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Establishing the Independence of Super PACs: How to Distinguish the Indistinguishable

Eli Evans†

INTRODUCTION

Super political action committees ("PACs") continue to garner significant interest and scrutiny four years after the Citizens United v. Federal Election Commission1 decision that spawned them. This attention is due in part to the increasing size of campaign expenditures via super PACs, as well as the limited disclosure requirements for donors. While conventional PACs can make contributions and expenditures to influence federal elections, they must comply with the Federal Election Campaign Act ("FECA") and their donors are subject to contribution limits.2 Conventional PACs can expressly advocate on behalf of a clearly identified candidate, but a super PAC “can only make independent expenditures and is barred from making direct candidate contributions.”3 Additionally, super PACs differ from conventional PACs because super PACs are “legally entitled to raise donations in unlimited amounts.”4 This flexibility stems from the idea that “[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent... alleviates the danger that expenditures will be given as a quid pro quo for improper

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1 558 U.S. 310 (2010).
2 See Political Committee Status, 72 Fed. Reg. 5595, 5596–97 (Feb. 7, 2007) ("FECA defines a ‘political committee’ as ‘any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year.’").
4 Id. at 1647.
commitments from the candidate." Consequently, private donors give most of their independent expenditures to super PACs, which then funnel the money into political ads or other means of influencing political opinion. In a recent decision, however, the Second Circuit held that a super PAC may be subject to campaign contribution limits if it is "functionally indistinguishable" from a traditional PAC that makes limited contributions to candidates.

In *Vermont Right to Life Commission, Inc. v. Sorrell,* the Second Circuit addressed whether campaign contribution limits apply to independent-expenditure-only ("IEO") organizations, such as super PACs, when the IEOs are linked to direct expenditure organizations ("DEO") like conventional PACs. The Second Circuit's decision creates a much more rigorous test than those established by other circuits, particularly the leading opinion of the Fourth Circuit. Put roughly: if it looks like a PAC and acts like a PAC, then the government should regulate it like a PAC.

The Supreme Court will have a significant decision to make if it grants certiorari to hear *Vermont Right to Life.* The Second Circuit's precedent-shaking decision appears to open the door for the Supreme Court to weaken super PACs, as well as create incentives for super PACs to rely on indirect signaling to coordinate their behavior with candidates they support. While there are several potential approaches the Court could take in resolving the circuit split, ultimately, the Second Circuit's reasoning correctly recognizes and attacks the weaknesses of the current regulatory regime. By looking to other areas of the law for guidance, particularly areas of antitrust law that deal with collusive behavior, the Court can further refine the Second Circuit's approach to deal with the problem of distinguishing collusion from other forms of speech.

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5. *Citizens United,* 558 U.S. at 431 (quoting *Buckley v. Valeo,* 424 U.S. 1, 47 (1976)).
8. *Id.* at 139.
9. *See id.* at 145.
10. *See id.*
I. BACKGROUND

A. Constitutional Law as Applied to Campaign Finance Regulations

1. First Amendment and standard of review.

The First Amendment of the Constitution of the United States states that "Congress shall make no law . . . abridging the freedom of speech." The text of the Constitution does not define speech, however, nor does it provide explicit exceptions to the First Amendment. Over the past century, the Court has identified certain categories of "low-value" speech that are no longer protected. Despite these limited exceptions, the Court has stated that the First Amendment "has its fullest and most urgent application' to speech uttered during a campaign for political office." The Court has also repeatedly recognized that "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." These declarations affirm the importance of political speech and provide it with full First Amendment protection. Consequently, any laws that would burden political speech are subject to strict scrutiny by the courts. The government must be able to prove the law "furthers a compelling interest and is narrowly tailored to achieve that interest." Therefore, while other parts of the Vermont statute dealing with campaign contribution disclosure requirements are subject only to the intermediate scrutiny level of "exacting scrutiny," the Court in

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11 U.S. CONST. amend. I.
12 Id.
15 Id. (quoting Buckley, 424 U.S. at 14).
18 Exacting scrutiny only requires a "substantial relation" between a disclosure
Citizens United distinguished expenditure restrictions and applied a strict scrutiny standard.19

2. Political expenditures and political contributions distinguished.

The seminal case Buckley v. Valeo20 distinguishes between "political expenditures" and "political contributions" with regard to First Amendment scrutiny.21 This decision came on the heels of a flurry of reforms to campaign finance and other political behavior "triggered by the Watergate scandal."22 The Court in Buckley evaluated the FECA reporting requirements on political committees, which the statute defined as "any committee, club, association, or other group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000."23 However, the statute failed to differentiate between the two forms of spending and jointly described them as the "use of money or other valuable assets 'for the purpose of . . . influencing' the nomination or election of candidates for federal office."24 The Court reasoned that this definition presented "vagueness problems, because 'political committee' is defined only in terms of amount of annual 'contributions' and 'expenditures,' and could be interpreted to reach groups engaged purely in issue discussion."25

To "avoid these line-drawing problems," the Court subsequently narrowed the definition of political committees and clarified what sort of payments they can receive from donors:

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19 Vt. Right to Life, 758 F.3d at 136 ("The 'express advocacy' analysis . . . applies with equal force to "the major purpose" analysis here").
21 Id. at 19.
22 Id. at 68–69; see also Rodney A. Smolla, Political Process, 2 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 16:10 (2014) (describing Buckley as a "landmark Supreme Court decision involving political expenditures by individuals [that] came in 1976 on the heels of the reforms triggered by the Watergate Scandal.").
23 Buckley, 424 U.S. at 79 n. 105 (quoting 2 U.S.C. § 431(d) (current version at § 431(4)(A))).
24 Id. at 77 (quoting 2 U.S.C. § 431(e), (f) (current version at § 431(8), (9))).
25 Id. at 79.
To fulfill the purposes of the Act, [political committees] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.²⁶

