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# Why Limits on Contributions to Super PACS Should Survive Citizens United

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# CHICAGO

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***WHY LIMITS ON CONTRIBUTIONS TO SUPER PACS SHOULD  
SURVIVE CITIZENS UNITED***

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**THE LAW SCHOOL  
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WHY LIMITS ON CONTRIBUTIONS TO SUPER PACS  
SHOULD SURVIVE *CITIZENS UNITED*

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Part I

INTRODUCTION

A. THE INDEFENSIBLE POLICY AND INCOMPREHENSIBLE LAW CREATED BY *SPEECHNOW.ORG V. FEC*

In 2010, two months after the Supreme Court decided *Citizens United v. FEC*,<sup>1</sup> the D.C. Circuit held all limits on contributions to super PACs unconstitutional. Its decision in *SpeechNow.org v. FEC*<sup>2</sup> created a regime in which contributions to candidates for office are limited but in which contributions to “independent expenditure committees” urging votes for these candidates are unbounded.

In the 2016 presidential campaign, for example, federal law barred hedge fund manager Donald Sussman from contributing as much as \$5500 to Hillary Clinton’s campaign. It barred hedge fund manager Robert Mercer from contributing \$5500 to Donald Trump’s campaign. The law capped contributions to campaigns for federal office at \$2700 per election or \$5400 for both the primary and general elections.<sup>3</sup> Forty years earlier, the Supreme Court had upheld limits on contributions to candidates in *Buckley v. Valeo*.<sup>4</sup>

But federal law did not prohibit Donald Sussman from contributing \$21 million to Priorities USA Action, a super PAC whose principal mission was to place advertisements on behalf of Clinton.<sup>5</sup> And federal law did not bar Robert Mercer from contributing \$15.5 million to Make America Number 1, a super PAC that supported Ted Cruz in the Republican primaries and

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<sup>1</sup> 558 U.S. 310 (2010).

<sup>2</sup> 599 F.3d. 686 (D.C. Cir. 2010) (en banc).

<sup>3</sup> 52 U.S.C.A. § 30116(a) (West 2016); Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 78 Fed. Reg. 8530m 8532 (Feb. 6, 2013); Contributions, Fed. Election Comm’n, <http://www.fec.gov/pages/brochures/contrib.shtml> (visited on Apr. 21, 2015) (providing the inflation-adjusted limits for 2015-16).

<sup>4</sup> 424 U.S. 1 (1976) (per curiam).

<sup>5</sup> See *Outside Spending: Sussman, S. Donald: Donor Detail*, OPENSECRETS.ORG, [http://www.opensecrets.org/outsidespending/donor\\_detail.php?cycle=2016&id=U0000004604&type=I&super=N&name=Sussman%2C+S.+Donald](http://www.opensecrets.org/outsidespending/donor_detail.php?cycle=2016&id=U0000004604&type=I&super=N&name=Sussman%2C+S.+Donald) (last visited Mar. 7, 2017).

Trump in the general election.<sup>6</sup> Until 2010, a federal statute limited contributions to groups like Priorities USA Action and Make America Number 1 to \$5000 per year,<sup>7</sup> but *SpeechNow* held this statute unconstitutional.

“Super PACs” or “independent expenditure committees” are groups that do not make contributions to candidates but instead place their own advertisements supporting candidates and/or disparaging their opponents. Although these groups may not coordinate their expenditures with those of an official campaign,<sup>8</sup> their managers often understand that their job is to attack an opponent while the candidate they support takes a higher road.<sup>9</sup> Super PACs have been called “the attack dogs and provocateurs of modern politics.”<sup>10</sup> The advertisements they produce contribute to the nation’s cynicism about politics, a cynicism that runs especially deep among young people.<sup>11</sup> The candidates they support need not take responsibility for what

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<sup>6</sup> See *Outside Spending: Robert L. Mercer: Donor Detail*, OPENSECRETS.ORG, [http://www.opensecrets.org/outsidespending/donor\\_detail.php?cycle=2016&id=U0000003682&type=I&super=S&name=Mercer%2C+Robert+L](http://www.opensecrets.org/outsidespending/donor_detail.php?cycle=2016&id=U0000003682&type=I&super=S&name=Mercer%2C+Robert+L). (last visited Mar. 7, 2017).

<sup>7</sup> 52 U.S.C.A. § 30116(a)(1)(C) (West 2016).

<sup>8</sup> See 11 C.F.R. §§ 109.20-.23 (2009). “Independent expenditure committees” need not be entirely independent. Candidates may, within limits, solicit donations to these groups and may speak at their gatherings. See FED. ELECTION COMM’N, ADVISORY OPINION 2011-12 (June 30, 2011), <http://saos.fec.gov/aodocs/AO%202011-12-pdf>. They may thank contributors for making donations to super PAC, share fundraising consultants with super PACs, and provide lists of prospective donors to super PACs. Note, *Working Together for an Independent Expenditure*, 128 HARV. L. REV. 1478, 1480, 1485-86 (2015). A recent solicitation for funds by a super PAC advised a prospective donor, “We are the blessed Super PAC by Sen. Toomey. I am his former senior aide and finance director, and I am working with his former chief-of-staff.” Robert Faturechi & Lauren Kirchner, *Super PAC to Billionaire: We Need More Money to Save a Republican Senate*, PRO PUBLICA, Oct. 14, 2016, <https://www.propublica.org/article/super-pac-to-billionaire-we-need-more-money-to-save-a-republican-senate>.

<sup>9</sup> See David A. Graham, *The Incredible Negative Spending of Super PACs—in 1 Chart*, THE ATLANTIC, Oct. 15, 2012, <http://www.theatlantic.com/politics/archive/2012/10/the-incredible-negative-spending-of-super-pacs-in-1-chart/363643/> (reporting that, in the 2012 presidential campaign, Republican super PACs spent three times more attacking the Democratic candidate than they did supporting the Republican candidate and that Democratic super PACs spent nine times more attacking the Republican candidate than they did supporting their own candidate).

<sup>10</sup> Jeremy W. Peters, *Conservative “Super PACs” Synchronize Their Messages*, N.Y. TIMES (Sept. 24, 2012), <http://www.nytimes.com/2012/09/25/us/politics/conservative-super-pacs-sharpen-their-synchronized-message.html>.

<sup>11</sup> See Sheryl Gay Stolenberg, *For “Millennials,” a Tide of Cynicism and a Partisan Gap*, N.Y. TIMES, Apr. 29, 2013, <http://www.nytimes.com/2013/04/30/us/politics/formillennial-voters-a-tide-of-cynicism-toward-politics.html>; *Beyond Distrust: How Americans View Their Government*, PEW RESEARCH CENTER, Nov. 23, 2015, <http://www.people-press.org/2015/11/23/beyond-distrust-how-americans-view-their-government/>.

they say, and the groups usually disappear once an election is over.

Limits on contributions to candidates no longer restrict how much people can give to electoral efforts. They simply require contributors to channel their funds to less responsible and more destructive speakers.<sup>12</sup> No sane legislator would vote in favor of this system of campaign financing, and none ever has. The United States has this topsy-turvy regime because the D.C. Circuit held that the First Amendment requires it.

The thought that the Constitution requires this toxic state of affairs, however, is astonishing. According to the Supreme Court, Congress may prohibit a \$5500 contribution to an official campaign because this contribution is corrupting or creates the appearance of corruption.<sup>13</sup> According to the D.C. Circuit, however, Congress may not prohibit a \$20 million contribution to a super PAC because this contribution does not corrupt or create even an appearance of corruption.<sup>14</sup> The D.C. Circuit reached this conclusion, not on the basis of empirical investigation, but “as a matter of law.”<sup>15</sup>

#### B. THE *SPEECHNOW* SYLLOGISM

The D.C. Circuit did not argue that the system of campaign financing it created was desirable or defensible, and it did not argue that the law it created was sound or coherent. The court made no effort to distinguish contributions to super PACs from contributions to candidates. It offered no defense of the merits of its ruling. The court simply announced that a single sentence of the *Citizens United* opinion compelled its result.

The Supreme Court wrote in *Citizens United*, “We now conclude that

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<sup>12</sup> See Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 455 (2013) (“I am skeptical of any governmental effort to police campaign speech to make it less negative, vitriolic, or immoderate, but there is little to be said for laws that exacerbate these vices.”). Donors typically give the maximum allowable amount to the candidates they favor and then make additional donations to super PACs supporting the same candidates. They apparently seek to obtain with super PAC contributions what the law prevents them from getting with direct donations to candidates. See Stephen R. Weissman, *The SpeechNow Case and the Real World of Campaign Finance* at 2-6 (Tables 1 & 2), FREE SPEECH FOR PEOPLE (Oct. 2016), <https://freespeechforpeople.org/wp-content/uploads/2016/10/FSFP-Weissman-Report-final-10-24-16.pdf>.

