Polling Hypo are now ostensibly illegal in California.[164] The reader should continue

161. *See* LA. STAT. ANN. §§ 18:1483(6)(b) (West, Westlaw through 2017 2d Extraordinary Sess.) ("'Contribution' shall also include, without limitation: (i) . . . expenditures made by any person *in cooperation*, consultation or concert, with, or at the request *or suggestion of*, a candidate . . . ." (emphasis added)).

162. LA. STAT. ANN. § 18:1505.2(H) (West, Westlaw through 2017 2d Extraordinary Sess.) (establishing contribution limits for various levels of state elective offices).

163. *See, e.g.*, LA. STAT. ANN. § 18:1505.2(A)(2) (West, Westlaw through 2017 2d Extraordinary Sess.) ("(a) Any person who violates the provisions of this Subsection unknowingly shall be assessed a penalty equal to the amount of the contribution plus ten percent. (b)(i) Any person who violates the provisions of this Subsection knowingly and willfully shall be assessed a penalty equal to twice the amount of the contribution."); *see also* LA. STAT. ANN. § 18:1505.5(A) (West, Westlaw through 2017 2d Extraordinary Sess.) ("any person who knowingly and willfully violates any provision of [LA. STAT. ANN. § 18:1505.2] or any other provision of this Chapter shall be assessed a civil penalty for each violation," including a range of financial penalties); LA. STAT. ANN. § 18:1505.6(C) (West, Westlaw through 2017 2d Extraordinary Sess.) ("Any candidate . . . or any other person who knowingly, willfully, and fraudulently violates any provision of [LA. STAT. ANN. § 18:1505.2], or any other provision of this Chapter shall, upon conviction, be sentenced to not in excess of six months in the parish jail or to pay a fine of not more than five hundred dollars, or both.").

164. *See* CAL. CODE REGS. tit. 2, § 18225.7 (2017), http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/LegalDiv/Regulations/Index/Chapter2/18225.7.pdf (defining coordinated expenditures in regulations promulgated by the California Fair Political Practices Commission); *accord* Burns & Wang, *supra* note 144.

testing the hypotheticals in Sections II.B and II.C against the statutory framework of each state to develop permutations that give a deeper appreciation for the disparate outcomes that can result across the states in identical factual scenarios. The only person these divergent approaches truly help is the carpetbagger[165] looking to avoid taking up residence in a penitentiary.[166]

With so many different approaches to regulating coordination among the states, to say nothing of the system of federal elections having its own coordination regime, there is little way for an unwary, novice candidate proverbially getting her feet wet for the first time to predict what acts will land her in trouble. Similarly, an unsophisticated voter must guess whether a candidate has actually broken a law when an allegation of prohibited coordination arises. A model coordination conduct standard would go a long way to resolving this conundrum, just as model standards have helped stabilize the national economy through widely adopted contract laws governing the sale of goods[167] and have clarified criminal laws, thus improving notice to potential

165. "An outsider who presumptuously seeks a position or success in a new locality." *Carpetbagger*, THE AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2002).

166. *Cf. generally* Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (hypothesizing that people respond practically to policy changes, like local tax ordinances, and sort themselves geographically away from high-tax jurisdictions to maximize their personal economic utility).

167. *See generally* UNIF. COMM. CODE (AM. LAW INST. & UNIF. LAW COMM'N 2017). Commentators have observed that the UCC's drafters wrote the model code with the specific goal of "bring[ing] the law applicable to commercial transactions more in line with business practice, so as to effectuate the legitimate expectations of those engaged in business dealings." CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 7 (7th ed. 2012); *accord* DOUGLAS J. WHALEY & STEPHEN M. MCJOHN, PROBLEMS AND MATERIALS ON COMMERCIAL LAW 3 (11th ed. 2016) ("The idea [behind drafting and proposing the UCC for adoption in state legislatures] was that if commercial law were uniform throughout the country, commerce would be more certain and efficient (the same goals animating the law merchant centuries before)."). Adoption and implementation of the UCC has achieved this purpose. *See* Jean Wegman Burns, *Horizontal Jurisprudence and Sex Discrimination*, 49 HASTINGS L.J. 105, 143–44 (1997) (describing the UCC as "a law successfully used for over 30 years" and noting that "various foreign governments, impressed with the UCC's success, have considered adopting similar laws").

defendants.[168] State lawmakers should therefore consider amending their states' coordination statutes with a model conduct standard. But before reaching for just any standard, lawmakers should meditate on fundamental American values like the freedoms enshrined in the Constitution and the struggles that led to its ratification. And legislators should embrace—not ignore—the practical realities of politics in developing a model conduct standard.

IV. LIBERAL ASSUMPTIONS TO GUIDE THE REFORM PATH

Power corrupts.[169] As such, there exists a non-trivial argument that, even if a donor never expressly asks an elected official for a political favor in exchange for a contribution,[170] the elected official will nonetheless, over time, become subject to influence[171] that

168. *See generally* MODEL PENAL CODE (AM. LAW INST. 1985). The American Law Institute began drafting the Model Penal Code in 1952 to "bring coherence" to a patchwork of statutory and un-codified common-law crimes across fifty jurisdictions. JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW CASES AND MATERIALS 5 (7th ed. 2016). Furthermore, "[t]he Model Penal Code has greatly influenced criminal law . . . courts look to it for guidance to fill holes in their own statutory systems." *Id.* at 6.

169. *Lord Acton Quote Archive*, ACTON INST., https://acton.org/research/lord-acton-quote-archive (Feb. 20, 2018) ("Power tends to corrupt and absolute power corrupts absolutely.").

170. Colo. Republican Fed. Campaign Comm. v. FEC (*Colorado I*), 518 U.S. 604, 643 (1996) (Thomas, J., dissenting) ("As one commentator has observed, 'it must not be forgotten that a large number of contributions are made without any hope of specific gain: for the promotion of a program, because of enthusiasm for a candidate, or to promote what the giver vaguely conceives to be the national interest.'" (citing LOUISE OVERACKER, MONEY IN ELECTIONS 192 (1974)). *Accord* MEET THE DONORS, *supra* note 34, at 13:30–13:52 (Democratic "mega-donor" Haim Saban stating that he gave to former Secretary Hillary Clinton when she ran for president because personally agrees with her liberal social values and hawkish foreign policy views, not because of any personal pecuniary interest). *See also* Jacobs, *supra* note 33, at 34 ("From a network perspective, this is *network homophily*: the donor-candidate connection is created on the basis of their shared ideology, rather than the connection causing the shared ideology. . . . In this model, donations *are not strategic*: given unlimited resources, an individual would donate the same amount to all politicians they agree with.").

171. McConnell v. FEC, 540 U.S. 93, 153 (2003) ("Just as troubling to a functioning democracy as classic quid pro quo corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies,

manifests in adopting legislative positions favorable to the donor[172] or, at a minimum, providing outsized access to the donor.[173] Commentators arguing such positions may even be right, notwithstanding that the U.S. Supreme Court has repeatedly defined corruption narrowly.[174] The Court's definition of "corruption"[175]—quid pro quo corruption, the kind of corruption that the *Buckley* Court said Congress had a compelling interest in preventing—logically requires that a donation be given *as consideration for* a favor.[176] If a

but according to the wishes of those who have made large financial contributions valued by the officeholder."). *Accord generally* Hasen, *Proxy War*, *supra* note 36 (arguing that, until the Supreme Court's definition of "corruption" changes, statutory reforms to police coordination in the super PAC era are likely to fail); Jessica Medina, *When Rhetoric Obscures Reality: The Definition of Corruption and Its Shortcomings*, 48 LOY. L.A. L. REV. 597 (2015) (arguing that quid pro quo is too narrow a definition of corruption, and advocating for a broader definition); *see also* Zephyr Teachout, *How the Supreme Court Gets Corruption Totally Wrong*, WASH. POST (May 5, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/05/05/how-the-supreme-court-gets-corruption-totally-wrong/ ("It's common sense that big money is corrupting.").

172. *See* Jacobs, *supra* note 33, at 35 ("[D]onations . . . create a sense of indebtedness, which leads to reciprocation in the form of legislative effort."). *But see* Citizens United v. FEC, 558 U.S. 310, 360 (2010) ("Ingratiation . . . [is] not corruption.").

173. *See generally* Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 391–93 (2009) (arguing that unequal access to elected officials is a form of corruption regardless of whether it ever results in a quid pro quo). *But see Citizens United*, 558 U.S. at 360 ("[A]ccess . . . [is] not corruption.").