The Court has referred to this narrowing construction in subsequent opinions and the "major purpose" test still holds sway in most circuits.²⁷

Political expenditures are the "amount[s] of money a person or group can spend on political communication during a campaign."²⁸ Political contributions, on the other hand, are the "amount[s] that any one person or group may contribute to a candidate or political committee."²⁹ The Supreme Court has held "campaign finance restrictions must target quid pro quo corruption or its appearance in order to survive First Amendment scrutiny."³⁰ Thus, restrictions on political expenditures must "target what we have called quid pro quo corruption or its appearance"³¹ while being "narrowly tailored" to the task.³² Restrictions on political contributions must also be aimed at corruption, but only need to satisfy the less stringent "closely drawn" standard of review.³³

²⁶ Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 487 (7th Cir. 2012) (quoting Buckley, 424 U.S. at 79 (emphasis added)).
²⁸ Buckley, 424 U.S. at 19.
²⁹ Id. at 20.
³⁰ Vt. Right to Life, 758 F.3d at 140 (citing McCutcheon v. Fed. Election Comm’n, 134 S. Ct. 1434, 1441–42, 1450 (2014)). The Court has refused to extend strict scrutiny to laws "preventing the appearance of influence or access, limiting distortions of the marketplace of ideas, protecting the dissenting shareholders of corporate speakers, equalizing the resources of candidates, or ensuring that government officials do not devote excessive time to raising money." Vt. Right to Life, 758 F.3d at 182. (internal citations omitted).
³¹ McCutcheon, 134 S. Ct. at 1441.
³³ See Ognibene v. Parkes, 671 F.3d 174, 193 (2d Cir. 2011).
3. Independent-expenditure-only groups.

There are two kinds of traditional PACs. The first are IEO groups, which may promote political interests but do not contribute directly to candidates.\textsuperscript{34} In \textit{Citizens United}, the Court reaffirmed "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a \textit{quid pro quo} for improper commitments from the candidate."\textsuperscript{35} Because the Court reasons that there is no possibility for quid pro quo corruption, limits on IEOs do not support a compelling government interest and fail to satisfy scrutiny.\textsuperscript{36}

The second variety of PACs includes organizations that make direct contributions to candidates.\textsuperscript{37} The Court and several circuits have held it "is unquestionably constitutional... [to limit] contributions by individuals to particular candidate committees."\textsuperscript{38} When distinguishing between IEOs and DEOs, the Court emphasized the "absence of prearrangement and coordination."\textsuperscript{39} While the courts seem fairly consistent in their identification of IEOs and DEOs, the distinction is strongly reliant on the assumption that IEOs cannot be controlled. It is the requirement of independence—the absence of prearrangement and coordination—that "alleviates the danger that expenditures will be given as a \textit{quid pro quo} for improper commitments from the candidate."\textsuperscript{40} This assumption, however, does not appear as reliable as it once did.

\textsuperscript{34} \textit{Vt. Right to Life}, 758 F.3d at 121.
\textsuperscript{35} 558 U.S. at 345 (citing \textit{Buckley}, 424 U.S. at 47). The District of Columbia stated the "Court has effectively held that there is no corrupting 'quid' for which a candidate might in exchange offer a corrupt 'quo.'" \textit{SpeechNow.org v. Fed. Election Comm'n}, 599 F.3d 686, 694–95 (D.C. Cir. 2010) (en banc).
\textsuperscript{36} See \textit{Vt. Right to Life}, 758 F.3d at 121.
\textsuperscript{38} \textit{Landell v. Sorrell}, 382 F.3d 91, 140 (2d Cir. 2002).
\textsuperscript{39} \textit{Citizens United}, 558 U.S. at 357 (quoting \textit{Buckley}, 424 U.S. at 47).
\textsuperscript{40} \textit{id.}
B. Second Circuit Challenge to the Vermont Statute

_Vermont Right to Life_ presented a challenge to a Vermont state statute. In relevant part, the law states a “political committee [or PAC]... shall not accept contributions totaling more than $2,000.00 from a single source, political committee, or political party in any two-year general election cycle.” The plaintiff, Vermont Right to Life Committee (“VRLC”), was “a Vermont corporation that file[d] federal tax returns as a non-profit entity under 26 U.S.C. §501(c)(4).” VRLC formed Vermont Right to Life Committee—Fund for Independent Political Expenditure (“VRLC-FIPE”) “as a registered Vermont political committee under the Vermont campaign finance statutes.” VRLC-FIPE’s formation resolution stipulated “that it may not make monetary or in-kind contributions to candidates, or coordinate the content, timing or distribution of its communications or other activities with candidates or their campaigns.” VRLC argued VRLC-FIPE was an IEO and exempt from complying with the Vermont campaign finance statute. VRLC also formed Vermont Right to Life Committee, Inc. Political Committee (“VRLC-PC”), which “engages in campaign activities, including making direct contributions to pro-life political candidates.” Among other claims against Vermont’s statutory scheme, VRLC argued that §2805(a) was unconstitutional as applied to VRLC-FIPE because it is an IEO, despite its relationship to VRLC-PC. The district court rejected VRLC’s argument and concluded that the provisions were constitutional.