<sup>13</sup> *Buckley* said, “It is unnecessary to look beyond the Act’s primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the \$1000 contribution limitation.” *Buckley*, 424 U.S. at 26.

<sup>14</sup> *SpeechNow* said, “[C]ontributions to groups that make independent expenditures . . . cannot corrupt or create the appearance of corruption.” *SpeechNow*, 599 F.3d at 694.

<sup>15</sup> *Id.*

independent expenditures . . . do not give rise to corruption or the appearance of corruption,”<sup>16</sup> and the D.C. Circuit declared, “In light of the Court’s holding as a matter of law that independent expenditures do not corrupt or create the appearance of corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption.”<sup>17</sup> This Article will refer to this declaration as the *SpeechNow* syllogism: If the money going out of a super PAC doesn’t corrupt, the money coming into a super PAC can’t corrupt either.

*Citizens United* and *SpeechNow* presented very different issues. In *Citizens United*, the Supreme Court struck down limits on a political group’s *expenditures* while the issue in *SpeechNow* was the validity of limiting *contributions* to a political group. The Court has treated these two sorts of restrictions differently. In *Buckley v. Valeo*, although the Court upheld limits on contributions to candidates and political parties,<sup>18</sup> it struck down limits on expenditures by candidates and parties.<sup>19</sup> It also struck down limits on expenditures by individuals and groups that independently advocate a candidate’s election.<sup>20</sup>

Decisions since *Buckley* have confirmed that expenditure limits and contribution limits are judged by different standards. Limits on expenditures are subject to strict scrutiny. These limits must “further a compelling interest” and must be “narrowly tailored to achieve that interest.”<sup>21</sup> Contribution limits are not subject to strict scrutiny. These limits must merely be “closely drawn” to match a “sufficiently important interest.”<sup>22</sup> In the years since *Buckley*, the Supreme Court has struck down every expenditure limit to come before it, but it has upheld most contribution limits.<sup>23</sup> A later section of this Article will discuss the reasons for the

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<sup>16</sup> *Citizens United*, 558 U.S. at 357.

<sup>17</sup> *SpeechNow*, 599 F.3d at 694.

<sup>18</sup> *Buckley*, 424 U.S. at 23-35.

<sup>19</sup> *Id.* at 54-58.

<sup>20</sup> *Id.* at 39-51.

<sup>21</sup> See, e.g., *Citizens United*, 558 U.S. at 340 (quoting *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 464 (2007) (opinion of Roberts, C.J.)).

<sup>22</sup> See, e.g., *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 387-88 (2000); *FEC v. Beaumont*, 539 U.S. 146, 158-59 (2003).

<sup>23</sup> The Court struck down expenditure limits in *Buckley v. Valeo*, 424 U.S. 1 (1976); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *FEC v. Nat’l Conservative Pol. Action Comm.*, 470 U.S. 480 (1985); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *Colorado Republican Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (*Colorado I*); and *Citizens United v. FEC*, 558 U.S. 310 (2010).

The Court upheld contribution limits in *Buckley v. Valeo*, 424 U.S. 47 (1976); *California Medical Ass’n v. FEC*, 453 U.S. 182 (1981); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000); and *FEC v. Beaumont*, 539 U.S. 146 (2003). It struck down contribution limits in *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1982)

Court's distinction.<sup>24</sup>

*Citizens United* did not disrupt the pattern of the earlier cases. The Supreme Court observed that “contribution limits, . . . unlike limits on independent expenditures, have been an accepted means of preventing *quid pro quo* corruption.”<sup>25</sup> In its opening paragraph, its closing paragraph, and many places in between, the Supreme Court emphasized that the case before it concerned only expenditure limits.

In *SpeechNow*, the court acknowledged for purposes of decision that the case before it concerned only contribution limits and that these limits were not subject to strict scrutiny. The court nevertheless saw *Citizens United* as effectively resolving the contribution-limit issue the Supreme Court had set aside. The *SpeechNow* syllogism rendered the distinction between contributions and expenditures irrelevant:

[B]ecause *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations. No matter which standard of review governs contribution limits, the limits on contributions to *SpeechNow* cannot stand.<sup>26</sup>

In *Citizens United*, according to the D.C. Circuit, “the [Supreme] Court held that the government had *no* anti-corruption interest in limiting independent expenditures.”<sup>27</sup> It italicized the word *no*. Whatever the standard of review might be, the Court said, “something . . . outweighs nothing every time.”<sup>28</sup> Acknowledging even a smidgen, soupçon, or scintilla of regulatory interest would have undercut the court's analysis entirely.

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(declaring limits on contributions to groups supporting or opposing referendums unconstitutional because these contributions pose no risk of corrupting public officials); *Randall v. Sorrell*, 548 U.S. 230 (2006) (invalidating Vermont's extremely low limits); and *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (invalidating limits on the total amount an individual may contribute to all candidates and political committees during a single election cycle).

In *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (*Colorado II*), the Court said, “[W]e have routinely struck down limitations on independent expenditures by candidates, other individuals, and groups while repeatedly upholding contribution limits.” *Id.* at 441-42 (emphasis and citations omitted).

<sup>24</sup> See Part III *infra*.

<sup>25</sup> *Citizens United*, 558 U.S. at 359; see *id.* at 356 (similarly stressing *Buckley*'s distinction between expenditures and contributions).

<sup>26</sup> *SpeechNow*, 599 F.3d at 696.

<sup>27</sup> *SpeechNow*, 599 F.3d at 693 (emphasis in the original).

<sup>28</sup> *Id.* at 695.



Under the Supreme Court’s two-tiered standard of review, an interest that cannot justify a restriction of expenditures can justify a restriction of contributions, but the government may not restrict even low-value speech when its interest in doing so is nonexistent.

*SpeechNow* was a unanimous en banc decision. The court’s syllogism persuaded all nine of its judges, including the three appointed by Democrats. In the years since *SpeechNow*, its syllogism has convinced five additional federal courts of appeals to strike down limits on contributions to super PACs.<sup>29</sup> The Federal Election Commission has acquiesced in the *SpeechNow* decision,<sup>30</sup> and academic criticism of the ruling has been sparse.<sup>31</sup> One commentator declared that *Citizens United* “utterly removed room for argument about Super PACs”<sup>32</sup> and “made *SpeechNow* an easy case with only one possible outcome.”<sup>33</sup>

The Justice Department did not seek Supreme Court review of the *SpeechNow* decision. Attorney General Eric Holder explained in a letter to Senator Harry Reid, “[T]he court of appeals decision will affect only a small

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<sup>29</sup> Some of these decisions approved only preliminary injunctions. They thus resolved the question tentatively but not definitively. *See* Republican Party of N.M. v. King, 741 F.3d 1089, 1095-96, 1103 (10th Cir. 2013) (approving a preliminary injunction); New York Progress & Protection PAC v. Walsh, 733 F.3d 483, 487, 489 (2d Cir. 2013) (approving a preliminary injunction); Vermont Right to Life Comm. v. Sorrell, 758 F.3d 118, 140 (2d Cir. 2014) (a decision after *New York Progress & Protection PAC v. Walsh, supra*, that expressly left open whether the Second Circuit should follow *SpeechNow*); Texans for Free Enter. v. Texas Ethics Comm’n, 732 F.3d 535, 537-38 n.3 (5th Cir. 2013) (approving a preliminary injunction); Wis. Right to Life State Political Action Comm. v. Barland, 664 F.3d 139, 154-55 (7th Cir. 2011); Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684, 696-99 (9th Cir.), *cert. denied*, 562 U.S. 896 (2010). In all of the cases striking down limitations on contributions to super PACs, government lawyers argued that contribution limits differed from expenditure limits, and, in all of them, courts responded by endorsing the *SpeechNow* syllogism. The Seventh Circuit described this syllogism as “inexorable.” *Barland*, 664 F.3d at 154. One other court of appeals had made a ruling resembling *SpeechNow* prior to the D.C. Circuit’s decision. *See* N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 308 (4th Cir. 2008). *See also* EMILY’s List v. FEC, 581 F.3d 1, 11, 25 (D.C. Cir. 2009) (a D.C. Circuit precursor of *SpeechNow*).

<sup>30</sup> *See* FED. ELECTION COMM’N, ADVISORY OPINION 2010-11, <http://saos.fec.gov/aodocs/AO%202010-11.pdf> (Commonsense 10).