174. *See, e.g.*, FEC v. Nat'l Conservative Political Action Comm. (*NCPAC*), 470 U.S. 480, 497 (1985) ("The hallmark of corruption is the financial quid pro quo: dollars *for* political favors." (emphasis added)). *But see* Zephyr Teachout, *What John Roberts Doesn't Get About Corruption*, POLITICO (Apr. 14, 2014), http://www.politico.com/magazine/story/2014/04/what-john-roberts-doesnt-get-about-corruption-105683 ("No reasonable reading of *Buckley* limits all corruption to quid pro quo corruption.").

175. *See NCPAC*, 470 U.S. at 497.

176. Buckley v. Valeo, 424 U.S. 1, 26–27 (1976) ("To the extent that large contributions are given *to secure political quid pro quo's* [sic] *from current and potential office holders*, the integrity of our system of representative democracy is undermined." (emphasis added)). *See also Quid Pro Quo*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("An action or thing that is *exchanged for* another action or thing of more or less equal value . . . ." (emphasis added)); LAZAR EMANUEL, LATIN FOR LAWYERS: THE LANGUAGE OF LAW 313–14 (1st ed. 1999) (defining "quid pro quo" as "What thing *for* what thing? An exchange of something *for* something else.

favor is not within the contemplation of the donor and candidate when the contribution exchanges hands, it is illogical to conclude that corruption of the recipient candidate or official has occurred under the prevailing definition, even if the candidate or official later takes some political action favorable to the donor. The *Buckley* Court permitted Congress to police the appearance of corruption, but that is an impractical project. Accordingly, States should reconsider their approaches to coordination for reasons outlined in Parts II and III. As they do, they should also consider longstanding values and practical political realities.

A. Rights of Candidates, Donors, and Voters

"Remember all Men would be tyrants if they could."[177] As the nature of the relationship between legislative campaign finance reform efforts and the courts demonstrates, any model standard will need to account for a number of negative rights[178] that the Supreme Court has recognized,[179] and perhaps others the Constitution does not explicitly

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The *mutual consideration* between parties to a contract. In cases alleging sexual harassment, the promise or grant of special employment privileges *in exchange for* sexual favors . . . ." (emphasis added)).

177. Letter from Abigail Adams to John Adams, Mass. Delegate to the Second Cont'l Cong. (Mar. 31, 1776) (on file with the Massachusetts Historical Society), http://www.masshist.org/digitaladams/archive/doc?id=L17760331aa. Although the nation's second First Lady was admonishing her husband to advocate for the inclusion of women's rights when conceiving a new nation, the principle espoused in her words here is no less applicable to this Note.

178. "The holder of a negative right is entitled to *non-interference* . . . . Negative rights can be respected simply by each person *refraining from interfering* with each other . . . ." Leif Wenar, *Rights*, STAN. ENCYCLOPEDIA OF PHIL. (emphasis added), https://plato.stanford.edu/entries/rights/ (last updated Sept. 9, 2015).

179. Since this Note calls for state-law reforms, recall that the incorporation doctrine brings the rights secured by the Bill of Rights (and other fundamental rights) into the purview of the Due Process Clause of the Fourteenth Amendment, thereby enforcing those rights against the States. *See generally* U.S. CONST. amend XIV, § 1, cl. 2 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ."); *see also* Washington v. Glucksberg, 521 U.S. 702, 722 (1997) (holding that a right is fundamental for incorporation purposes if it is "deeply rooted in history and tradition," and the contours of the right are "carefully refined"); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (holding that a right is fundamental for incorporation purposes where it is "fundamental to the American scheme of

recognize by its text, but which are nonetheless within its protective embrace.[180] Because so much of campaign finance law implicates constitutionally protected freedoms, states should ensure that any model conduct standard for coordinated communications that they adopt can withstand strict scrutiny.[181]

1. Rights to Speak and Hear

Given that communication and persuasion are at the heart of political campaigning, the right to speak is chief among the rights a model coordination standard must protect. Unfortunately, American lawmakers have had a complicated relationship with free speech since the dawn of the Republic. For example, after a broad Anti-Federalist public awareness campaign ushered the successful ratification of the Bill of Rights in 1791,[182] the right to speak nevertheless found itself in Congress's crosshairs. The Federalists enacted the Sedition Act in 1798, a federal law that criminalized speech that was critical of the government,[183] and their President John Adams signed it into law. Before the quill ink dried on the parchment, powerful members of the

justice"); Palko v. Connecticut, 302 U.S. 319, 324–25 (1937) (holding that a right is fundamental for incorporation purposes if it is "implicit in the concept of ordered liberty").

180. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

181. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (stating that courts should apply strict scrutiny to laws that, inter alia, "appear[] on [their] face[s] to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth").

182. Contrary to the Federalists, who favored a stronger, more centralized federal government to the failures of the Articles of Confederation, the Anti-Federalists favored a society based on "liberty, popular sovereignty, majority rule, deliberative processes, [and] localism." *See generally* Donald S. Lutz, *The Articles of Confederation as the Background to the Federal Republic*, 20 PUBLIUS J. FEDERALISM 55, 55–56 (1990) (providing overview of Anti-Federalist political efforts and beliefs). Thus, they argued strenuously for inclusion of a Bill of Rights in the Constitution. CHARLES SLACK, LIBERTY'S FIRST CRISIS: ADAMS, JEFFERSON, AND THE MISFITS WHO SAVED FREE SPEECH 103–04 (2015); *see also* THE ANTI-FEDERALIST PAPERS, *infra* note 203.

183. *See generally* SLACK, *supra* note 182, at 67–89. See also Sedition Act, ch. 74, 1 Stat. 596 (1798), to fully grasp its terrifying, broad scope.

Federalist Party, like Adams's Secretary of State Timothy Pickering, started investigating the editors of Anti-Federalist newspapers.[184] Pickering believed that using the law to punish political enemies was vital to the survival of the nascent republic.[185]

This reflex to criminalize political speech is an affront to American ideals and lends itself to further forms of corruption that may offend liberal values more than a simple quid pro quo. For instance, as Justice Robert Jackson noted in a speech to United States Attorneys when he served as President Franklin D. Roosevelt's Attorney General, the very nature of prosecution rationally incentivizes someone to capriciously single out personal political opponents:

> One of the greatest difficulties of the position of prosecutor is that *he must pick his cases*, because no prosecutor can even investigate all of the cases in which he receives complaints. . . . *If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted.* With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of *some act* on the part of *almost anyone*. In such a case, *it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.*

184. SLACK, *supra* note 182, at 82. The Supreme Court of the United States never had occasion to invalidate the Sedition Act as an impermissible restraint on First Amendment freedoms. Nevertheless, President Thomas Jefferson pardoned many people charged under the act, believing the Sedition Act to be unconstitutional, and Congress later repealed the act with subsequent legislation. New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

185. SLACK, *supra* note 182, at 83. The crime of sedition is still alive and well in other parts of the world. Mongkol Bangprapa, *Govt Sedition Cases Breed Fear, Says HRW*, BANGKOK POST (Sept. 4, 2017, 9:12 AM), http://www.bangkokpost.com/news/general/1317751/govt-sedition-cases-breed-fear-says-hrw (noting that 66 people face sedition charges after a 2014 coup in Thailand).

> It is in this realm—in which the prosecutor picks some person *whom he dislikes or desires to embarrass*, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that *law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views*, or being personally obnoxious to or in the way of the prosecutor himself.[186]

The FEC is the civil enforcement body with authority to hear allegations of federal campaign violations;[187] it is comprised of six commissioners, no more than three of whom may be members of the same political party.[188] This express constraint on the partisan composition of the enforcement body is a deliberate, if tacit, recognition by Congress that the prosecutorial function is a dangerous weapon in the concentrated hands of 50%+1[189] (no matter how

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186. Morrison v. Olson, 487 U.S. 654, 727–28 (1988) (Scalia, J., dissenting) (emphasis added) (internal quotation marks omitted) (quoting Robert Jackson, Attorney General, U.S. Dep't of Justice, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940)).

187. 52 U.S.C. §§ 30106(b)(1), 30109 (2012). While the FEC has exclusive jurisdiction over civil enforcement of BCRA and FEC regulations, 52 U.S.C. § 30106(b)(1) (2012), the Commission can also refer violations to the United States Attorney General for criminal enforcement under BRCA. 52 U.S.C. § 30109(c)–(d) (2012).

188. 52 U.S.C. § 30106(a)(1) (2012).