The Second Circuit affirmed. The court framed the issue in the following way: “The only question here is whether the statute’s contribution limits are unconstitutional as applied to [an IEO affiliated with a direct expenditure group], which claims

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41 758 F.3d at 118.
42 _Id._ at 139 (quoting Vt. Stat. Ann. tit. 17 § 2805(a)).
43 _Id._ at 122.
44 _Id._
45 _Vt. Right for Life_, 758 F.3d at 122 (internal quotations omitted).
46 _See id._
47 _Id._
48 _Id._ at 139.
49 _Vt. Right for Life_, 758 F.3d at 128.
to be an independent-expenditure-only PAC.” The Second Circuit had previously held that “the state may impose contribution limits on some groups . . . that directly contribute or coordinate expenditures with campaigns.” While VRLC-FIPE did not itself satisfy these conditions, the district court had found that “VRLC-FIPE [the IEO] is enmeshed financially and organizationally with VRLC-PC, a PAC that makes direct contributions to candidates.” Based on that finding of fact, the Second Circuit held “Vermont’s contribution limits as applied to VRLC-FIPE are permitted.”

The court reached this conclusion because the IEO and the direct expenditure organization “cannot be functionally distinguished.” The court focused on “the total overlap of staff and resources, the fluidity of funds, and the lack of any informational barrier between the entities” and concluded that these characteristics made the two organizations “indistinguishable.” The American Law Review summarized the holding in the following way:

Under Vermont law, political committee was not [an] independent expenditure only group, and thus was subject to state’s campaign finance restrictions, even though non-profit corporation created committee separately from political committee formed to engage in campaign activities, and committees had separate bank accounts, where funds were transferred freely between committees’ bank accounts, corporation had complete control over both committees’ structure and finances, members of both committees were appointed by corporation’s president with approval of its board, committees shared substantial overlap in membership, and there was no point at which committee separated itself from lines of communication between candidate, corporation, and other committee.

50 Id. at 139.
51 Id. at 145.
52 Id. at 141.
53 Vt. Right for Life, 758 F.3d at 145.
54 Id.
55 Id.
56 E.W.H., Annotation, Construction and application of provisions of corrupt
The Second Circuit rejected the following *per se* rules established by other circuits, and instead substituted deference to the district court's finding of fact with regard to the organization's structure.\(^{57}\)

C. Other Circuits' Approaches to Distinguishing Between IEOs and Direct Expenditure Organizations

The Second Circuit's conclusion in *Vermont Right to Life* particularly clashes with *North Carolina Right to Life, Inc. v. Leake*.\(^{58}\) In that case, the Fourth Circuit held that an IEO that shared facilities and a "parent entity" with a DEO was still "independent as a matter of law" based on the founding documents of the organization.\(^{59}\)

In *Leake*, a nonprofit whose purpose was advocacy for the protection of human life and an anti-abortion political action committee established by that same nonprofit brought a First Amendment challenge against several of North Carolina's campaign finance laws.\(^{60}\) The two organizations were housed in the same building, shared a common advocacy goal, and had the same management.\(^{61}\)

The District Court invalidated a provision that allowed for consideration of "contextual factors" in determining whether an organization is advocating for a specific candidate; as a result, the court found that the contribution limits at issue in the case were unconstitutional.\(^{62}\) The court "decided that the North Carolina campaign finance statute that employed a 'reasonable person' test and permitted examination of 'contextual factors,' including timing, distribution, and cost, in determining whether the 'essential nature' of a given communication was in support of a specific candidate and therefore regulable, was vague, overbroad, and violated the First Amendment on its face."\(^{63}\)

\(^{57}\) *Vt. Right to Life*, 758 F.3d at 141-44.

\(^{58}\) 525 F.3d 274, 294 n. 8 (4th Cir. 2008).

\(^{59}\) *Leake*, 525 F.3d at 294 n. 8.

\(^{60}\) Id. at 274. See also Marilyn E. Phelan, *Political Organizations, 2 NONPROFIT ORGANIZATIONS: LAW AND TAXATION* § 20:10 (2015).

\(^{61}\) *Leake*, 525 F.3d at 306.

\(^{62}\) Id. at 280-81.

\(^{63}\) Phelan, *supra* note 60.
The Fourth Circuit affirmed this reasoning, holding that the North Carolina statute's use of "context to identify communications in support of or opposition to a candidate" was unconstitutional.\(^6\) A dissenting judge voiced concern, however, that this holding weakens the state's ability to regulate its own elections. In particular, ignoring the context of communications would allow organizations "to easily disguise their campaign advocacy as issue advocacy, thereby avoiding regulation."\(^6\)

Some conservative commentators have argued that this approach burdensomely increases the costs contribution regulations, particularly for small organizations.\(^6\) "These laws are expensive to comply with, so larger organizations with more resources for accountants and lawyers—overhead that can be better absorbed—have a comparative advantage over smaller players."\(^6\) According to this line of argument, the government will be able to censor political speech, particularly that of small, marginal political groups, under the guise of ordinary campaign finance regulations designed to combat corruption.

Other circuits, applying *Citizens United*, "have concluded that an anti-corruption rationale therefore cannot apply to contributions to groups that engage only in independent expenditures."\(^6\) In particular, the D.C. Circuit held that separate bank accounts between organizations are enough to render an organization an IEO: "[the IEO] simply must ensure, to avoid circumvention of individual contribution limits by its donors, that its contributions to parties or candidates come from a hard-money account."\(^6\) "Relying on *Emily’s List v. Federal Election Commission*,\(^6\) the U.S. District Court for the District of Columbia held that maintaining segregated bank accounts is sufficient to ensure a division between funds raised by a federal

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\(^{64}\) *Leake*, 525 F.3d at 308.