<sup>31</sup> One of the authors of this Article did criticize *SpeechNow*. *See* Albert W. Alschuler, *Limiting Political Contributions After McCutcheon, Citizens United, and SpeechNow*, 67 FLA. L. REV. 389 (2015). Alschuler’s criticism appeared, however, amidst a 120-page article addressing other topics. With his permission and that of the *Florida Law Review*, this co-authored Article sometimes recycles passages of Alschuler’s earlier article without using quotation marks or noting the pages of the earlier article where this material appeared.

<sup>32</sup> Michael S. Kang, *The Year of the Super PAC*, 81 GEO. WASH. L. REV. 1902, 1912 (2013).

<sup>33</sup> *Id.* at 1911.

subset of federally regulated contributions.”<sup>34</sup>

Holder’s statement belongs on a historic list of wrong predictions near that of the manager of the Grand Ole Opry who told Elvis Presley, “You ain’t goin’ nowhere, son—you ought to go back to drivin’ a truck.”<sup>35</sup> In 2016, 2,389 super PACs campaigning in federal elections raised \$1.8 billion.<sup>36</sup> Sixty-one percent of this amount came from 100 donors (individuals and groups),<sup>37</sup> and 43% percent came from the top 100 individual donors.<sup>38</sup> The amounts given by these top donors ranged from \$89.5 million (Thomas Steyer) to \$1.4 million (Steven Spielberg).<sup>39</sup> The average amount contributed by the top donors was \$7.7 million.<sup>40</sup> What Attorney General Holder called “a small subset of federally regulated contributions” has become the creature that ate federal election law. Although seven years have passed since *SpeechNow*, the Supreme Court has not decided whether Congress’s limits on contributions to super PACs are valid.

This Article offers three criticisms of the *SpeechNow* syllogism:

1. The syllogism is fallacious. Contributions to super PACs can corrupt even when expenditures by these groups do not.

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<sup>34</sup> Letter from Attorney General Eric H. Holder, Jr. to Senate Majority Leader Harry Reid, July 10, 2010, <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/06-16-2010.pdf>. Although the Justice Department did not seek certiorari in *SpeechNow*, it filed a brief in opposition to a petition for certiorari in which the plaintiffs claimed that they had not won enough and that independent expenditure committees like *SpeechNow* should not be required to register as political committees at all. See Brief for the Respondent in Opposition, *Keating v. FEC*, 526 U.S. 1003 (2010) (No. 10-144) (denying a writ of certiorari to review *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010)).

<sup>35</sup> See Victor Navasky, *Tomorrow Never Knows*, N.Y. TIMES MAGAZINE, Sept. 29, 1996, <http://www.nytimes.com/1996/09/29/magazine/tomorrow-never-knows.html> (also reporting Albert Einstein’s 1932 statement, “There is not the slightest chance that [nuclear] energy will ever be attainable”).

<sup>36</sup> See *2016 Outside Spending, by Super PAC*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?chrt=V&type=S> (last visited Mar. 16, 2017).

<sup>37</sup> See *2016 Super PACs: How Many Donors Give?*, OPENSECRETS.ORG, [https://www.opensecrets.org/outsidespending/donor\\_stats.php?cycle=2016&type=I](https://www.opensecrets.org/outsidespending/donor_stats.php?cycle=2016&type=I) (last visited Mar. 16, 2017).

<sup>38</sup> *Id.*

<sup>39</sup> See *2016 Top Donors to Outside Spending Groups*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2016&disp=D&type=V&uperonly=S> (last visited Mar. 16, 2017).

<sup>40</sup> *Id.*

2. The major premise of the syllogism—*Citizens United*'s statement that independent expenditures do not corrupt—was dictum, a nonbinding aside.
3. Other statements in the *Citizens United* opinion and a Supreme Court decision shortly before *Citizens United* make clear that the Supreme Court did not mean that independent expenditures do not corrupt *at all*.

Following this Article's criticism of the *SpeechNow* syllogism, it will consider an argument for the D.C. Circuit's ruling that the D.C. Circuit did not make. The contribution limits that the Supreme Court has upheld have all been limits on contributions to candidates, political parties, and other groups that contribute to candidates or coordinate their expenditures with candidates. Perhaps the Court meant to distinguish contributions to candidates from all other forms of campaign financing. Perhaps it distinguished contributions from expenditures because it believed that candidates cannot be corrupted by funds whose expenditure they do not control. On this view, contributions to super PACs are not truly contributions. They are expenditures.

As this Article will show, this argument for the *SpeechNow* result misses the reasons the Supreme Court distinguished contributions from expenditures. The Court did not endorse the untenable view that candidates and office holders cannot be corrupted by money paid to and spent by others. It did not imagine that candidates could avoid corruption or the appearance of corruption by saying, "Please pay the money to my super PAC."

*Buckley* instead pointed to a number of differences between contributions and expenditures. One of them was that funds whose expenditure a candidate controls are likely to be *more* valuable to him than funds spent by others on his behalf.<sup>41</sup> Another, however, was that "the transformation of contributions into political debate involves speech by someone other than the actor."<sup>42</sup> A review of all of the concerns that prompted the Supreme Court to distinguish between contributions and expenditures shows that contributions to super PACs differ from the expenditures whose restriction the Court has struck down. Contributions to super PACs, however, cannot reasonably be distinguished from the contributions to candidates whose restriction the Court has upheld. Super

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<sup>41</sup> *Buckley*, 424 U.S. at 47.

<sup>42</sup> *Id.* at 21.

PAC contributions are indeed contributions.

After addressing the *SpeechNow* syllogism and exploring the reasons for the Supreme Court's distinction between contributions and expenditures, this Article will next focus on the ultimate question posed by *Buckley v. Valeo*. Do unlimited super PAC contributions create a sufficient appearance of quid pro quo corruption to justify Congressional restriction? The appearance of corruption created by these contributions is in fact intense, pervasive, and *reasonable*. *SpeechNow* has sharpened class divisions and helped to tear America apart.

After explaining why limits on contributions to super PACs should survive *Citizens United*, this Article will finally note the difficulty of bringing the issue before the Supreme Court. It will describe the efforts of this Article's authors, other lawyers, members of Congress, candidates for Congress, and the public-interest organization Free Speech for People to secure an authoritative Supreme Court resolution of the question.

## Part II

### THE DEFICIENCIES OF *SPEECHNOW*

#### A. *SPEECHNOW*'S SUPPOSED SYLLOGISM IS FALLACIOUS

Although *SpeechNow* concluded that “contributions to groups that make independent expenditures . . . cannot corrupt,”<sup>43</sup> a federal grand jury took a different view when, in 2015, it indicted U.S. Senator Robert Menendez and Dr. Solomon Melgen for bribery. The indictment alleged that Dr. Melgen made two \$300,000 contributions to a super PAC supporting Senator Menendez's reelection. According to the indictment, he made these contributions “in return for MENENDEZ's advocacy at the highest levels of [two federal agencies] on behalf of MELGEN in his Medicare billing dispute.”<sup>44</sup>

Menendez and Melgen moved to dismiss the charges based on the super PAC contributions. They maintained that “no *quid pro quo* corruption can arise when a private citizen contributes to a *bona fide* Super PAC, because a bona fide Super PAC does not coordinate its expenditures with a candidate.”<sup>45</sup> A federal court denied the motion to dismiss, noting that the

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<sup>43</sup> *SpeechNow*, 599 F.3d at 694.

<sup>44</sup> See Indictment at 61-63 (Counts 15-18), *United States v. Menendez* (D.N.J. 2015) (No. 15 CR 155), available at [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/01/menendez\\_and\\_melgen\\_indictment.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/01/menendez_and_melgen_indictment.pdf).

<sup>45</sup> *United States v. Menendez*, 132 F. Supp. 3d 635, 639 (D.N.J. 2015) (quoting Defendants' Motion to Dismiss).

federal bribery statute forbids corruptly seeking “anything of value *personally or for any other person of entity*, in return for being influenced in the performance of any official act.”<sup>46</sup> The court quoted a Seventh Circuit decision: “A participant in a scheme to defraud is guilty even if he is an altruist and all the benefits of the fraud accrue to other participants.”<sup>47</sup> Just as a public official cannot escape a bribery conviction by saying, “Please pay the money to my sister,” he cannot avoid conviction by saying, “Please pay the money to my alter-ego super PAC.”

Of course we do not know whether the charges against Menendez and Melgen are true, but a case in which a candidate expressly promises official action in exchange for a super PAC contribution gives the lie to the bottom line of the *SpeechNow* opinion: “[C]ontributions to groups that make independent expenditures . . . cannot corrupt.”<sup>48</sup> Designating an “independent expenditure group” as an official’s beneficiary cannot legalize bribe-taking, and it cannot make bribe-taking a First Amendment right.