189. "Congress intended the agency to enforce campaign finance laws in a non-partisan manner . . . . Additionally, the political party restrictions . . . further[] the goal of partisan impartiality." Joshua Kershner, Note, *Political Party Restrictions and the Appointments Clause: The Federal Election Commission's Appointments Process Is Constitutional*, 32 CARDOZO L. REV. 615, 619 (2010). It is worth noting, too, that the United States House Committee on Ethics is comprised of equal numbers of members from the two major parties, ostensibly for similar reasons: it would be a dangerous weapon if one party could easily dominate its business. *See Committee History*, COMM. ON ETHICS, U.S. HOUSE OF REPRESENTATIVES, https://ethics.house.gov/about/committee-history (last visited Mar. 2, 2018) ("The Committee is the only standing committee of the House whose membership is *evenly divided between each political party*." (emphasis added)). The committee's rules even restrict partisan composition and electoral activity of its professional staff. *See*

frustrating it may be to FEC commissioners when their ideological or partisan counterparts on the Commission do not agree with them on the merits of various actions before them[190]).

H. COMM. ON ETHICS, 115TH CONG., RULES 11 (Comm. Print 2017), https://ethics.house.gov/sites/ethics.house.gov/files/Committee_Rules_for_115th_Congress_FINAL_3-27-2017.pdf ("The staff is to be assembled and retained as a professional, *nonpartisan* staff. . . . No member of the staff shall engage in *any partisan political activity* directly affecting any congressional or presidential election." (emphasis added)).

These concerns are not merely theoretical; the Wisconsin Attorney General launched an internal investigation into the John Doe allegations against Governor Scott Walker after the Court denied certiorari in *Peterson*, *see supra* Section II.C.3, and the results were startling. After prosecutors in the case used the judicial system as a fishing expedition to obtain the emails of employees in Governor Walker's administration (and of other public figures), the Wisconsin Government Accountability Board ("GAB") "placed a large portion of these emails into several folders entitled 'Opposition Research' or 'Senate Opposition Research.' DOJ . . . is deeply concerned by what appears to have been the weaponizing of GAB by partisans in furtherance of political goals." BRAD SCHIMEL, STATE OF WISCONSIN, REPORT OF THE ATTORNEY GENERAL CONCERNING VIOLATIONS OF THE JOHN DOE SECRECY ORDERS 64 (2017). For a layman's guide to the field of opposition research and its function in partisan politics, see generally Julie Bykowicz, *AP Explains: How Do Politicians Collect Opposition Research?*, U.S. NEWS & WORLD REP. (July 12, 2017), https://www.usnews.com/news/politics/articles/2017-07-12/ap-explains-why-do-politicians-want-opposition-research. These same GAB witch-hunters also obtained "over 150 very private and very personal emails between a Senator and her child, [and] placed those in a folder named 'Opposition Research.'" SCHIMEL, *supra*, at 66–67. DOJ subsequently recommended referring GAB's attorney to professional licensure authorities for a misconduct investigation and contempt proceedings against prosecutors and GAB employees involved in the gambit. Andrew Beckett, *Investigation into John Doe Leak Complete*, WISC. RADIO NETWORK (Dec. 6, 2017), https://www.wrn.com/2017/12/investigation-into-john-doe-leak-complete/.

190. *See generally* OFFICE OF COMM'R ANN M. RAVEL, FEC, DYSFUNCTION AND DEADLOCK: THE ENFORCEMENT CRISIS AT THE FEDERAL ELECTION COMMISSION REVEALS THE UNLIKELIHOOD OF DRAINING THE SWAMP 1, 7–12 (2017), http://classic.fec.gov/members/ravel/ravelreport_feb2017.pdf (bemoaning "[a] bloc of three [Republican] Commissioners [that] routinely thwarts, obstructs, and delays action on the very campaign finance laws its members were appointed to administer. . . . vot[ing] in lockstep 98% of the time," and describing matters before the FEC that resulted in deadlocked votes).

Because of the deep distrust of governing institutions that is fused into the American political DNA,[191] speech critical of the government—particularly speech critical of incumbent politicians—both deserves and needs protection from the reflexive instinct to silence opponents. One commentator has posited that the freedom of speech "should be seen as an 'auxiliary precaution' against the abuse of power" to which James Madison referred in the *Federalist Papers*.[192] Given these fundamental philosophical building blocks of the American republic, the *Buckley* Court's anti-corruption rationale is a curious one: while preventing *actual* corruption might well be a compelling governmental interest,[193] preventing the *appearance* of corruption seems like a fool's errand, akin to a pig attempting to prevent the appearance of having a snout and curly tail, or the appearance of bathing in mud—especially when voters have a remedy at the ballot box for perceived injuries or when someone appears corrupt to them.[194] It seems counterintuitive to condone or trust the fox guarding the henhouse.

First Amendment jurisprudence recognizes these principles, and is thus chock-full of precedent holding that political speech is in a class by itself, calling it a "preferred" right that deserves more

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191. *See* THE FEDERALIST NO. 51 (James Madison) ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.").

192. SAMPLES, *supra* note 70, at 30; *see also* THE FEDERALIST NO. 51 (James Madison) ("In framing a government which is to be administered by men over men . . . experience has taught mankind the necessity of auxiliary precautions.").

193. Buckley v. Valeo, 424 U.S. 1, 29 (1976). *Cf. Law Talk with Epstein, Yoo & Senik: 100*, THE RICOCHET AUDIO NETWORK at 44:29–48:43 (Aug. 23, 2017), https://itunes.apple.com/us/podcast/law-talk-with-epstein-yoo-senik/id563127951?mt=2&i=1000391412608 (defining a "compelling state interest" as "the sort of thing without which the state cannot function," applying the principle to various examples to demonstrate its practical meaning, and decrying expansive assertions of compelling governmental interests to justify encroachments on freedoms otherwise protected by the Bill of Rights).

194. For more discussion on the Constitution's foundations of distrust of government, predicated on man's inherent fallibility, see HEALY, *supra* note 18, at 24–25 (citing, *inter alia*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 59–60 (1992)) ("[W]hat turned power into a malignant force, was not its own nature so much as the nature of man—his susceptibility to corruption and his lust for self-aggrandizement. On this there was absolute agreement [among the Framers]." (internal quotation marks omitted)).

protection than other forms of speech.[195] Even where a statement is objectively untrue, the First Amendment will still shield it from regulation if it is political in nature, underscoring how much constitutional law prizes the freedom of political speech.[196]

Reciprocal to a donor's, politician's, or IE group's right to *speak* is the voter's right to *hear*. Justice Kennedy, writing for the majority in *Citizens United v. FEC*, put it thus: "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."[197] An overbroad statute that gives too much latitude to authorities to rein in the free flow of communications deprives the polity of the opportunity to hear certain political messages and decide for themselves how best to allocate their political capital when voting. Much of our traditional legal commitment to free speech follows from the philosophy of John Stuart Mill, who believed that freedoms of speech and thought were so integral to our very humanity that the worst injustices that a tyrant could work upon another man would be to command him what to think or prevent him from speaking; Mill believed that there was positive virtue in a vibrant information

195. *See* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position."); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) ("This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" (quoting Carey v. Brown, 447 U.S. 455, 467 (1980))); *Buckley*, 424 U.S. at 14–15 (collecting cases that together stand for the proposition that speech related to "public issues and . . . the qualifications of candidates" deserves the most protection because it is "integral to the operation of the system of government established by our Constitution"); Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) ("[T]he [First Amendment's] constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."); New York Times Co. v. Sullivan, 376 U.S. 254, 297 (1964) (Black, J., concurring) ("An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.").

196. *See, e.g.*, *New York Times Co.*, 376 U.S. at 271 ("[C]onstitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" (quoting NAACP v. Button, 371 U.S. 415, 455 (1963))); *see also generally* Susan B. Anthony List v. Driehaus, 814 F.3d 466 (6th Cir. 2016) (invalidating an Ohio statute that criminalized the political statements of advocacy groups that were objectively false because the statute was not narrowly tailored to safeguard the integrity of state elections).

197. 558 U.S. 310, 339 (2010).

ecosystem in which ideas and speech flowed freely, like an unrestrained market.[198] Any state legislature considering a model conduct standard for prohibited coordinated communication should take these vital speech-related values into account.

2. Right to Participate in Politics

Man is inherently "a political animal."[199] Especially in the case of first-time challenger candidates, but also for the benefit of those who choose to engage in politics from the sidelines by forming IE groups and making IEs, states should pay special attention to the right to participate in politics. Consider Professor Alan Dershowitz's experiential theory of rights, an ethical system in which rights emerge from wrongs previously suffered.[200] He observed that the founders seemed to embody something like his experiential theory when they wrote the Declaration of Independence.[201] Nevertheless, in the early days of the republic, those in power routinely drove their partisan opponents out of the political process under pain of various sanctions, like threatening arrest and incarceration.[202] This tension between abstract and practical virtue no doubt propelled the Anti-Federalists in their efforts to amend the Constitution so soon after ratification.[203]

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198. *See* JOHN STUART MILL, *On Liberty*, *in* UTILITARIANISM, ON LIBERTY, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, REMARKS ON BENTHAM'S PHILOSOPHY 83, 83–123 (Geraint Williams ed., 1993).