\(^{65}\) *Id.*


\(^{67}\) *Id.*

\(^{68}\) *Vt. Right to Life*, 758 F.3d at 140. For circuits applying that rationale, see *Wisc. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 154 (7th Cir. 2011); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1118–21 (9th Cir. 2011); *N.C. Right to Life*, 525 F.3d at 296.


\(^{70}\) *Id.*
political committee for independent expenditures and those raised by the same organization for candidate contributions."71

D. The Second Circuit’s Interpretation is Compatible with Supreme Court Precedent

The Supreme Court indicates that district and appellate courts must find an “absence of prearrangement and coordination.”72 Following this mandate the Supreme Court has previously upheld limitations on contributions to “entities whose relationships with candidates are sufficiently close to justify concerns about corruption or the appearance thereof.”73 However, these decisions do not deal specifically with IEOs.

In McConnell v. Federal Election Commission,74 various parties challenged the constitutionality of the Bipartisan Campaign Reform Act of 2002. Congress designed the Act “to purge national politics of what [is] conceived to be the pernicious influence of 'big money' campaign contributions.”75 Political parties and candidates had tried to circumvent FECA restrictions “by using 'issue ads' that were specifically intended to affect election results, but did not contain 'magic words,' such as 'Vote Against Jane Doe.'”76 The Supreme Court ultimately upheld the constitutionality of the Act’s “limitations on contributions to political parties because ‘the close relationship

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72 Citizens United, 558 U.S. at 357. See also Ala. Democratic Conference v. Broussard, 541 Fed. Appx. 931, 935 (11th Cir. 2013) (per curiam) (“In prohibiting limits on independent expenditures, Citizens United heavily emphasized the independent, uncoordinated nature of those expenditures, which alleviates concerns about corruption.”).

73 Vt. Right to Life, 758 F.3d at 145 (citing Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684, 686 (9th Cir. 2010); accord McConnell v. Fed. Election Comm’n, 540 U.S. 93, 154–55 (2003) (upholding limitations on contributions to national parties because “the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, ... have made all large soft-money contributions to national parties suspect”); California Medical Association, 453 U.S. at 203 (Blackmun, J., concurring in part and concurring in the judgment) (upholding limitations on contributions to “multicandidate political committees” because their close relationship with candidates and office holders made them “conduits for contributions to candidates, and as such they pose[d] a perceived threat of actual or potential corruption”).


75 Id. (quoting United States v. Auto. Workers, 352 U.S. 567, 572 (1957)).

76 Id. at 94.
between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, ... have made all large soft-money contributions to national parties suspect." The Court's concerns about close collaboration between candidates and national parties could be very relevant to an analysis of possible collusion between IEOs and direct expenditure organizations.

The Court similarly upheld contribution limitations for "multicandidate political committees" in the earlier California Medical Association v. Federal Election Commission, where a non-profit association of doctors and a multicandidate medical PAC challenged the constitutionality of threatened FEC enforcement action resulting from annual contributions to the PAC in excess of $5,000. While the district court certified questions regarding the constitutionality of the contribution limits under FECA, the Ninth Circuit reversed and upheld the challenged limits. The Supreme Court affirmed. Although this case pre-dates the creation of super PACs, the Court's reasoning is extremely relevant since the "multicandidate" PACs similarly promote a variety of candidates instead of a single person. In this case, the Court found that the "multicandidate" PACs' close relationship with candidates and office holders made them "conduits for contributions to candidates, and as such they pose[d] a perceived threat of actual or potential corruption."

The concerns expressed by the Supreme Court in both McConnell and California Medical Association appear to mirror those of the Second Circuit and suggest that Vermont Right to Life could be upheld upon review.

E. Validity of the Circuit Split

Some commentators question whether a circuit split on this issue really exists at all. They argue that while the Second Circuit distinguished its position from the Fourth Circuit's

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77 Long Beach Area Chamber of Commerce, 603 F.3d at 696 (quoting McConnell, 540 U.S. at 154–55).
79 Id.
80 California Medical Association, 453 U.S. at 203 (Blackmun, J., concurring in part and concurring in the judgment). See also id., at 197 (maj. op.) ("[T]he rights of a contributor are similarly not impaired by limits on the amount he may give to a multicandidate political committee . . . which advocates the views and candidacies of a number of candidates.".).
Leake, this distinction “incorrectly suggest[ed] that the Fourth Circuit would rely entirely on a committee’s formal intention, expressed in organizational documents, to function independently.”81 Furthermore, “the Fourth Circuit made clear that it would consider a showing that, notwithstanding stated policies of independence or separate bank accounts, a committee’s independence was fictitious.”82 These commentators conclude that even “if the Court does eventually address the issue, the chances are good that it will side with the spender.”83

The Second Circuit, however, considers its own behavior a deviation from the other circuits. More importantly, the Second Circuit’s approach in Vermont Right to Life, if not in direct opposition to decisions like Leake, highlights how little guidance currently exists for regulators and courts to assess the required independence of IEOs. Addressing this circuit split allows the Court to clarify the rules so that political committees can structure themselves to retain independent expenditure branches while avoiding liability. As IEOs continue to gain importance in the political arena, clarification becomes more important.84

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82 Id.
83 Id.
84 See id.: Hybrid committees, or independent committees within a family of organizations that includes contribution-making committees, are here to stay. The reason is simple: there is no basis in Buckley for the position that an organization making contributions can’t also make expenditures, or operate alongside related organizations that do. Contrary to what is often alleged, the independence of consequence under the law is the independence of the expenditure—an independence that keeps the candidate from shaping or consulting on the expenditure and bolstering the chance that the committee will be spending to her liking, for which she will be indebted. Committees can establish the ‘operational barriers’ or ‘organizational divides’ that protect against circumvention of this requirement.
II. PROPOSED SOLUTIONS

A. Per Se Rules

The D.C. Circuit has adopted a per se rule that requires an IEO to maintain separate bank accounts. This rule is extremely straightforward and low-cost for the courts to implement. Unfortunately, it does little to protect against collaboration between various branches of an organization. Without additional restrictions, the DEO could simply direct the spending of the IEO and thereby circumvent the rule.