A super PAC contribution given in return for official favors will be spent in the same way as other contributions. It will buy advertisements and bring information to the public. This contribution is no less “speech” than the other contributions are. If it were true that “contributions to groups that make independent expenditures . . . cannot corrupt,” the government would have no interest in regulating this speech. It could no more restrict super PAC contributions through the law of bribery than it could through campaign finance law.

The question remains whether the D.C. Circuit fairly disclaimed responsibility for its unfounded conclusion by pointing to the Supreme Court. Did this conclusion follow ineluctably from *Citizens United*’s declaration that “independent expenditures . . . do not give rise to corruption or the appearance of corruption”?<sup>49</sup>

Notice that the Menendez-Melgen indictment did not allege that the super PAC that received Melgen’s funds did anything wrong or that its expenditures corrupted Menendez. Contrary to the analysis of the D.C. Circuit, super PAC contributions can corrupt even when these groups’ expenditures do not. The *SpeechNow* syllogism is fallacious.

Of course a contribution to a super PAC might turn out to have little value to a candidate if the super PAC never spent it. The corrupting effect of a contribution, however, does not depend on whether the recipient uses it to benefit the donor or on whether it is spent at all. A Senator who agreed to vote in favor of widget subsidies in exchange for a widget maker’s donation

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<sup>46</sup> *Id.* at 640 (quoting 18 U.S.C. § 201(b)(2)) (emphasis added by the court).

<sup>47</sup> *Id.* (quoting *United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005)).

<sup>48</sup> *SpeechNow*, 599 F.3d at 694.

<sup>49</sup> *Citizens United*, 558 U.S. at 357.

to the Red Cross might see little value in the donation unless the Red Cross put this donation to use. In such a case, however, the D.C. Circuit surely would not say that, because the Red Cross's expenditures did great good and did not corrupt anyone, the widget maker's contribution to the Red Cross could not corrupt either.<sup>50</sup>

Corruption by contribution rather than expenditure is in fact what happens in practice. It is the six-, seven-, and eight-figure donations to super PACs that have created the appearance (and likely the reality) of corruption, not the groups' expenditures. When an op-ed writer complains that the government has become "like a corporation, with the richest 0.001% buying shares and demanding board seats,"<sup>51</sup> he speaks of donors to super PACs, not the operatives who determine how their funds are spent. People who decry the influence of David and Charles Koch,<sup>52</sup> Sheldon Adelson,<sup>53</sup> George Soros,<sup>54</sup> and George Clooney<sup>55</sup> probably do not know the names of

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<sup>50</sup> The *SpeechNow* syllogism seems to rest on the proposition that the greater includes the lesser. A super PAC's expenditures typically occur after many contributions have been assembled and processed. If the super PAC's final products do not corrupt, their components cannot corrupt either. But super PAC contributions can corrupt before they become part of the product. They can corrupt even if they are never spent because a super PAC manager absconds with them to Rio.

A three-judge federal district court in the District of Columbia clearly repudiated the *SpeechNow* syllogism in *Republican Party of Louisiana v. FEC*, 219 F. Supp. 3d 86 (D.D.C. 2016), *aff'd*, 198 L. Ed. 2d 228 (2017). In an opinion by Circuit Judge Sri Srinivasan, the court declared that, even when a political party's soft-money expenditures are independent of any candidate and do not corrupt, contributions to the party for the purpose of making these expenditures do corrupt: "[T]he inducement occasioning the prospect of indebtedness on the part of a federal officeholder is not the *spending* of money by the political party. The inducement instead comes from the *contribution* of soft money to the party in the first place." *Id.* at 97 (emphasis in the original).

The court sought to distinguish *SpeechNow* by suggesting that the ties between candidates and political parties are closer than those between candidates and independent-expenditure PACs. *Id.* at 98. But *SpeechNow* had not offered this empirical judgment; it rested on a supposedly compelling logical inference—one that the three-judge panel plainly did not accept. Moreover, the empirical judgment attributed to *SpeechNow* was plucked from the air without evidentiary support. Unlike the D.C. Circuit in *SpeechNow*, the three-judge panel got it right.

<sup>51</sup> David M. Magerman, *The Oligarchy of the 0.001 Percenters*, PHILADELPHIA INQUIRER, March 1, 2017, [http://www.philly.com/philly/blogs/inq-phillydeals/Billionaires\\_and\\_Democracy\\_Magerman\\_Mercer\\_Renaissance\\_Trump\\_Bannon\\_Conway.html](http://www.philly.com/philly/blogs/inq-phillydeals/Billionaires_and_Democracy_Magerman_Mercer_Renaissance_Trump_Bannon_Conway.html).

<sup>52</sup> See generally JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* (2016).

<sup>53</sup> See, e.g., *Sheldon Adelson's Billions Shape US Politics as Many Question His Influence*, THE GUARDIAN, Nov. 1, 2012, <https://www.theguardian.com/world/2012/nov/01/sheldon-adelson-billions-politics-influence>.

<sup>54</sup> See, e.g., Richard Larsen, *This is Why We Should Fear George Soros, Not the Koch*



the managers who receive and spend these donors' funds. It is the check-writers, not the money spenders, who may have given America its carried-interest deduction, its sugar subsidies, and its armaments approved by Congress despite opposition by the Pentagon. A campaign-finance system like the one authorized by *Buckley*—one in which contributions are limited but in which candidates, parties, and super PACS may spend whatever they receive—would notably limit corruption. As *Buckley* observed, “The interest in alleviating the corrupting influence of large contributions is achieved by the Act’s contribution limitations and disclosure provisions rather than . . . campaign expenditure ceilings.”<sup>56</sup>

#### B. THE STATEMENT UPON WHICH THE D.C. CIRCUIT RELIED WAS DICTUM

*SpeechNow* characterized *Citizens United*’s statement that independent expenditures do not corrupt as something the Supreme Court had held as a matter of law.<sup>57</sup> The Supreme Court’s statement, however, was dictum.

*Citizens United* was argued twice. After the initial argument, the Court restored the case to the docket and ordered the parties to address an issue they had not previously considered. Two of the Court’s earlier decisions had held that political speech could be restricted simply because the speaker was a corporation.<sup>58</sup> The Court asked whether these decisions should be overruled.<sup>59</sup>

The first part of the *Citizens United* opinion did overrule the earlier decisions. It held that a group’s speech cannot be restricted simply because the group is incorporated. The Supreme Court declared that the First Amendment prohibits “restrictions distinguishing among different speakers, allowing speech by some and not by others.”<sup>60</sup> It found “no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.”<sup>61</sup> It noted that “[s]peech

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*Brothers*, WESTERN JOURNALISM, Apr. 24, 2014, <http://www.westernjournalism.com/koch-brothers-george-soros-fear/>.

<sup>55</sup> See, e.g., *George Clooney Wants You to BELIEVE He Doesn’t Buy Political Influence*, BUZZKIX.COM, Oct. 3, 2016, <http://buzzkix.com/george-clooney-wants-you-to-believe-he-doesnt-buy-political-influence/>.

<sup>56</sup> *Buckley*, 424 U.S. at 55.

<sup>57</sup> *SpeechNow*, 599 F.3d at 694.

<sup>58</sup> See *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990); *McConnell v. FEC*, 540 U.S. 93 (2003).

<sup>59</sup> Order of June 29, 2009, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205), available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/08-205.htm>.

<sup>60</sup> *Citizens United*, 558 U.S. at 340.

<sup>61</sup> *Id.* at 341.

restrictions based on the identity of the speaker are all too often simply a means to control content.”<sup>62</sup> It concluded that “the Government cannot restrict political speech based on the speaker’s corporate identity.”<sup>63</sup>

This holding fully resolved the case before the Court. A statute restricted a group’s political expenditures only because the group was a corporation. This statute was unconstitutional. However strong the government’s regulatory interest might have been, the government could not advance this interest by limiting only corporate speech. The group won its case.

The Supreme Court, however, did not stop. It noted that *Buckley v. Valeo* had regarded only one interest as “sufficiently important” to justify limiting campaign contributions and expenditures—“the prevention of corruption and the appearance of corruption.”<sup>64</sup> It added, “When *Buckley* identified a sufficiently important interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.”<sup>65</sup> The Court concluded, “The anticorruption interest is not sufficient to displace the speech here in question.”<sup>66</sup> This statement fully resolved the case before the Court a second time.

Either branch of the *Citizens United* opinion would have sufficed without the other. Once the Court had held that the government may not restrict independent expenditures on the basis of corporate identity, there was no reason for it to consider whether the government may not restrict independent expenditures at all. And if the Court had said initially that independent expenditures are insufficiently corrupting for Congress ever to restrict them, there would have been no reason for it to consider whether this speech-related activity may be restricted on the basis of corporate identity.