199. ARISTOTLE, POLITICS (Benjamin Jowett trans., 1994), http://classics.mit.edu/Aristotle/politics.1.one.html.

200. ALAN DERSHOWITZ, RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGINS OF RIGHTS 81–82 (2004).

201. *Id.* at 88–89.

202. *See, e.g.*, SLACK, *supra* note 182, at 125–36 (recounting the arrest, prosecution, trial, and ultimate imprisonment of Vermont's incumbent Representative Matthew Lyon under the Sedition Act when he narrowly failed to win a majority on a first ballot, and his Federalist political opponents thought a criminal trial would keep him so busy that he could not effectively wage a run-off campaign, thus allowing a Federalist candidate to win the second vote and replace Lyon in Congress).

203. THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 225, 246 (Ralph Ketcham ed., 1986) [hereinafter THE ANTI-FEDERALIST PAPERS] (reciting a proposed constitutional amendment that emerged during the Virginia Ratifying Convention in June 1788, "That the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press

When one scans the annals of history and sees that the powerful have worked overtime to prevent the masses from enjoying broad rights of political participation,[204] one can derive a right to participate in politics pursuant to the experiential theory.[205] Whether through the incorporation doctrine[206] or a Ninth Amendment[207] analysis, the right to participate in politics is a constitutionally protected freedom. Artificial barriers to participation, like broad-based bans on creative collaboration, then become, at a minimum, both ethically and legally suspect. State lawmakers considering a model conduct standard for prohibited coordinated communications must try to side-step this booby trap.

3. Right to Associate

State legislatures grappling with regulation of coordinated expenditures in politics must also grapple with the right to associate. The First Amendment protects the freedom of association that inheres in political activity,[208] but vague, substantially overbroad laws targeting coordinated communications prevent people and groups from associating.[209] A more relaxed conduct standard for coordinated

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is one of the greatest bulwarks of liberty, and ought not to be violated," and a separate proposed amendment from the Pennsylvania Ratifying Convention in December 1787, "That the people have a right to the freedom of speech, of writing and publishing their sentiments, therefore, the freedom of the press shall not be restrained by any law of the United States").

204. SLACK, *supra* note 182, at 171.

205. *Cf.* DERSHOWITZ, *supra* note 200; *see also generally* Bauer, *Do Politics*, *supra* note 36.

206. *See supra* note 179 (collecting leading incorporation doctrine cases).

207. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). *But see, e.g.*, Froehlich v. Wis. Dep't of Corr., 196 F.3d 800, 801 (7th Cir. 1999) (Posner, C.J.) ("The Ninth Amendment is a rule of interpretation rather than a source of rights." (citing, inter alia, Quilici v. Vill. of Morton Grove, 695 F.2d 261, 271 (7th Cir. 1982))).

208. *See e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958) (holding that a state statute requiring a disclosure of a minority rights group's membership had an unconstitutional chilling effect on collective civic participation).

209. *Cf.* Colo. Republican Fed. Campaign Comm. v. FEC (*Colorado I*), 518 U.S. 604, 637 (1996) (Thomas, J., dissenting) ("Political associations allow citizens to pool their resources and make their advocacy more effective, and such efforts are

communications could actually help ameliorate the plight of disenfranchised minorities by expanding the pool of financial resources available to them that Justice Thomas described in his dissent in *Colorado I*.[210] The *Buckley* Court wrongly tolerated FECA's restraints on the political associations that underlie coordinated communications, insofar as the law treats coordinated communications like contributions to a candidate.[211] Stating that someone "*can* still associate," but not effectively in the political context (which requires resources) raises similar issues to that of locking a candidate in a room where nobody can hear him, rationalizing it with a shrug by saying, "Well, he *can* still speak."[212] The U.S. Supreme Court expressly rejected an alternative-channels argument for speech in *Citizens United v. FEC*,[213] and states should likewise reject an alternative-channels argument for associations.

To wit, as one commentator observed, the conduct involved in coordination is "the very stuff of politics: negotiations and discussions, the relationships with allies and operatives, [and] the struggle for control between politicians and interests."[214] Bribery laws already police actual quid pro quo corruption,[215] and thus coordination laws unduly burden political associations. The *Buckley* Court, however, rejected this theory, and it rationalized FECA's encroachment on associational rights by postulating that bribery laws catch "only the most blatant and specific attempts of those with money

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fully protected by the First Amendment." (citing FEC v. Nat'l Conservative Political Action Comm. (*NCPAC*), 470 U.S. 480, 494 (1985))).

210. *Id.*

211. Buckley v. Valeo, 424 U.S. 1, 28 (1976) ("[FECA's] contribution limitation . . . leav[es] persons free to engage in independent political expression, to *associate actively through volunteering their services*, and to assist to a limited but nonetheless substantial extent in supporting candidates . . . with financial resources." (emphasis added)).

212. *See supra* notes 49–53 and accompanying text.

213. 558 U.S. 310, 326 (2010) ("While some means of communication may be less effective than others at influencing the public in different contexts, any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority.").

214. Bauer, *McCain-Feingold Coordination Rules*, *supra* note 40, at 516.

215. *See generally, e.g.*, 18 U.S.C. §§ 201, 666 (2017).

to influence governmental action."[216] In his dissent in *Colorado I*, Justice Thomas defrocked this confounding conclusion in his narrow-tailoring analysis,[217] but he remains in the minority. The relationships and activities that inhere in effective political organization and association *require* collaboration, and state lawmakers considering a model conduct standard for prohibited coordinated communications should not stifle these activities just because they involve financial transactions.

B. Inherent Virtue of Competitive Elections

State lawmakers should additionally embrace the principle that competitive elections[218] are healthy for society,[219] if for no other reason than that they help reduce the incidence of agency loss.[220] We see the

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216. *Buckley*, 424 U.S. at 28.

217. Colo. Republican Fed. Campaign Comm. v. FEC (*Colorado I*), 518 U.S. 604, 643–44 (1996) (Thomas, J., dissenting) ("That bribery laws are not completely effective in stamping out corruption is no justification for the conclusion that prophylactic controls on funding activity are narrowly tailored."). If the prevailing social view of campaign contributions must be that contributions are per se legalized bribery—see, for example, *supra* notes 20–21 and accompanying text—then I submit that the bright lines that bribery and disclosure laws provide will do a much better job of eliminating corruption than the current morass of bloated and inconsistent coordination doctrine.

218. "'Competition' is a wonderfully ill-defined term—'anticompetitive' even more so." Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849, 850 n.3 (2000). This Note uses the term "competitive elections" to refer to elections in which there is sufficient likelihood of an incumbent losing that she must exert effort to retain her seat. This work entails both prioritizing her policy pursuits in a way that hews to her constituents' desires and actually campaigning for votes.

219. *See* SAMPLES, *supra* note 70, at 167 ("Elections in some measure constrain [government's monopoly on the use of force by requiring] government officials—the people who control the use of violence—to face electoral competition.").

220. "Agency loss" refers to "[t]he discrepancy between what principals [voters in the political context] would ideally like their agents [representatives in government] to do and how these agents [the representatives] actually behave." SAMUEL KERNELL & GARY C. JACOBSON, THE LOGIC OF AMERICAN POLITICS 19 (2d ed. 2003). A "competitive election"—see the explanation *supra* note 218 and accompanying text—then, is somewhat analogous to a competitive market for goods, in which the mere existence of rival producers forces firms to self-discipline in terms of keeping costs (and ultimately prices) low, and quality high, if they are to maximize

agency-loss dynamic play out frequently in Congress in the form of log-rolling through pork-barrel legislation.[221] Counteracting incumbency advantages when agency loss is high may be necessary for voter welfare in a given election cycle, but it is never easy: incumbents—even those who perpetrate agency loss—enjoy high recognition rates among voters, which yields positive results for an incumbent at the polls.[222] Incumbents today also enjoy an average 4:1 fundraising advantage over challengers, whereas the same ratio was once only roughly 1.5:1.[223] Incumbents can also avail themselves of franking, a cost-free direct-mail advertising service that members of Congress can use to claim credit for legislative accomplishments to try to shape their constituents' views of them.[224] Most importantly,

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their appeal to consumers. *See, e.g.*, Ricard Gil & Myongjin Kim, Does Competition Increase Quality? Evidence from the U.S. Airline Industry (Jan. 17, 2016) (unpublished manuscript), https://ssrn.com/abstract=2617528 ("[O]ur evidence suggests that an increase in competition unambiguously increases consumer surplus since prices go down and quality goes up."). Without a serious rival in the political context, then as with a monopoly in the goods context, an incumbent has little incentive to improve quality, resulting in deadweight loss. WILLIAM A. MCEACHERN, ECONOMICS: A CONTEMPORARY INTRODUCTION 217–18 (8th ed. 2009). Conversely, then, the competitive pressure that a legitimate challenger imposes forces an incumbent to discipline herself from engaging in agency loss that can later become a political vulnerability.