Similarly, the Fourth Circuit also has a per se rule that requires legally distinct organizations based on foundational documents. Because it is a per se rule, the evidentiary burden to establish independence is light and filing of the required documents should be sufficiently straightforward for IEOs to avoid concerns about non-compliance. Unfortunately, it does not require financial independence between organizations and makes collaboration easy.

B. Hybrid Approach

The Second Circuit’s approach incorporates both the D.C. Circuit and Fourth Circuit approaches with a multi-factor test. The multi-factor test considers “the overlap of staff and resources, the lack of financial independence, the coordination of activities, and the flow of information between the entities.” This test stems from the Second Circuit’s belief that the other circuits’ approaches are not “enough to ensure there is a lack of ‘prearrangement and coordination.’” A separate bank account may be relevant, but it does not prevent coordinated expenditures—whereby funds are spent in coordination with the

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85 See Emily’s List, 581 F.3d at 12:

To prevent circumvention of contribution limits by individual donors, non-profit entities may be required to make their own contributions to federal candidates and parties out of a hard-money account. But non-profit entities are entitled to make their expenditures—such as advertisements, get-out-the-vote efforts, and voter registration drives—out of a soft-money or general treasury account that is not subject to source and amount limits.

86 See N.C. Right to Life, 525 F.3d at 294 n. 8.

87 Vt. Right to Life, 758 F.3d at 142.
candidate." The Second Circuit's test places a greater burden on the trial courts because the appellate courts will be beholden to their findings of fact. Furthermore, the evidentiary costs of establishing an information flow are likely to be higher. But the Second Circuit's approach is still desirable because it takes care to force a barrier between IEOs and DEOs. In particular, "coordination of activities" is a broad limitation on interaction between the groups. Such a limitation may carry efficiency costs because groups cannot benefit from economies of scale but should still help maintain the desired independent behavior of the IEOs. In Vermont Right to Life, the Second Circuit identifies at least two important state interests promoted by its approach. First, avoiding either the appearance or reality of *quid pro quo* corruption. Second, a state "anticircumvention interest in preventing the evasion of valid contribution limits."

Unfortunately, political contributors who are unable to influence politics directly because of conventional contribution limits may "scrambl[e] to find another way to purchase influence."

C. Limitations of Existing Approaches

Even the Second Circuit's more stringent and rigorous analysis has limitations. Judge Richard Posner predicted that allies of a candidate could run a super PAC and, without speaking directly to the candidate or party officials, figure out what type of political advertising would be helpful to the candidate. Some super PACs have already begun developing structures to avoid direct communication and interaction with other political committees and groups. For example, in a 2014

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88 Id. at 141 (quoting Stop This Insanity, Inc. Emp. Leadership Fund v. Fed. Election Comm'n, 902 F. Supp. 2d 23, 43 (D.D.C. 2012)).

89 See id. at 142–43.

90 See id.

91 Larry Fullerton, *FTC Challenges to "Invitations to Collude",* 25 ANTITRUST 30, 33 (2011). See also *Vt. Right to Life,* 758 F.3d at 140 n. 20 (citing Ognibene v. Parks, 671 F.3d 174, 194–95 (2d Cir. 2011)).

92 *Vt. Right to Life,* 758 F.3d at 140 n. 20 (citing Ognibene, 671 F.3d at 194–95).


Colorado Senate race, the super PAC Americans for Prosperity "told the Washington Post it would spend $970,000 on three weeks of television, radio, and online ads attacking [the] incumbent Democratic Senator," which signaled to the Republican candidate that he could focus on fundraising for future efforts instead of spending on his own attack ads during that period.  

The 2014 midterm elections were rife with such activity. Many campaigns would publish candidate information in a format that was easily transferable to ads, or even published stock video footage of a candidate on the campaign's website that super PACs could download and use in television spots or online videos. One of the most explicit examples of coordination was performed by the campaign of Thom Tillis, the Republican senatorial candidate in North Carolina. In October 2014, Tillis's "campaign e-mailed an extensive strategy memo to anyone who had signed up for updates on Tillis's Web site that listed [the campaign's] most pressing needs, including to 'increase our spending in Asheville' and 'add 1,000 gross ratings points in Charlotte.'"  

Paul S. Ryan, senior counsel for the Campaign Legal Center, which has filed complaints with the FEC about the widespread use of shared video footage in the 2014 campaigns, argued that "the increasing degree of interaction between candidates and outside groups is rendering the candidate contribution limits meaningless."  

Even so, commentators have found the Vermont Right to Life decision to be a step in the right direction. "One of the real crucial points of this decision, though, is to peer behind the veil of the claim of independence,' said Tara Malloy, senior counsel at the reform group Campaign Legal Center. "The fact that the

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96 Id.  
98 Id.
Opponents may argue that the proposal to adopt the Second Circuit’s impact of campaign behavior would rely too heavily on speculation and qualitative data. They may also question whether adoption of the stricter Second Circuit rule would have much of an impact on campaign behavior since, regardless of the distinction between IEOs and DEOs for purposes of contribution limits, campaign rules regarding communication between official campaigns and PACs remain in place. The prior cases, however, illustrate how concerned courts have been about the diminished autonomy of IEOs. To satisfy these criticisms about the effectiveness of the Second Circuit rule in the face of collusive behavior between IEOs and DEOs, the Court should look outside the realm of election law for guidance.