Offering both conclusions at once contravened the familiar principle that a court should not decide constitutional issues in advance of necessity.<sup>67</sup> This principle means among other things that a court should not make two constitutional rulings when one will do. As Chief Justice Roberts observed before joining the Supreme Court, “[I]f it is not necessary to decide more, it is necessary not to decide more.”<sup>68</sup>

Even after resolving the case before it twice, the Supreme Court did not stop. Three sentences after it declared, “The anticorruption interest is not sufficient to displace the speech here in question,” it offered the statement

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<sup>62</sup> *Id.* at 340.

<sup>63</sup> *Id.* at 346.

<sup>64</sup> *Id.* at 345 (quoting *Buckley v. Valeo*, 421 U.S. 1, 25 (1975)).

<sup>65</sup> *Id.* at 359.

<sup>66</sup> *Id.* at 357.

<sup>67</sup> *See, e.g.*, *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-67 (1936) (Brandeis, J., concurring).

<sup>68</sup> *PDK Labs, Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment).



that drove the *SpeechNow* decision: “[W]e now conclude that independent expenditures . . . do not give rise to corruption or the appearance of corruption.”<sup>69</sup> The Court’s initial statement declared the anticorruption interest *insufficient* to support any restriction of independent expenditures. The D.C. Circuit saw the second statement as pronouncing this interest *nonexistent*. So interpreted, the statement went far beyond any issue before the Court.

If the Court had stopped after its initial statement, the D.C. Circuit could not have written the opinion it wrote in *SpeechNow*. The major premise of the court’s syllogism would not have existed. The court could not have declared that “the [Supreme] Court held that the government had *no* anti-corruption interest in limiting independent expenditures.”<sup>70</sup> It could not have relied on the proposition that “something . . . outweighs nothing every time.”<sup>71</sup> The court would have been required to assess the strength of the government’s regulatory interest, recognizing that an interest too weak to justify a restriction of expenditures can justify a restriction of contributions.

In a decision that followed *Citizens United*, four dissenting Justices criticized *Citizens United*’s description of the kind of corruption needed to justify a restriction of independent expenditures. They observed that the Court’s language should be regarded “as dictum, as an overstatement, or as limited to the context in which it appears.”<sup>72</sup> These Justices were correct. Indeed, the statement that became major premise of the *SpeechNow* syllogism was not merely dictum; it was doubly dictum.

### C. THE SUPREME COURT DID NOT MEAN ITS DICTUM LITERALLY

One might take a conspiratorial view of *Citizens United*’s ambiguous dictum that independent expenditures do not corrupt. Perhaps five Justices of the Supreme Court, realizing that Justices with their perspective might not constitute a majority of the Court forever, reached out to resolve issues not before them, including the issue that soon came before the D.C. Circuit in *SpeechNow*. Perhaps these activist Justices truly meant to say that independent expenditures do not corrupt even a smidgen, and perhaps they swept broadly in a calculated effort to control the future. We doubt, however, that the Justices in the majority had any grand or devious strategy. It seems to us much more likely that they did not mean their dictum to be taken in the way the D.C. Circuit took it.

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<sup>69</sup> *Citizens United*, 558 U.S. at 357.

<sup>70</sup> *SpeechNow*, 599 F.3d at 693 (emphasis in the original).

<sup>71</sup> *Id.* at 695.

<sup>72</sup> *McCutcheon v. FEC*, 134 S. Ct. 1434, 1471 (2014) (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., dissenting).

The Supreme Court slipped easily from its declaration that independent expenditures are insufficiently corrupting to justify their restriction to its declaration that these expenditures do not corrupt at all. Under *Buckley*'s two-tiered standard of review, these two statements have very different consequences, but the Court gave no sign that it recognized any notable difference between them.<sup>73</sup>

The Court again indicated that it failed to notice any important difference between its two formulations when it attributed the stronger of these formulations to *Buckley*. It wrote, "This confirms *Buckley*'s reasoning that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption."<sup>74</sup> *Buckley*, however, had said no such thing. It had endorsed only the weaker formulation: "We find that the governmental interest in preventing corruption and the appearance of corruption is *inadequate* to justify § 608(e)(1)'s ceiling on independent expenditures."<sup>75</sup> And again: "[T]he independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."<sup>76</sup>

The clearest indication that the Court did not mean its dictum literally is that this statement, if taken literally, would be inconsistent with a ruling the Court made less than a year before it decided *Citizens United*. The opinion in *Caperton v. A. T. Massey Coal Co.*<sup>77</sup> was written by Justice Kennedy, the same justice who wrote the Court's opinion in *Citizens United*.<sup>78</sup> *Caperton* concerned contributions and expenditures made by the chief executive officer of the Massey Coal Company, Don Blankenship.

After a jury returned a \$50 million verdict against Massey, Blankenship spent more than \$3 million to prevent the reelection of a justice of the state supreme court that would hear Massey's appeal. The incumbent justice was defeated, and his replacement provided the decisive vote for reversing the \$50 million verdict against Massey.

The Supreme Court held that the newly elected justice's refusal to recuse himself from the coal company's appeal violated the Due Process Clause. Justice Kennedy wrote for the Court, "We conclude that there is a

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<sup>73</sup> Slight literary imprecision can have huge consequences. *See, e.g.*, *O'Connor v. Oakhurst Dairy*, 851 F.3d 69 (1st Cir. 2017) (concluding that the absence of a comma before the final item in a statutory series required an award of overtime pay that would not have been allowed if the comma had been present); Daniel Victor, *Lack of Oxford Comma Could Cost Maine Company Millions in Overtime Dispute*, N.Y. TIMES, Mar. 16, 2017, <https://www.nytimes.com/2017/03/16/us/oxford-comma-lawsuit.html? r=0>.

<sup>74</sup> *Citizens United*, 558 U.S. at 360.

<sup>75</sup> *Buckley*, 424 U.S. at 45 (emphasis added).

<sup>76</sup> *Id.* at 46 (emphasis added).

<sup>77</sup> 556 U.S. 868 (2009).

<sup>78</sup> Justice Kennedy was in fact the only justice to join both five-to-four decisions.

serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds . . . when the case was pending or imminent.”<sup>79</sup> The opinion in *Citizens United* distinguished *Caperton* by noting that *Caperton*’s “holding was limited to the rule that the judge must be recused, not that the litigant’s political speech could be banned.”<sup>80</sup>

Judicial recusal and limiting independent expenditures are indeed different remedies, and *Caperton*’s ruling that the Constitution required one of these remedies was consistent with *Citizens United*’s ruling that the Constitution precluded the other. If Blankenship’s expenditures did “not give rise to corruption or the appearance of corruption,” however, why was any remedy required? Could the expenditures have produced “a serious risk of actual bias” without giving rise to an appearance of corruption? A near army of commentators have observed that *Caperton*’s holding is inconsistent with *Citizens United*’s statement that “independent expenditures . . . do not give rise to corruption or the appearance of corruption.”<sup>81</sup>

When the Supreme Court has spoken carelessly and without fully considering the implications of a statement, lower courts and the Court itself have found ways to say with the legendary comedian Gilda Radner “never mind.” For example, early in the *Citizens United* opinion, the Court declared that the First Amendment prohibits “restrictions distinguishing among different speakers, allowing speech by some and not by others.”<sup>82</sup> The Court apparently referred to all forms of speech, including political contributions and expenditures. Two years after *Citizens United*, however,

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<sup>79</sup> *Id.* at 884.

<sup>80</sup> *Citizens United*, 558 U.S. at 360.

<sup>81</sup> *Citizens United*, 558 U.S. at 357. *See, e.g.*, Nicholas Almendares & Catherine Hafer, *Beyond Citizens United*, 84 *FORDHAM L. REV.* 2756-77, 2768-71 (2016); Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 *CORNELL J. L. & PUBL. POL’Y* 643, 659-60 (2011); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 *MICH. L. REV.* 581, 584 (2011); Michael S. Kang, *The End of Campaign Finance Law*, 98 *VA. L. REV.* 1, 45-47 (2012); James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, 66 *N.Y.U. ANN. SURV. AM. L.* 727, 729-30 (2011); Alexander Polikoff, *So How Did We Get into This Mess? Observations on the Legitimacy of Citizens United*, 105 *NW. U. L. REV. COLLOQUY* 203, 221-22 (2011); Adam Liptak, *Foreword: Funding Justice*, 52 *ARIZ. L. REV.* 203, 203 (2010); Anthony Johnstone, *A Madisonian Case for Disclosure*, 13 *GEO. MASON L. REV.* 413, 437-38 (2012); Larry Howell, *Once Upon a Time in the West: Citizens United, Caperton, and the War of the Copper Kings*, 73 *MONT. L. REV.* 25, 54-57 (2012); Burt Neuborne, *Felix Frankfurter’s Revenge: An Accidental Democracy Built by Judges*, 2011 *N.Y.U. REV. L. & SOC. CHANGE* 602, 659-60 (2011); Justin Levitt, *Confronting the Impact of Citizens United*, 29 *YALE L. & POL’Y REV.* 217, 230 (2010).