221. Diana Evans, *Policy and Pork: The Use of Pork Barrel Projects to Build Policy Coalitions in the House of Representatives*, 38 AM. J. POL. SCI. 894, 898 (1994) (explaining that, since reelection is necessary to achieve large policy victories and leadership's support is necessary for reelection, junior members of Congress may trade support for senior members' bills for short-term distributive benefits, even though leadership's policy agenda may conflict with the goals of junior members' constituents).

222. *See generally* Markus Prior, *The Incumbent in the Living Room: The Rise of Television and the Incumbency Advantage in U.S. House Elections*, 68 J. POL. 657 (2006) (explaining that low-information voters are more likely to vote for incumbents based upon television coverage of them).

223. *See* Learn Liberty, *supra* note 6. Campaign finance reform proponents argue that this fundraising disparity is cause for more regulation of campaign finance. *See generally, e.g.*, LESSIG, *supra* note 21. *But see infra* Section IV.C (discussing counterintuitive views on campaign finance regulation).

224. *See generally* David C.W. Parker & Craig Goodman, *Making a Good Impression: Resource Allocation, Home Styles, and Washington Work*, 34 LEGIS. STUD. Q. 493 (2009). Members of Congress do not pay for franked mail; taxpayers do. Laws that make it harder for challenger candidates to communicate with voters

incumbents enjoy exclusive power to control the rules of the very game that could be their undoing. United States Senator Barbara Boxer, for example, noted in a floor speech in support of BCRA that "*[w]e* will not be hit by these last-minute ads . . . to which *we* will be unable to respond."[225] Senator Boxer's remarks suggest that she knew quite well that BCRA would handicap their potential electoral opponents.

Fundraising limits—whether set forth explicitly in statute in terms of nominal dollars, or through regulation of coordinated communications—counterintuitively function as barriers to entry in the elections game. Name recognition and the strength of an incumbent's social and professional networks, relative to those of a challenger, make it easier for an incumbent to develop larger coffers than an unknown candidate can do with even her best fundraising efforts.[226] Even if an attractive candidate with a desirable policy

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thus heavily favor incumbents who may shift the cost of direct-mail advertising to taxpayers, whereas challengers must raise funds to pay direct-mail consultants to achieve the same ends.

225. 148 CONG. REC. 33, 2101 (daily ed. Mar. 20, 2002) (emphasis added) (statement of Sen. Boxer).

226. JAMES MERRINER & THOMAS P. SENTER, AGAINST LONG ODDS: CITIZENS WHO CHALLENGED CONGRESSIONAL INCUMBENTS 165 (1999). The authors examined fifteen election contests in the mid-1990s in which a vast majority of challengers lost to incumbents to reach this conclusion. *Id.* at 164–65. They also identified a number of other incumbency advantages that challengers must overcome, including, inter alia: (1) professional staff, travel, and franked mail, all paid for by taxpayers; (2) the opportunity to perform constituent casework, thus developing loyalty among eligible voters; (3) gerrymandered House districts that limit partisan shifts; (4) high visibility in the media; and (5) a more vast and powerful network of business and political supporters than incumbents, simply by virtue of holding elective office. *Id.* at 165. Even the Court recognizes that contribution limits, which coordination laws are in effect, can distort what would otherwise be a competitive market for political representation:

> Following *Buckley*, we must determine whether . . . contribution limits prevent candidates from "amassing the resources necessary for effective [campaign] advocacy," . . . ; *whether they magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage*. . . . [W]e must recognize the existence of some lower bound. . . . [C]ontribution limits that are too low *can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders*, thereby reducing democratic accountability. Were we to ignore that fact, *a statute that seeks to regulate campaign*

platform rallies Charles and David Koch to his cause, he can only accept funds in amounts consistent with statutory caps on individual contributions. Because he has no corresponding professional or social network, and if he is not already independently wealthy, with the ability to self-fund, statutory contribution limits hamper his ability to compete against the incumbent because he cannot scale his fundraising outreach as easily as the incumbent can. Counterintuitively, then, our laws should perhaps *encourage* coordination between candidates and IE groups, at least to the extent that it would prevent, mitigate, or remedy agency loss by helping challenger candidates scale their campaigns to counteract incumbency advantages.[227]

The complexity inherent in a patchwork of inconsistent federal and state coordination laws additionally compounds the agency-loss problem. Consider, for example, the Tragedy of the Commons.[228] Suppose that Acme Corp. builds 1,000 widgets annually at a cost of $0.90 per widget, but it billows air pollution from its factory that costs local taxpayers $1,000 annually in clean-up costs.[229] Acme Corp. may set the per-unit widget price at $1.00, which would yield a nominal annual accounting profit of $100 ($0.10 x 1,000 widgets). But this price fails to internalize the entire economic cost of production, which includes the $1,000 in air pollution clean-up. The $900 leftover cost ($1,000 – $100) reflects a negative externality that Acme Corp.'s failure to efficiently price its widgets imposes on society. The absence

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> *contributions could itself prove an obstacle to the very electoral fairness it seeks to promote*.

Randall v. Sorrell, 548 U.S. 230, 248–49 (2006) (emphasis added) (citations omitted).

227. Frustrated, I concede that this framing poses one of the classical corruption-reform conundrums: the very people whose help we need most to change the system are the people with the least incentive to do anything about it. *Cf.* McCutcheon v. FEC, 134 S. Ct. 1434, 1441–42 (2014) (dictum) ("[T]hose who govern should be the *last* people to help decide who *should* govern.").

228. *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244–45, 1247–48 (1968), http://science.sciencemag.org/content/sci/162/3859/1243.full.pdf (postulating that, in the absence of well-defined property rights, negative externalities like pollution are certain to manifest when actors in a market all have incentives to over-consume available resources).

229. I am deeply indebted to Cecil C. Humphreys School of Law Professor John M. Newman for his helpful guidance on this point and his suggestion that I frame this particular argument with this thought experiment.

of clear, enforceable rights creates a rational incentive for Acme Corp. to over-consume the available supply of clean air by polluting in its production process.

Similarly, while Congress and the states designed coordination laws to protect the integrity of elections—a public good like clean air in the Acme Corp. hypothetical—these laws, as written, do not clearly define prohibited conduct. Without clearly defined permissions, prohibitions, or requirements, Incumbent Candidate Q, like Acme Corp., has a rational incentive to over-consume political capital by polluting the integrity of the election with false accusations that Challenger Candidate R violated coordination laws. In so doing, consumers of political representation (voters), who are none the wiser, absorb external costs in voting for Incumbent Candidate Q, when Challenger Candidate R may actually be the more efficient choice (the choice who poses less risk of agency loss). Incumbent Candidate Q's use of the coordination cudgel to frame Challenger Candidate R's candidacy imposes a cost on society in that it undermines the public's faith in the process. In such a world, Incumbent Candidate Q escapes the competitive pressure of a legitimate electoral challenge, and his victory at the polls enables him to perpetrate agency loss on voters. This is an inefficient result.[230] False positives—if, for example, Challenger Candidate R's conduct was not in fact unlawful—may also impose costs on society that are completely separate from the negative externalities that clever incumbents impose on the process.[231]

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230. *Cf., e.g.*, R.S.M. Inc. v. Alliance Capital Mgmt. Holdings L.P., 790 A.2d 478, 483 n.3 (Del. Ch. 2001) ("[U]nder the doctrine of Pareto optimality, a change should be made if it would make one party to an economic relationship better off without making another party worse off[.]"); *cf. also* Johnson v. Scandia Assocs., 717 N.E.2d 24, 30 n.9 (Ind. 1999) ("Pareto superior moves are 'win-win' changes because wealth is maximized for one without causing another to lose."). Pareto optimality in the market for political representation thus represents, in essence, an allocation of votes and candidates such that no actor—voter or elected official—could be made better-off without making someone else worse-off. In a Pareto optimal election result, agency loss would ostensibly not exist (although one can potentially envision a world in which agency loss results in increased efficiency). In this race between Candidates Q and R, where Candidate Q wins by over-consuming votes by lying about Candidate R, clearer laws could make voters better off without making Candidate Q—an incumbent with all the advantages that come with that status—any worse off.