III. AN ALTERNATIVE APPROACH

A. The Court Can Use Antitrust Law as a Guidepost for Applying the Second Circuit’s Approach

Whether by coincidence or design, the Second Circuit’s approach to regulating coordination between IEOs and DEOs closely mirrors that of antitrust law’s regulation of coordination by firms. This similarity in method is unsurprising, considering the similarity in motive behind the regulations: antitrust law seeks to protect consumers from the anticompetitive actions of firms, election law seeks to protect voters (political consumers) from the coordinated, anticompetitive behavior of expenditure organizations. Campaign finance law also faces many of the same regulatory problems as antitrust: “the notion of ‘coordination’ is vague, and tacit coordination with a candidate or a party seems to occupy the same never-never land as tacit collusion in antitrust law.”


101 Richard Posner, Unlimited Campaign Spending—A Good Thing?, THE BECKER-
antitrust law regarding collusion to election law, the Court could further refine the Second Circuit's approach in Vermont Right to Life to increase deterrence of future illegal coordination and minimize enforcement costs.

While there is apparently little empirical data on this particular area of election law, there is a sizable body of scholarship applying economic rationale to campaign scenarios. In fact, several prominent legal scholars and economists have noted the sort of problems with collusion that are likely to exist between IEOs and DEOs. Speaking to lobbying generally, Alexander Volokh predicts that "a concentrated industry may be able to more easily overcome its collective action problems, so we might expect lobbying to increase as concentration increases."102 The appearance of a few, large super PACs suggests a trend in this direction and with fewer IEOs, it might be easier for a few influential conventional PACs to direct their behavior. In fact, there has been concern about political parties themselves being a vehicle for "circumventing FECA's contribution limits since this money is spent in tacit collusion with elected officials."103

While the arguments about the applicability of antitrust law must be further developed, Volokh notes that "privatization is a form of antitrust, and antitrust is a form of campaign finance regulation."104 This suggests that efforts to splinter IEOs and DEOs are a form of antitrust and may be used to regulate campaign contributions.105

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104 Volokh, supra note 1022, at 1253.
105 This is not to suggest that the traditional antitrust regulatory agencies (see infra 15 U.S.C. at § 21) have authority to regulate federal election behavior in the context of independent-expenditure and direct expenditure organizations. While such an argument could be made, this comment only relies on Volokh's statement in order to argue that existing antitrust law has developed to deal with similar problems and serves as a useful guidepost for this particular area of campaign finance law.
1. Sections of the Sherman Act are applicable to the regulation of independent-expenditure organizations.

Much of antitrust law comes from Section 1 of the Sherman Act, which prohibits “contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce.”¹⁰⁶ “The crucial question is whether [the challenged anticompetitive conduct]... stemmed from independent decision or from an agreement, tacit or express.”¹⁰⁷ The problem in antitrust litigation, and the corresponding problem in application to campaign finance, is that “[w]hile a showing of parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short of conclusively establishing agreement or... itself constituting a Sherman Act offense.”¹⁰⁸

Furthermore, “[e]ven conscious parallelism, a common reaction of firms in a concentrated market [that] recognize[es] their shared economic interests and their interdependence with respect to price and output decisions is not in itself unlawful.”¹⁰⁹ Purely tacit collusion should not be a per se Sherman Act violation, therefore, because such a rule would yield too many false positives.¹¹⁰ To avoid summary judgment under Section 1 of the Sherman Act, plaintiffs must produce “evidence that ‘tends to exclude the possibility’” that the alleged conspirators acted independently.¹¹¹ Applying this approach, the Second Circuit’s rule “should have enough content to exclude... certain categories of parallel behavior, including some involving benign forms of communication.”¹¹²

¹⁰⁹ Id. at 553–54 (internal quotations omitted).
¹¹² Page, supra note 110.
2. FTC authorized to prevent anti-competitive behavior.

In addition to the Department of Justice, the Federal Trade Commission (FTC) "is a quasi-judicial, independent regulatory agency led by five commissioners" that enforces U.S. antitrust law. The commission was initially created in 1914 to "prevent unfair methods of competition in commerce as part of the battle to 'bust the trusts.'" Since that time, Congress has passed additional laws granting the Commission authority such that its mission is now "[t]o prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity." Consequently, the FTC is the only federal agency with jurisdiction for both consumer protection and competition across the economy.

The FTC regulates anticompetitive conduct under section 5 of the Federal Trade Commission Act. The Act specifies that "[t]he Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." While the FTC does not have the authority to regulate under the Sherman Act like the Department of Justice, its authority under Section 5 of the Federal Trade Commission Act closely parallels that of the Sherman Act. Courts may therefore appropriately look to the FTC for guidance regarding the identification and regulation of collusive behavior.

115 Id.
116 See id.
3. Applications of the “invitation to collude” enforcement mechanism described in Section 5 of the Federal Trade Commission Act.