<sup>82</sup> *Citizens United*, 558 U.S. at 340.

the Court summarily affirmed a lower court decision upholding a ban on political contributions and expenditures by noncitizens who are not permanent residents of the United States.<sup>83</sup> The Court's statement that the government may not restrict speech on the basis of a speaker's identity evidently had become inoperative.<sup>84</sup>

*Citizens United* said more narrowly, "[T]he Government cannot restrict political speech based on the speaker's corporate identity."<sup>85</sup> This statement in fact appeared to be *Citizens United*'s holding. Taking the Court's statement literally, however, would give corporations the same right as individuals to contribute to candidates, and the number of corporations an individual can form is unlimited. A person should not be able to contribute 101 times the individual contribution limit simply because he has created 100 corporations. Perhaps the Court did not consider fully the implications of its statement.

After *Citizens United*, four federal courts of appeals upheld Congress's century-old prohibition of political contributions by corporations,<sup>86</sup> and the Supreme Court denied certiorari in two of the cases.<sup>87</sup> The declaration that "the Government cannot restrict political speech based on the speaker's corporate identity" also seemed to have become inoperative.

Lower courts and the Supreme Court itself have tempered a literal reading of *Citizens United*'s broad pronouncements with common sense. The D.C. Circuit should have done the same thing in *SpeechNow*. Instead, the court based its analysis of whether the Constitution guarantees the right to give \$10 million to a super PAC entirely on an imprecise Supreme Court dictum. The court read this statement for all it might be worth and then some. The Supreme Court's dictum supplied the only support the lower court offered for its conclusion that contributions to super PACs cannot

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<sup>83</sup> *Bluman v. FEC*, 565 U.S. 1104 (2012), *aff'd* 800 F. Supp. 2d 281, 282-83 (D.D.C. 2011).

<sup>84</sup> See WILLIAM SAFIRE, *SAFIRE'S POLITICAL DICTIONARY* 346 (rev. ed. 1993) (defining "inoperative" as "a correction without an apology, leaving the corrector in a deep hole").

<sup>85</sup> *Citizens United*, 558 U.S. at 346.

<sup>86</sup> *Minnesota Citizens Concerned for Life v. Swanson*, 692 F.3d 864, 877-80 (8th Cir. 2012) (en banc); *United States v. Danielczyk*, 683 F.3d 611, 617 (4th Cir. 2012); *Ognibene v. Parkes*, 671 F.3d 174, 183-84 (2d Cir. 2012); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1124-27 (9th Cir. 2011); *Green Party of Conn. v. Garfield*, 616 F.3d 189, 199 (2d Cir. 2010). See also 34 Stat. 864, 864-65 (1907) (the Tillman Act) (forbidding political contributions by corporations); *FEC v. Beaumont*, 539 U.S. 146 (2003) (upholding the ban on contributions by corporations—a decision that *Citizens United* did not discuss and probably did not mean to overrule).

<sup>87</sup> *Danielczyk v. United States*, 133 S. Ct. 2013 (2013) (denying certiorari in *United States v. Danielczyk*, 683 F.3d 611, 617 (4th Cir. 2012)); *Ognibene v. Parkes*, 133 S. Ct. 28 (2012) (denying certiorari in *Ognibene v. Parkes*, 671 F.3d 174, 183-84 (2d Cir. 2012)).

corrupt—not even a scintilla and not even when they lead to federal indictments for bribery.

### Part III

## THE DIFFERENCES BETWEEN CONTRIBUTIONS AND EXPENDITURES

### A. SUPREME COURT PRECEDENTS

The contribution limits the Supreme Court has upheld have all been limits on contributions to candidates, parties, and other groups that have either contributed money to candidates or coordinated their expenditures with candidates. In three decisions, however, members of the Court and the Court itself have spoken to the issue that the D.C. Circuit decided in *SpeechNow*—the validity of limiting contributions to groups that make only independent expenditures.

In *California Medical Ass’n v. FEC*,<sup>88</sup> the Court upheld a limit on what a medical association could contribute to a PAC that made both independent expenditures and contributions to candidates—a conventional PAC, not a super PAC. Four dissenting Justices would not have reached the issue; they maintained that the Supreme Court lacked jurisdiction to hear the case.

The other five Justices unanimously upheld the contribution limit, but Justice Blackmun wrote in a concurring opinion that, if the PAC had been a super PAC rather than a conventional PAC, he would have voted to strike the limit down: “[A] different result would follow if [the contribution limit] were applied to contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates.”<sup>89</sup>

The other four Justices who reached the merits did not join Justice Blackmun’s opinion, apparently because they took a different view. *Buckley* had treated contributions as low-value speech partly because “the transformation of contributions into political speech involves speech by someone other than the contributor.”<sup>90</sup> The four-Justice plurality quoted this language, italicizing the words “*speech by someone other than the contributor.*”<sup>91</sup> It observed that, although the medical association had created the PAC to which it contributed, the PAC’s speech was not the

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<sup>88</sup> 453 U.S. 182 (1981).

<sup>89</sup> *Id.* at 203 (Blackmun, J., concurring in part and concurring in the judgment).

<sup>90</sup> *Buckley*, 424 U.S. at 21.

<sup>91</sup> *California Medical Ass’n*, 453 U.S. at 197 (plurality opinion).

association's,<sup>92</sup> and it declared, “[S]peech by proxy’ . . . is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection.”<sup>93</sup> The plurality’s analysis was as applicable to contributions to super PACs as it was to contributions to conventional PACs and to candidates.

In *Colorado Republican Campaign Comm. v. FEC (Colorado I)*,<sup>94</sup> the Supreme Court struck down a limit on expenditures by a political party. The principal opinion by Justice Breyer, joined by Justices O’Connor and Souter,<sup>95</sup> concluded that these expenditures were not coordinated with those of any candidate. The opinion recognized, however, that, by contributing to an independent expenditure group like the party, donors could evade the limits on contributions to candidates. Justice Breyer accordingly had no doubt that limits on contributions to independent expenditure groups were valid:

The greatest danger of corruption . . . appears to be from the ability of donors to give sums up to \$20,000 to a party which may be used for independent . . . expenditures for the benefit of a particular candidate. We could understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits was a serious matter, might decide to change the statute’s limitations on contributions to political parties. But we do not believe that the risk of corruption present here could justify the “markedly greater burden on basic freedoms caused by” the statute’s limitations on expenditures.<sup>96</sup>

In a third case, *McConnell v. FEC*,<sup>97</sup> the Court summarized and criticized the position taken by Justice Kennedy in dissent. Justice Kennedy’s view, according to the Court, was that Congress may limit only “contributions made directly to, contributions made at the behest of, and expenditures made in coordination with, a federal officeholder or candidate.”<sup>98</sup> This view would block Congress from limiting contributions to super PACs unless these contributions were made at the behest of a candidate. The Court, however, rejected Justice Kennedy’s position, calling

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<sup>92</sup> *Id.* at 196.

<sup>93</sup> *Id.*

<sup>94</sup> 518 U.S. 604 (1996).

<sup>95</sup> *Id.* at 608 (opinion of Breyer, J.).

<sup>96</sup> *Id.* at 617.

<sup>97</sup> 540 U.S. 93 (2003).