231. *Cf.* Judge Frank Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15–16 (1984) (explaining that the "costs of competition wrongly condemned" by

Because inconsistent and vague coordination laws may contribute to agency loss, states should adopt a clear model conduct standard for prohibited coordinated communication that everyone can understand. Such a standard would ideally empower challenger candidates to expand the reach of their messages when agency loss is high. Clearly defining rights in abstractions like "clean air" and "election integrity" is no doubt difficult. But the undertaking would be a worthwhile endeavor: deriving a licensing scheme for radio spectrum, for example, organized an entire media industry and allowed it to flourish.[232] Taking these dynamics into account, incumbent state lawmakers, who are the only people with power to remedy the problems that coordination doctrine has wrought on our politics, must concede to themselves that their offices imbue them with terrific power to artificially handicap insurgent challengers. They must resist the temptation.

C. Hard Truth: Even "Clean" Elections Cost Money

Finally, as a practical matter, it is important to keep the costs of elections in perspective. After all, money is a but-for cause of the transmission of political information.[233] One could argue empirically that concerns about the amount of money moving through our political system are overblown: what Americans spend on politics in a given year is a fraction of what they spend on other consumption.[234] Like

courts in antitrust cases are harmful, and that "we should prefer the error of tolerating questionable conduct, which imposes losses over a part of the range of output, to the error of condemning beneficial conduct, which imposes losses over the whole range of output").

232. *See generally* Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 25–35 (1959) (explaining that the FCC's important contribution to the efficient allocation of radio broadcast frequencies, thereby preventing chaos on the airwaves wrought by competing broadcasters with rational incentives to broadcast as far and on as many frequencies as they could, was to define property rights in bandwidth through the creation and issuance of licenses to radio stations).

233. *See* Buckley v. Valeo, 424 U.S. 1, 19 (1976); *see also* Justice Breyer, *supra* note 47, at 252.

234. *Compare Election Overview*, OPENSECRETS.ORG, https://www.opensecrets.org/overview/ (last visited Feb. 20, 2018) (reporting that candidates for President of the United States, United States House, and United States

the price of a bushel of apples at the market, the price of airing a political advertisement on television is a function of the demand for airtime relative to a largely stable supply of channels in visual media, and thus it can be volatile. As prices of airtime rise, so too does the individual and aggregate amount of money that candidates will spend in a given election cycle.[235] This dynamic necessarily presupposes prioritizing additional fundraising efforts because candidates cannot control exogenous market factors that contribute to prevailing advertising rates.[236] Effective and charismatic candidates with an appealing message and a sophisticated campaign organization will, on balance, raise more money than one who is not as charismatic,

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Senate raised a combined $3.2 billion in the 2016 election cycle), *with Halloween Headquarters*, NAT'L RETAIL FED'N, https://nrf.com/resources/consumer-data/halloween-headquarters (last visited Feb. 20, 2018) (estimating that Americans will spend in excess of $8.4 billion on Halloween costumes and candy in 2016 alone), *and Best-Ever Business Year Highlighted by Record Revenue*, NAT'L HOCKEY LEAGUE (Apr. 13, 2011), https://www.nhl.com/news/best-ever-business-year-highlighted-by-record-revenue/c-559630 (reporting that the top league in one of America's least-popular professional sports grossed more than $2.9 billion in the 2010-2011 season). *Accord Taking Back Our Democracy: Responding to* Citizens United *and the Rise of Super PACs: Hearing Before the Subcomm. on Constitution, Civil Rights and Human Rights*, 112th Cong. 16, 67 (2012) (statement of Ilya Shapiro, Senior Fellow in Constitutional Studies, Cato Institute), https://www.judiciary.senate.gov/imo/media/doc/CHRG-112shrg86915.pdf (comparing election spending to sales of Easter candy).

235. *See generally* Cecilia Kang & Matea Gold, *With Political Ads Expected to Hit a Record, News Stations Can Hardly Keep Up*, WASH. POST (Oct. 31, 2014), https://www.washingtonpost.com/business/technology/with-political-ads-expected-to-hit-a-record-news-stations-can-hardly-keep-up/2014/10/31/84a9e4b4-5ebc-11e4-9f3a-7e28799e0549_story.html ("The flood of ads surged dramatically in October as conservative groups ramped up their spending, sending prices climbing sky-high in cities such as Little Rock, Denver and Manchester, N.H. There, WMUR-TV was charging $1,400 per gross rating point this month—six times the rate before Labor Day."). *Accord* John Shelton, *The 2012 Election Cycle Is Already Costing You Money*, ADAGE (Aug. 7, 2012), http://adage.com/article/campaign-trail/2012-election-cycle-costing-money/236568/ (explaining how a surge in political advertising spending was driving up prices for non-political, commercial advertisers because the spike in demand relative to a stagnant supply of channels causes a price increase).

236. *See* ABRAHAM, *supra* note 49 and accompanying text.

appealing, or sophisticated.[237] Additionally, one commentator has predicted that the rise of Internet technologies in politics will pave the way for vast sums of money raised from disperse localities to counteract the influence of money from a few dozen ultra-wealthy people.[238] Although the sample size is yet small, we have some evidence that the commentator's claim was prescient.[239] Taking these factors into account, we must recognize that the mere presence of money in our politics—even a lot of it—is not prima facie evidence of quid pro quo corruption.

The U.S. Supreme Court's reasoning in *McCutcheon v. FEC*[240] is instructive on these points. Statutory aggregate contribution limits thwarted donor Shaun McCutcheon from giving as much as he wanted to candidates and party committees in two consecutive election cycles, even though the amounts he tried to give to each candidate fell well below the FECA/BCRA limits on contributions to individuals.[241] McCutcheon petitioned a district court for declaratory relief and an injunction against the FEC's enforcement of aggregate limits, but the district court dismissed McCutcheon's claim on the basis of an implausible hypothetical in which 50 separate candidates would collude to take individual donations from McCutcheon, transfer the

237. *See, e.g.*, *William McKinley: The Modern Campaign*, WASH. POST (June 11, 2016, 26:06–28:43), https://itunes.apple.com/us/podcast/william-mckinley-the-modern-campaign/id1072170823?i=1000371016315&mt=2 (explaining that the sophistication and professionalization of former President William McKinley's 1896 campaign for office, along with his political pedigree, helped him out-raise his Democratic opponent by a margin of roughly $3.6 million to roughly $300,000, or 12:1).

238. *See* JOE TRIPPI, THE REVOLUTION WILL NOT BE TELEVISED: DEMOCRACY, THE INTERNET, AND THE OVERTHROW OF EVERYTHING 235 (2004).

239. John Templon et al., *How Bernie Sanders Raises All That Money*, BUZZFEED NEWS (Apr. 19, 2016, 1:56 PM), https://www.buzzfeed.com/johntemplon/how-bernie-sanders-raises-all-that-money; Jonathan Martin, *Ron Paul's "Money Bomb"*, POLITICO (Nov. 5, 2007, 12:15 PM), http://www.politico.com/blogs/jonathanmartin/1107/Ron_Pauls_Money_Bomb.html .

240. 134 S. Ct. 1434 (2014) (plurality opinion).

241. *Id.* at 1443.

funds to a party committee, and then coordinate expenditures with their political party.[242] McCutcheon appealed.[243]

At oral argument, Chief Justice Roberts became concerned with the notion that aggregate contribution limits for individual donors would, on one hand, permit a donor to give the maximum allowable donation in a cycle to nine distinct congressional candidates, but on the other hand, prevent the same donor from giving the maximum donation to a tenth candidate.[244] The Government could not fully ventilate this concern, at least not to the Court's satisfaction.[245] Chief Justice Roberts thus famously observed in the Court's plurality opinion that

> [i]f there is no corruption concern in giving nine candidates up to $5,200 each [2 x $2,600, the combined permissible contribution levels for federal candidates in a primary and a general election in the same cycle at the time], *it is difficult to understand how a tenth candidate can be regarded as corruptible if given $1,801* [the aggregate limits at the time were $48,600; hence Chief Justice Roberts's numbers], *and all others corruptible if given a dime*. And if there is no risk that additional candidates will be corrupted by donations of up to $5,200, then the Government must defend the aggregate limits [some other way if they are to survive strict scrutiny].[246]

The Court ultimately found that Congress had failed to narrowly tailor the aggregate contribution limits to the compelling governmental interest of preventing quid pro quo corruption or the appearance thereof, and it held that the limits "impermissibly restrict[ed] participation in the political process."[247]

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242. *See id.* at 1443–44.

243. *Id.* at 1444.

244. Transcript of Oral Argument at 47–49, McCutcheon v. FEC, 134 S. Ct. 1434 (2014) (No. 12-536), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2013/12-536_2k81.pdf.