The FTC has long taken the position that “invitations to collude” may violate Section 5 of the Federal Trade Commission Act. Invitation to collude are unilateral solicitations to enter into unlawful horizontal price-fixing or market allocation agreements. Historically, the Commission has taken a per se approach that first internally evaluates the suspected invitation to collude “in light of factors that bear on the likelihood and magnitude of its possible anticompetitive effects, including any purported justifications.” If the FTC decides that intervention is justified based on these factors, then it challenges the conduct as illegal without any finding that the challenged conduct had any actual past or present anti-competitive effect, as would normally be required under Section 1.

The FTC's regulation of “invitations to collude” is uncontroversial so long as the communication is private—partly because this regulation is so far from the normal protection of free speech—and could be interpreted unambiguously as a solicitation to enter into an anticompetitive agreement. Similarly, in the context of election law, while the FEC has comfortably limited private communication between IEOs and DEOs, it has tended to minimize its regulation of public speech. Michael Toner, a former FEC commissioner, says stopping candidates and independent groups from openly disseminating their plans would be impossible “unless you want to make it illegal to use information in the public sphere. And I don’t know how that would be manageable or constitutional.”

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120 See Fullerton, supra note 91.
121 Fullerton, supra note 91.
122 Id.
123 See Page, supra note 110, at 184 (focusing on private communication instead of public price announcements because of the inherently ambiguous purpose of such facilitating practices).
At least in the antitrust sphere, the FTC has stretched its authority to even reach suspected invitations to collude that were communicated publicly. In *Valassis Commc'ns*, the FTC alleged that Valassis extended an unlawful invitation to collude to its only competitor, during a mandatory conference call with financial analysts. The FTC subsequently issued a consent order prohibiting Valassis from inviting any further collusion, while permitting the company “publicly to disclose any information ... required by the Federal Securities Laws.” More recently, the FTC has asserted even broader discretionary authority over both public and private invitations to collude.

In *U-Haul Int'l*, Budget, a shipping competitor, filed a complaint about U-Haul issuing both private and public communications announcing price increases and expressing hope that Budget would match and not “throw the money away.” The FTC, without distinguishing between private and public communications, stated that in order to infer an actionable invitation to collude, “[i]t is not essential that the Commission find repeated misconduct attributable to senior executives, or define a market, or show market power, or establish substantial competitive harm, or even find that the terms of the desired agreement have been communicated with precision.” The resulting final consent order in *U-Haul* mirrored the FTC’s consent order in *Valassis*. These holdings suggest that the FEC may be able to draw parallels to the FTC’s increased authority to regulate public communications. As described above, however, the Court has generally been wary of

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126 FTC File No. 051-0008 (Apr. 19, 2006).
130 FTC File No. 081-0157 (July 14, 2010).
regulations on public speech, particularly political speech. Consequently, the FEC must be cautious before targeting publicly communicated invitations to collude and should clearly indicate to IEOs and DEOs what sort of communication will qualify as *per se* collusion.  

4. Additional considerations relevant to “invitations to collude.”

Current antitrust literature on “invitations to collude” suggests at least three factors that the Court should consider before adopting the Second Circuit’s test in cases of public communication between IEOs and DEOs. Each factor suggests that clearer guidelines will promote more efficient communications and less accidental collusion by political organizations.

First, the Court should clarify the line between a public announcement of the campaign’s goals as a means of inciting increased public support and an invitation to collude. \(^{133}\) *U-Haul* and *Valassis* identify several factors that help identify when public communication about product pricing crosses the line to constituting an invitation to collude: the solicited party is clearly identified in the communication; the solicited party is the solicitor’s “closest” competitor; the communication includes specific references to future prices and price policies; an announced future price is explicitly contingent on the solicited party’s cooperation; and the solicited party is threatened (often with a price war) if they do not respond favorably. \(^{136}\) A court evaluating suspect IEO behavior could, with minor modifications, rely on these factors to make the inference that a public announcement is an invitation to collude. For instance, a public announcement that a campaign plans to spend advertising money in a certain market as long as a particular super PAC makes sufficient gains in a different specified market

\(^{133}\) For instance, the FEC must clarify how required contribution disclosure filings will be evaluated, since it wants to promote forthrightness by PACs in disclosing, while simultaneously guarding against collusion.


\(^{135}\) See id. at 33 (“The Commission should clarify the line between an advance public announcement of a future price increase and an invitation to collude that would be actionable under Section 5.”).

\(^{136}\) Id. at 33.
would satisfy many of these factors. This approach does a good job of identifying behavior such as the prior example of Thom Tillis’s public strategy email listing the campaign’s most pressing needs, including increasing spending in Asheville and adding 1,000 ratings points in Charlotte, as an invitation to collude.

Next, the Court “should clarify the market characteristics that support an inference of likely anticompetitive harm.”137 In Valassis, the FTC said that liability should depend in part on the “context of the communication.”138 While the FTC did not make clear what characteristics should be taken into account, factors such as whether the communication is only applicable to a single super PAC might be enough to support an inference of harm. A highly concentrated market of political donors also might be sufficient to support such an inference. This move to improve competition in the political speech market follows a strong trend within free speech law to avoid limiting speech so that conflicting ideas can compete amongst themselves, resulting in the supremacy of the best ideas.139 While the Court has found “equality” not to be a legitimate interest in campaign finance law,140 the government clearly has some interest in minimizing market concentration of donors. “Experimental economics suggests that collusion without communication is rare and dependent upon highly specific conditions.”141 In particular, while collusion without communication seems to be possible in duopolies, it is far less likely in markets with at least three firms, generally because firms will have a harder time disciplining defections.142 Existing campaign contribution limits help produce this ideal diversified political market and the

137 See id.
140 See Buckley, 424 U.S. at 54 (“The ancillary interest in equalizing the relative financial resources of candidates competing for elective office . . . is clearly not sufficient to justify the provision’s infringement of fundamental First Amendment rights”).
141 Page, supra note 110, at 191 (citing Charles A. Holt, Industrial Organization: A Survey of Laboratory Research, in THE HANDBOOK OF EXPERIMENTAL ECONOMICS 409 (John H. Kagel & Alvin E. Roth eds., 1997) (summarizing the literature as finding that duopolies are able to coordinate price, in part, because rivals can punish non-cooperative behavior without hurting cooperative rivals; above three participants, however, there is little evidence of a “pure numbers effect” in price coordination)).
142 Id.
government seems to have an interest in more, smaller campaign contributors as a proxy for greater political market participation.