<sup>98</sup> *Id.* at 152 (summary by the majority of Justice Kennedy’s position) (citing *id.* at 290-93, 298-99 (Kennedy, J., dissenting)).

it “crabbed” and declaring that it ignored “precedent, common sense, and the realities of political fundraising.”<sup>99</sup> In the course of its discussion, the Court observed in a footnote that Congress could validly limit contributions made for purpose of funding “express advocacy and numerous other noncoordinated expenditures.”<sup>100</sup>

## B. ARE CONTRIBUTIONS TO SUPER PACS REALLY CONTRIBUTIONS?

Although most of the Supreme Court Justices who have considered the constitutionality of limiting contributions to super PACs have rejected the D.C. Circuit’s position and although the Court itself rejected that position in *McConnell*’s footnote dictum,<sup>101</sup> it would be consistent with the Court’s decisions to distinguish contributions to candidates and groups linked to candidates from all other forms of campaign financing. Perhaps, when some Justices have spoken of contributions, they have meant only contributions to candidates and groups whose spending candidates can influence. When a group’s expenditures are coordinated with those of a candidate, the expenditures become contributions to the candidate.<sup>102</sup> And if expenditures become contributions when they are “coordinated,” perhaps contributions become expenditures when they are “uncoordinated”—when no candidate influences how they are spent. Concluding that contributions to super PACs are not truly contributions—that they are in fact expenditures—would provide an alternate basis for the ruling in *SpeechNow*.<sup>103</sup>

If the distinction between contributions and expenditures rested on the proposition that candidates cannot be corrupted by funds given to and spent by others, this alternate rationale for *SpeechNow* would make sense. That proposition, however, is plainly false, and it was not in fact the basis for the Supreme Court’s distinction. If it were true, someone would need to tell former Alabama governor Don Siegelman, who recently spent more than six years in federal prison for bribery.<sup>104</sup> Siegelman allegedly appointed

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 152 n.48.

<sup>101</sup> *See id.* The *McConnell* footnote erroneously claimed that *California Medical Ass’n* established Congress’s power to limit contributions made to fund “express advocacy and . . . other noncoordinated expenditures.” The Court apparently overlooked the fact that Justice Blackmun rejected that proposition and that his vote was crucial to the result.

<sup>102</sup> *See, e.g.,* 52 U.S.C. § 30116 (a)(7)(B)(i); *Buckley*, 424 U.S. at 36-37, 46-47, 78; *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (Colorado II).

<sup>103</sup> *But see* note *infra* (noting that, even if contributions to super PACs could be regarded as expenditures, many of them could not be regarded as *independent* expenditures).

<sup>104</sup> *See Former Alabama Governor Released From Prison*, MONTGOMERY ADVERTISER, Feb. 8, 2017,



someone to a state board in return for a contribution to a group supporting a referendum he favored, a contribution that did not benefit him personally.<sup>105</sup> As this Article noted in its discussion of the charges against Senator Menendez and Dr. Melgen, an official cannot avoid a charge of corruption by saying, “Please pay the money to the Red Cross or my alter-ego super PAC.”<sup>106</sup>

In *Buckley*, the Supreme Court did not endorse the untenable view that candidates cannot be corrupted by money paid to and spent by others. Instead it noted several differences between contributions and expenditures. (One difference, to be sure, was that money given to a candidate tends to be *more* corrupting than money spent on his behalf by someone else.)

The Court offered three reasons for concluding that direct contributions have less communicative value than independent expenditures and two reasons for concluding that contributions are more corrupting. An examination of these reasons reveals that contributions to super PACs are indeed contributions, not expenditures. These contributions cannot reasonably be distinguished from the contributions to candidates whose limitation *Buckley* upheld.

### C. THE SUPREME COURT’S REASONS FOR TREATING CONTRIBUTIONS AS LOW-VALUE SPEECH

All of *Buckley*’s reasons for treating contributions as low-value speech apply fully to contributions to super PACs.

First, the Court said, “A contribution serves as a general expression of support for the candidate and his views, but does not convey the underlying basis for that support.”<sup>107</sup> Equally, a contribution to a super PAC does not convey the underlying basis for the contributor’s support.

Second, the Court said, “the transformation of contributions into political debate involves speech by someone other than the contributor.”<sup>108</sup> Transforming a contribution to a super PAC into political debate also “involves speech by someone other than the contributor.”

Third, the Court said, limiting the amount of an individual’s contribution “permits the symbolic expression of support evidenced by a

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<http://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2017/02/08/fo-rmer-alabama-gov-don-siegelman-released-prison/97644094/>.

<sup>105</sup> See *United States v. Siegelman*, 640 F.3d 1159, 1169 n.13 (11th Cir. 2011) (affirming Siegelman’s conviction while acknowledging that “contributions to [issue oriented campaigns] do not financially benefit the individual politician in the same way that a candidate-election contribution does”).

<sup>106</sup> See Part IIA *supra*.

<sup>107</sup> *Buckley*, 424 U.S. at 21.

<sup>108</sup> *Id.*



contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues."<sup>109</sup> Again contributions to super PACs are no different. Limiting a contribution to a super PAC allows the contribution to serve as an expression of support but does not limit a contributor's freedom to discuss candidates and issues.

The strongest of the Court's reasons for treating contributions as low-value speech was probably its observation that transforming contributions into debate "involves speech by someone other than the contributor." Although *Buckley* rejected the bumper-sticker view that "money is not speech,"<sup>110</sup> it recognized that writing a check is not entitled to the same First Amendment protection as actually speaking. The four-Justice plurality in *California Medical Ass'n v. FEC*<sup>111</sup> saw this passage of the *Buckley* opinion as crucial. Their opinion declared, "[S]peech by proxy" . . . is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection."<sup>112</sup>

The Supreme Court's refusal to subject contribution limits to strict scrutiny rested on its conclusion that contributions have limited communicative value. Although the Court discussed the strength of the government's anticorruption interest as well, the intensity of this interest bears on *whether* a contribution or expenditure limit satisfies strict scrutiny or some other standard, not what the standard should be. As the Court explained in *FEC v. Beaumont*,<sup>113</sup>

[T]he level of scrutiny is based on the importance of the "political

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 15-17. The Court noted that one cannot publish a newspaper or send a telegram without spending money. Justice Alito has called it "very frustrating" for a Supreme Court opinion to be "reduced to a slogan that you put on a bumper sticker." LAURENCE TRIBE & JOSHUA MATZ, *UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION* 96 (2014).

<sup>111</sup> 453 U.S. 182 (1981).

<sup>112</sup> *Id.* at 196.

The weakest of the Court's reasons for treating contributions as low-value speech was its statement that a contribution limit "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." The Court elaborated, "The quantity of the communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." *Buckley*, 424 U.S. at 21. A contributor might be surprised to learn that writing a check to a campaign for the maximum permissible amount—a check for thousands of dollars—is merely "symbolic support." Contributions merit a degree of First Amendment protection, not only because they are symbolic speech, but also and more importantly because they bring the political speech of others to an audience. The larger the contribution, the more speech it is likely to facilitate (as well as the more illegitimate influence it is likely to have).

<sup>113</sup> 539 U.S. 146 (2003).

activity at issue” to effective speech or political association. . . . [R]estrictions on political contributions have been treated as merely “marginal” speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression.<sup>114</sup>

Contributions to super PACs have no greater communicative value than contributions to candidates. Like contributions to candidates, these contributions differ from expenditures and “lie closer to the edges than to the core of political expression.”

#### D. THE SUPREME COURT’S REASONS FOR TREATING CONTRIBUTIONS AS MORE CORRUPTING THAN EXPENDITURES

In addition to its three reasons for treating contributions to candidates as low-value speech, *Buckley* offered two reasons for viewing these contributions as more corrupting than independent expenditures. First, it said, “The 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 commitments from the candidate.”<sup>115</sup> Second, the Court said that independent expenditures tend to be less valuable to candidates. It wrote, “[I]ndependent advocacy . . . does not presently appear to pose any dangers of real or apparent corruption comparable to those identified with large campaign contributions.”<sup>116</sup> Moreover, “independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive.”<sup>117</sup>

The rules forbidding the coordination of a super PAC’s expenditures with those of a candidate limit what advice candidates can give to super PAC managers, but they do not limit what candidates can say to super PAC donors. If candidates wish to tell donors how they wish super PAC funds to be spent, they may do so freely, as long as the donors do not then act as the candidates’ agents by conveying their wishes to the people who will actually determine how the funds are spent.<sup>118</sup> And if candidates wish to advise donors how the donors’ own funds should be spent—namely, by donating them to the super PAC—again they may do so within limits.<sup>119</sup>

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<sup>114</sup> *Id.* at 161.

<sup>115</sup> *Buckley*, 424 U.S. at 47.

<sup>116</sup> *Id.* at 46.

<sup>117</sup> *Id.*

<sup>118</sup> See 11 CFR §§ 109.20(a), .21(a) (2016).

<sup>119</sup> See FED. ELECTION COMM’N, ADVISORY OPINION 2011-12 (June 30, 2011),

The possibility of prearrangement and coordination does not distinguish contributions to super PACs from contributions to candidates.