245. *See id.*

246. *McCutcheon*, 134 S. Ct. at 1452 (emphasis added).

247. *Id.* at 1456–57. *Cf. supra* Section IV.A.2.

As *McCutcheon* was a case about statutes designed to prevent circumvention of *aggregate* contribution limits, so too does coordination doctrine attempt to prevent end-runs around *individual* contribution limits. But if the government cannot articulate what it is about giving to a tenth candidate after giving to nine that is impermissibly corrupt, can the government articulate why the 2,701st dollar of a coordinated IE is or appears to be impermissibly corrupt? To date, the Government has not articulated a coherent principle for this restriction other than (a) preventing actual quid pro quos, which bribery laws already cover,[248] or (b) preventing the appearance of corruption, which is a naïve endeavor.[249] Statutory limits on coordination are thus arbitrary political theater, utterly devoid of any meaningful legal principle.[250] This is especially true where a donor gives to a candidate because the candidate *already* espouses views with which the donor agrees; the donor gives to the candidate *because she already agrees with him*, not to try to influence him. Indeed, if coordinated communications really could corrupt a candidate, why haven't we seen an all-out bidding war between Sheldon Adelson and the Koch brothers to air television advertisements supportive of Nancy Pelosi and Chuck Schumer? Why hasn't Tom Steyer reached out to Speaker Paul Ryan's re-election campaign about a series of direct-mail vote solicitations?

Coordination doctrine is at a tipping point. Americans deeply distrust elected officials and generally have negative views of the government, believing that elected officials "don't care what people like me think," and that politicians put their own interests ahead of the

248. *See* Colo. Republican Fed. Campaign Comm. v. FEC (*Colorado I*), 518 U.S. 604, 643 (1996) (Thomas, J., dissenting).

249. *See* Buckley v. Valeo, 424 U.S. 1, 27 (1976) (setting forth preventing "the appearance of corruption" as a compelling governmental interest that justifies statutory contribution limits that would otherwise violate the guarantees of the Free Speech Clause of the First Amendment); *see also supra* notes 57–59, 191–194 and accompanying text (discussing the *Buckley* Court's flawed reasoning on the appearance-of-corruption point, given the political theory that undergirds the Constitution).

250. *Cf.* Smith, *Super PACs*, *supra* note 2, at 606 ("[A]llegations of coordination are nothing more than an opposing campaign's propaganda efforts to discredit their opponents.").

public's when making policy choices.[251] In fact, with the exceptions of the periods surrounding the fighting and winning of the Cold War during the Reagan years, and the immediate aftermath of 9/11, Americans have steadily lost confidence in government since the 1950s.[252] But these are not reasons to continue strengthening our grip on money in politics. Indeed, campaign finance regulations, which are relatively new phenomena in American law,[253] appear to have had no effect on restoring Americans' trust in government in the over-four decades following Watergate.

Quid pro quo bargaining may be hard to prove, but rebuttable presumptions in coordination law, like the common-vendor[254] and former-employee[255] rules, may encroach on First Amendment rights.[256] When these legal presumptions[257] operate, they treat a candidate—who has done nothing to affirmatively request or suggest an expenditure, become materially involved in communication planning, or substantially discuss communications with an IE group—as having illicitly coordinated with an IE group. The candidate must then demonstrate to regulators that her conduct is above-board to avoid sanctions. Yet many political consultants and executives at IE groups do the work they do because they are activists at heart, and they want

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251. *See* PEW RESEARCH CTR., BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT, 72–73 (2015), http://www.people-press.org/files/2015/11/11-23-2015-Governance-release.pdf.

252. *Id.* at 18.

253. Smith, *Campaign Finance Regulation*, *supra* note 13, at 2.

254. 11 C.F.R. § 109.21(d)(4) (2017).

255. 11 C.F.R. § 109.21(d)(5).

256. Smith, *Super PACs*, *supra* note 2, at 622.

257. Some state statutes have embraced these presumptions. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-922(C) (West, Westlaw through 2017 Legis. Sess.); *see also* CONN. GEN. STAT. § 9-601c(b) (West, Westlaw through 2017 Legis. Sess.); IOWA CODE § 68A.404 (West, Westlaw through 2017 Legis. Sess.); OHIO REV. CODE ANN. §§ 3517.01(17)(d), 3517.1011(A)(5)(a) (West, Westlaw through 2017 Legis. Sess.); OR. REV. STAT. § 260.005(10)(d) (West, Westlaw through 2017 Legis. Sess. pending classification of undesignated material and text revision). One commentator has argued that presumptions of coordination should reach further than they currently do. *See* Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 97–98 (2013) (arguing that single-candidate super PACs should be presumed to be coordinating with candidates), http://columbialawreview.org/wp-content/uploads/2016/05/Briffault-113-Colum.-L.-Rev.-88-2013.pdf.

to devote their professional talents to realizing their worldview, which requires electing candidates to office.[258] The idea that the law should presume a candidate has done something unethical merely because the candidate and a former employee share a vision of the world, and transacted business to try to realize that vision, is tantamount to thought-policing, and it defies explanation in the Western liberal tradition. It is not a crime for people to agree on matters of politics and policy, and it is past time for liberalization of coordination doctrine. States have an awesome opportunity before them to take the reins from the federal government and lead the charge.

V. A MODEL CONDUCT STANDARD

States should consider a bright-line rule for a model conduct standard. Bright-line rules are a particularly useful species of law because they reduce the guesswork required when adjudicators apply them,[259] which helps conserve scarce judicial resources[260] and improves the public's understanding.[261] The form this particular bright-line rule should take has been hiding in plain sight all along, as a brief analysis of literature on federal coordination doctrine and one state's statutory law will demonstrate.

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258. *See, e.g.*, *supra* notes 50 & 106.

259. *See* Charlotte Garden, *Meta Rights*, 83 FORDHAM L. REV. 855, 863 n.39 (2014) ("Some scholars have also emphasized the usefulness of a bright-line rule to distinguish voluntary from involuntary statements to police, sometimes suggesting that the Court could improve on *Miranda* in ways that further eliminate the need for hearings regarding issues related to *Miranda* warnings."); *see also* Paige Kohn, Note, *Oil and Water Do Not Mix: An Argument for the United States Supreme Court's Deferral to Congress in* Exxon v. Baker, 38 CAP. U. L. REV. 229, 256 (2009) (describing how a bright-line rule eliminates ambiguity and increases predictability the punitive-damages context).

260. *See, e.g.*, Josh Deutsch, Note, *Finders-Keepers: A Bright-Line Rule Awarding Custody to Gestational Mothers in Cases of Fertility Clinic Error*, 12 CARDOZO J.L. & GENDER 367, 379 (2005) ("[T]he gestational bright-line rule improves judicial economy by requiring courts to dismiss the genetic parents' custody petition.").

261. *See* Michael M. Berger, Tahoe Sierra*: Much Ado About-What?*, 25 U. HAW. L. REV. 295, 312 (2003) ("[B]right line rules . . . can be understood by laymen and lawmen alike . . . .").

A. Professor Smith and the Christian Coalition *Standard*

Professor Smith suggests[262] that *FEC v. Christian Coalition*[263] offers a reform path. In the case, the FEC brought a civil enforcement action against a non-profit group that maintained a "house file" list of contributors to use for fundraising, issue advocacy, and get-out-the-vote efforts, and a separate "voter file" list of people who were likely to be pro-life, contact information for whom the Coalition purchased from other organizations or obtained through grassroots contacts.[264] The FEC alleged in its complaint that, in using the voter file to send its "voter guides" to targeted states and electoral districts after sharing drafts of the guides with former President Bush's 1992 reelection campaign, and with several congressional campaigns, the Coalition had made a coordinated expenditure in violation of FECA.[265] In its analysis of FECA and *Buckley*, the district court held that

> In the absence of a request or suggestion from the campaign, an expressive expenditure [like the voter guides the Coalition mailed to its lists, which did not constitute express advocacy,] becomes "coordinated" where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender . . . . Substantial discussion or negotiation is such that *the candidate and spender emerge as partners or joint venturers in the expressive expenditure*, but the candidate and spender need not be equal partners.[266]

In reaching this conclusion, the *Christian Coalition* court took a big step in the right direction when it reasoned that "the spender should not be deemed to forfeit First Amendment protections for her own

262. Smith, *Super PACs*, *supra* note 2, at 624.

263. 52 F. Supp. 2d 45 (D.D.C. 1999).

264. *Id.* at 50.

265. *Id.* at 50–51, 66, 73.