Finally, the Court should clarify what justifications it will recognize and in what circumstances.\textsuperscript{143} In the Valassis and U-Haul consent orders, the FTC only specifically recognized one justification—the need to make "required" securities disclosures. In the context of election law, the FEC could specify that making required contribution and expenditure disclosures qualifies as a justification for making statements that would otherwise constitute invitations to collude. In any case, it is important that the FEC specify these exceptions ahead of time so that organizations will be willing to disclose information freely without fear of punishment.

B. Benefits of the Antitrust-Based Approach

The primary benefits of emulating an antitrust-based analysis of collusive behavior is that it has already been applied elsewhere—so its efficacy may be evaluated—and that it is more developed and specified than existing election law approaches. In particular, clearer guidelines will allow political organizations to operate with less risk of accidentally violating FEC rules. For this reason, it is important that the FEC clarifies any justifiable exceptions to its prohibition on potentially collusive communication, particularly to the extent that the modified U-haul/Valassis factors conflict with existing disclosure requirements. Additionally, the breadth of the U-haul/Valassis factors should allow the FEC to capture more of the "scrambling" behavior of parties seeking to circumvent traditional contribution limits.

C. Implications of Increased Regulation Under the Second Circuit's Approach

Economic analysis of campaign behavior is useful in explaining how PACs will respond to changes in their incentive structure caused by the Second Circuit's approach. While increased regulation is likely to drive some political contributors

\textsuperscript{143} See Fullerton, supra note 911, at 33.
into other “underground” markets\textsuperscript{144} where they can donate without expenditure limitations, the act of criminalizing the use of supposedly independent expenditure organizations as a front for direct donations by regulated organizations like PACs will discourage some collaboration simply based on the social costs of engaging in illicit behavior.\textsuperscript{145}

The political donation market is not perfectly inelastic,\textsuperscript{146} and there is no perfect substitute for this particular contribution structure.\textsuperscript{147} Consequently, some subset of the PACs currently donating through IEOs in the manner described in \textit{Vermont Right to Life} will be “priced out” of the direct contribution market. Some organizations’ demand will still be too inelastic to be forced out since those organizations still want to exert political influence through more direct contributions, even if such behavior becomes significantly more expensive. The increase in “price” created by the Second Circuit’s approach, however, should reduce the volume of direct, unregulated campaign expenditures.

Assuming that such reduction is a social good—as previously discussed, First Amendment law seems to be based on this assumption—this change should be social welfare enhancing. It should be noted that such an assumption is no sure thing, since some self-interested political advocacy could promote interests that benefit society.\textsuperscript{148} While this Comment does not seek to make such a calculation formally, a future article could attempt to calculate the cost of increased regulation and contrast this with the benefit of reduced direct campaign contributions. However, the same economic reasoning suggests

\begin{thebibliography}{10}
\bibitem{144} Gary S. Becker et al., \textit{The Market for Illegal Goods: The Case of Drugs}, 114 J. POLIT. ECONOMY 38, 40 (2006) ("[S]ome producers may go underground to try to avoid a monetary tax.").
\bibitem{146} See Becker et al., \textit{supra} note 144 (discussing other goods that may be thought of as perfectly inelastic, such as the supply of land or illicit narcotics for a drug addict).
\bibitem{147} “Price elasticities of giving in the United States have largely been estimated to be greater than one in absolute value,” indicating that the supply curve for such contributions (including political contributions) is relatively flat and elastic. Bruce Chapman, \textit{Between Markets and Politics: A Social Choice Theoretic Appreciation of the Charitable Sector}, 6 GEO. MASON L. REV. 821, 857 n. 72 (1998).
\bibitem{148} See Volokh, \textit{supra} note 102, at 1247–49 (2008) (discussing how self-interested advocacy of prison privatization could be advocating a policy that is welfare enhancing).
\end{thebibliography}
that if demand for such donations is relatively inelastic, then the social cost of enforcing regulations is high.\textsuperscript{149}

IV. CONCLUSION

Regardless of whether the Supreme Court grants certiorari to hear \textit{Vermont Right to Life}, the Second Circuit's decision has opened a new debate on the appropriate regulatory structure to manage increased collaboration between DEOs and IEOs. There are a variety of approaches that the Supreme Court could adopt to resolve the debate, several of which provide relatively simple and inexpensive solutions. Unfortunately, these approaches do not provide the comprehensive regulation needed to separate the organizations. The Second Circuit's approach, while broader and more difficult to implement, does a better job of dealing with the bad incentives for DEOs to control IEOs.

The Court should consider shaping any modifications to the Second Circuit's approach on the model provided by U.S. antitrust law. In particular, the FTC's approach to identifying potentially problematic collusive behavior provides excellent guidance for future regulation of interaction between independent-expenditure-only political committees and direct expenditure organizations.

\textsuperscript{149} See Becker et al., \textit{supra} note 144.