266. *Id.* at 92 (emphasis added).

speech merely by having engaged in some consultations or coordination with a federal candidate."[267]

One can see why Professor Smith prefers this language. The holding requires "consultation that [goes] beyond creating the mere *appearance* of corruption—the *opportunity* for corrupt quid pro quo bargaining," namely, "requiring conduct *that would actually be corrupt*, or at least create a *very heightened* appearance of corruption."[268] The FEC responded to *Christian Coalition* with a rule that "specified instead that 'agreement or formal collaboration' [is] not necessary to find coordination, but . . . continued to require 'substantial discussions about the communication' to trigger a coordination finding."[269] This, argues Professor Smith, is a generally workable standard that fits within *Buckley*'s framework and deters quid pro quo bargaining while still allowing for an association without chilling speech.[270]

Professor Smith's laudable attempt to moderate and reach middle ground with campaign finance reform proponents nevertheless entrusts Congress, the FEC, and the states—who have been getting it all wrong since the 1970s[271]—to fairly police a "very heightened" appearance of corruption without trampling on the Constitution. This standard could be vastly improved, as even the district court in *Christian Coalition* conceded: Judge Green wrote, "Admittedly, a standard that requires 'substantial' anything leaves room for factual dispute. The possibility that the FEC may deem [an IE group's] pre-expenditure discussions or negotiations with a campaign to be 'substantial' will chill some speech."[272] While this standard gets us closer to a bright-line rule, the *Christian Coalition* standard has many of the same problems that the current standards have, absent further refinement.

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267. *Id.* at 91; *cf. supra* Section IV.A (invoking the First Amendment's speech and associational freedoms as protection against coordination regulations).

268. Smith, *Super PACs*, *supra* note 2, at 625 (emphasis added).

269. *Id.* at 627.

270. *Id.*

271. *See* Buckley v. Valeo, 424 U.S. 1, 27 (1976) (setting forth preventing "the appearance of corruption" as a compelling governmental interest that permits Congress to regulate the size of campaign contributions); *see also supra* notes 57–59, 191–194 and accompanying text.

272. *Christian Coalition*, 52 F. Supp. 2d at 92.

B. Tightening Christian Coalition*: BCRA's Missing Ingredient*

If state lawmakers insist on saddling us with coordination laws, they should amend and clarify their statutes instead of relying on the clunky, jargon-filled rules that Congress and the FEC drafted. As laboratories of democracy,[273] state lawmakers have tremendous flexibility to innovate where federal coordination doctrine has utterly failed the country. The *Christian Coalition* standard is simple, it mostly abandons the futile project of preventing the appearance of corruption,[274] and it focuses mainly on the problem we should be trying to solve—*actual* quid pro quo corruption—as opposed to encouraging innuendo and smear campaigning.[275] The *Christian Coalition* standard is more narrowly tailored to achieving a legitimate end than are current coordination laws, but states can still do better.

Rather, states should borrow the conceptual framework of the inchoate crime[276] of conspiracy[277] to synthesize a model conduct standard for prohibited coordinated communications. A judicial

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273. *See* Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) ("One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))). States can also, of course, succeed at such experiments, and they can serve as a model for other States and Congress.

274. *See Buckley*, 424 U.S. at 27; *see also supra* notes 57–59, 191–194 and accompanying text.

275. Smith, *Super PACs*, *supra* note 2, at 606, 608.

276. To be absolutely clear, I am *not* proposing that we (further) criminalize political speech and political activity. *See supra* note 13. Rather, conspiracy doctrine provides a useful heuristic for synthesizing a model conduct standard for prohibited coordinated communications because, as the criminal law provides an enforcement mechanism against conspirators because they are more dangerous to society once they make an agreement to carry out their object, see, for example, United States v. Brown, 726 F.3d 993, 997–98 (7th Cir. 2013), ostensibly a model conduct standard for coordination should only preemptively enforce against corruption once an agreement is formed—only after the violators form an agreement do they actually become dangerous.

277. *But see Christian Coalition*, 52 F. Supp. 2d at 89–90 (holding that a "conspiracy approach to coordination" would result in overbreadth). Nowhere in the analysis of that framework, however, did Judge Green analogize the FEC's proposed theory to conspiracy doctrine in criminal law. *See id.*

opinion in a first-year Criminal Law casebook explains why: "'The gist of the offense of conspiracy lies *in the unlawful agreement*.' The crime is complete *upon formation of the agreement* . . . ."[278] Therefore, one of Congress's great failures in campaign finance law was that BCRA commanded that the FEC "shall not require agreement or formal collaboration,"[279] and the FEC obliged. Because it is difficult to identify prohibited conduct, despite Congress's and the FEC's attempts to clarify the doctrine, and because the doctrine imputes foul motives to innocent actors by way of far-reaching presumptions, a standard requiring formal agreement or collaboration would go a long way toward correcting ambiguity, thereby solving problems with application of the rules. It would also help onlookers more easily identify prohibited conduct, and it would focus on policing quid pro quo corruption as the Supreme Court has defined it: donations given *in contemplation of* or *as consideration for* a political favor.[280]

South Carolina's statutory framework provides an elegant vehicle upon which to base a model conduct standard for other states' consideration.[281] I propose substituting "discussion or negotiation" with "formal agreement or collaboration"—the secret ingredient that Congress deliberately omitted from BCRA 15 years ago. Such a change would ameliorate the vagueness and overbreadth inherent in "discussion or negotiation" and thus likewise improve upon Judge Green's ambiguous "substantial discussion or negotiation"[282] formulation in *Christian Coalition* of which Professor Smith approves.[283]

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278. People v. Carter, 330 N.W.2d 314, 319 (Mich. 1982) (emphasis added) (quoting People v. Atley, 220 N.W.2d 465, 471 (1974)).

279. Bipartisan Campaign Reform Act § 214(c), Pub. L. No. 107-155, 116 Stat. 81, 95 (2002).

280. FEC v. Nat'l Conservative Political Action Comm. (*NCPAC*), 470 U.S. 480, 497 (1985) ("The hallmark of corruption is the financial quid pro quo: dollars *for* political favors." (emphasis added)); *accord* BLACK'S LAW DICTIONARY, *supra* note 176; EMANUEL, *supra* note 176.

281. S.C. CODE ANN. § 8-13-1300(33) (West, Westlaw through 2017 Legis. Sess.) (defining "[c]oordinated with").

282. *See Christian Coalition*, 52 F. Supp. 2d at 92.

283. Professor Smith writes:

> The *Christian Coalition* ruling seemed to require consultation that went beyond creating the mere appearance of corruption . . . to requiring conduct that would actually be corrupt . . . . It is not certain

So amended, this becomes an ideal model rule for several reasons. It is simple and clear. It requires an objectively observable agreement, which helps remedy information asymmetries among voters, provides notice to the unwary novice candidate of exactly what will get him in trouble, and reduces information costs for fact-finders investigating allegations of wrongdoing. The rule only encroaches on speech, hearing, associational, and participation rights to the extent that it prevents actual quid pro quo corruption, as opposed to the mere existential threat of it. Political actors who often suspect their partisan and ideological opponents of engaging in prohibited conduct, who are accustomed to reaching first for the coordination cudgel, will no doubt loathe such a bright-line test, first and foremost because they will not likely ever be able to prove that their opponent and an IE group formed an actual agreement. This is a feature of the standard, not a bug, for two discrete reasons.

First, taking away the club staves off the rancor that current coordination-related mudslinging and smearing engenders in our politics. By spending less time, energy, and money on manufactured witch-hunts at the FEC, in the press, or in the judicial system, our politics may yet return to substance—hopefully long enough to achieve a new level of trust and confidence in government and elections not seen since before Watergate, which was the original purpose of FECA's 1974 amendments. Second, such a bright-line rule will force people who genuinely believe our campaign finance system needs overhauling to start policing their own, and our politics can begin to forgo white-washing illicit campaign tactics as long as the right person uses them. When candidates and IE groups are confronted with ideological or partisan *allies* who are willing to police

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> whether the *Buckley* Court, had it considered the issue, would have required such a high standard. But the approach taken in *Christian Coalition fits quite comfortably* into the *Buckley* paradigm. . . . The [*Christian Coalition*] Court's interpretation [of coordination rules] *demonstrates a practical approach* to elections that anticipates that those citizens and groups most likely to be involved in campaigns will also have issues that they will wish to discuss with officeholders between campaigns, and further, that they will therefore have ample opportunities to become acquainted with officeholders and share ideas and advice.

Smith, *Super PACs*, *supra* note 2, at 625–26 (emphasis added).

coordination, then conduct that bothers us on an intuitive level may begin to disappear from American politics. Until states reform their elections codes in this way, for the reasons set forth in this Note, faith in our political process will continue to decline—a contradictory result to the ethos of modern campaign finance law.