*Buckley's* claim that the absence of prearrangement and coordination reduces the likelihood of improper commitments by candidates is unconvincing in any event. People willing to violate the law against bribery are usually willing to violate the law forbidding the coordination of electoral expenditures as well. Neither law bars a candidate from meeting with supporters, and when a candidate and a supporter have lunch, they may whisper about coordinating expenditures, bribes, and, if they like, robbing banks. It is difficult to see how the law forbidding the coordination of electoral expenditures reduces the likelihood of bribery in the slightest.<sup>120</sup>

The more important of *Buckley's* reasons for regarding independent expenditures as less corrupting than contributions was that expenditures usually have less value to a candidate. *Buckley's* approval of this reason, however, was tentative: “[I]ndependent advocacy . . . *does not presently appear* to pose any dangers of real or apparent corruption comparable to those identified with large campaign contributions.”<sup>121</sup> “[I]ndependent expenditures *may well* provide little assistance to the candidate’s campaign and indeed *may* prove counterproductive.”<sup>122</sup>

Experience in the years since *Buckley* has called the Court’s provisional judgment into question. When *Buckley* noted that independent expenditures might provide little assistance to a candidate and might prove counterproductive, the Court probably did not foresee super PACs that spend more than the candidates they support,<sup>123</sup> that are managed by candidates’ former campaign managers and other experienced political operatives,<sup>124</sup> and that may be ceded responsibility for all of a campaign’s

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<http://saos.fec.gov/aodocs/AO%202011-12-pdf>. Even if one were to envision contributions to super PACs as expenditures rather than contributions, one could not regard them as *independent* expenditures, for federal law allows candidates to encourage donors to make these expenditures.

<sup>120</sup> To put the point differently: *Buckley* maintained that people who observe the law restricting the coordination of electoral expenditures will have limited opportunities to engage in bribery. But if one is willing to assume that people obey the law forbidding the coordination of expenditures, this person should also assume that they obey the law against bribery. And, if people obey the law against bribery, the problem vanishes. People who obey the law forbidding coordinated expenditures may have limited opportunities to engage in bribery, but people who obey the law against bribery do not engage in bribery at all.

<sup>121</sup> *Buckley*, 424 U.S. at 46 (emphasis added).

<sup>122</sup> *Id.* (emphasis added).

<sup>123</sup> See Note, *Working Together for an Independent Expenditure*, note *supra*, at 1484 (“Super PACs are often able to outspend the candidates they support . . .”).

<sup>124</sup> See Alschuler, note *supra*, at 394 & n.23 (noting that the managers of Restore Our Future, the principal super PAC supporting Governor Romney’s 2012 presidential

advertising.<sup>125</sup> The Court’s judgment that, other things being equal, a candidate would prefer to control campaign expenditures himself is no doubt sound, but post-*Buckley* experience has suggested that other things often are not equal. There is a strong advantage to having messages sent on one’s behalf for which one need take no responsibility.

Without examining post-*Buckley* experience and without knowing what super PACs would become, *Citizens United* settled by fiat the empirical question *Buckley* left open. After declaring the anticorruption interest insufficient to justify any restriction of independent expenditures,<sup>126</sup> it made the sweeping pronouncement that has been the focus of much of this Article: “[W]e now conclude that independent expenditures . . . do not give rise to corruption or the appearance of corruption.”<sup>127</sup>

Perhaps, as *Buckley* tentatively postulated and as *Citizens United* proclaimed, independent expenditures are less corrupting than direct contributions to candidates. Of the five reasons *Buckley* offered for distinguishing independent expenditures from contributions, only this last one may also distinguish contributions to super PACs from contributions to candidates. A candidate may value a \$5500 contribution to a super PAC urging his election less than a \$5500 contribution to his own campaign.

But how much less? In a post-*Citizens United* decision, *McCutcheon v. FEC*,<sup>128</sup> four members of the *Citizens United* majority joined a plurality opinion written by Chief Justice Roberts. This opinion reiterated *Buckley*’s statement that “[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . undermines the value of the expenditure to the candidate” and then acknowledged, “But probably not by 95 percent.”<sup>129</sup> Similarly, a candidate might value a \$5500 contribution to a super PAC less than a \$5500 contribution to his own campaign, but “probably not by 95 percent.” A \$1 million super PAC contribution produces vastly more corruption and/or appearance of corruption than a \$5500 campaign contribution can yield. If Congress may prohibit the campaign contribution (as it may and has), it should be allowed to prohibit

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campaign, included the political director of Romney’s 2008 presidential campaign and the counsel and chief financial officer of Romney’s 2008 campaign—and that Priorities USA Action, the principal super PAC supporting President Obama, was also managed by people close to him).

<sup>125</sup> See *As Bush Campaign Goes Down, Knives Come Out*, NPR, Feb. 23, 2016, <http://www.npr.org/2016/02/23/467745559/where-did-all-that-jeb-bush-superpac-money-go> (noting that the official campaign committee for presidential candidate Jeb Bush “essentially outsourced its media operation to the supposedly independent superPAC”).

<sup>126</sup> *Citizens United*, 558 U.S. at 357.

<sup>127</sup> *Id.*

<sup>128</sup> 134 S. Ct. 1434 (2014).

<sup>129</sup> *Id.* at 1454.

the super PAC contribution as well. If *Buckley* still stands (and *Citizens United* says it does), *SpeechNow* was wrongly decided. Contributions to super PACs cannot reasonably be distinguished from the contributions to candidates whose limitation *Buckley* upheld.

E. WHY CONTRIBUTIONS AND EXPENDITURES ARE NOT FUNGIBLE: THE FALSE ALLURE OF THE HYDRAULIC HYPOTHESIS

One might suppose that, if wealthy people could not contribute unlimited sums to super PACs, they would use the same funds to make independent expenditures. They would substitute fully protected “speech” for “speech by proxy.” But they probably wouldn’t.

Some skeptics have embraced what one might call the hydraulic hypothesis. As the Supreme Court itself once declared, “Money, like water, will always find an outlet.”<sup>130</sup> The proponents of this hypothesis, however, have offered little evidence to support it.<sup>131</sup> If it were true, *SpeechNow* could not have changed the world. Before *SpeechNow*, the people who now make multi-million contributions to super PACs would have made multi-million-dollar independent expenditures instead. Million-dollar independent expenditures by people other than candidates, however, seem to have been extremely rare. Indeed, we know of none at all.<sup>132</sup> After *SpeechNow*, “large

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<sup>130</sup> *McConnell v. FEC*, 540 U.S. 93, 224 (2003); see *FEC v. National Conservative Pol. Action Com.*, 470 U.S. 480, 519 (1985) (Marshall, J., dissenting) (confessing that Justice Marshall erred in *Buckley* when he endorsed the distinction between contributions and expenditures because, in his view, when the ability to make direct contributions is limited, people “will find other ways to benefit the candidate’s campaign”); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) (“[P]olitical money, like water, has to go somewhere. It never really disappears into thin air.”).

<sup>131</sup> See MICHAEL J. MALBIN & THOMAS GAIS, *THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES* 79 (1998) (“Most [interest groups] have shown little interest in getting around contribution limits”). Although most interest groups seem not to take advantage of loopholes and workarounds, Malbin and Gais show that many groups do. Loopholes and workarounds matter, and we certainly do not propose ignoring them. We question only the hypothesis that donors *always* find a workaround so that contribution limits become futile. We note in addition that large independent expenditures by individuals are an especially unattractive and unlikely workaround.

<sup>132</sup> Candidates did sometimes fund their own campaigns, but, as *Buckley* noted, a candidate who makes expenditures on his own behalf does not corrupt himself. See *Buckley*, 424 U.S. at 54.

Independent expenditures provided one lawful way around contribution limits prior to *SpeechNow*, and donations to 527, 501(c)(4), and 501(c)(6) groups provided others. See 26 U.S.C. § 527, 501(c)(4), 501(c)(6). Donations to these groups, however, were less effective than direct contributions to candidates both in bringing messages to the public and in

contributions by individuals . . . skyrocketed.”<sup>133</sup>

Just as wealthy people apparently did not make large independent political expenditures before *SpeechNow*, they would be very unlikely to make these expenditures if the pre-*SpeechNow* regime were restored. Spending millions of political dollars effectively requires an *organization*, one employing people with a variety of skills. If a wealthy person were to establish such an organization as distinct legal entity, this organization would be called a super PAC. A person who funded this organization would engage in “speech by proxy,” and his contribution could be limited.

A wealthy person might employ a personal staff to aid him in making independent expenditures as an individual. He then would be liable for the torts and breaches of contract committed by staff members in the course of their employment; he would be required to take personal responsibility for the advertisements they placed (“I’m Bobby Billionaire, and I approved this message.”); and one of the dubious things *Buckley* said about independent expenditures might become true: “Unlike contributions, . . . independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive.”<sup>134</sup> Even if this person could find and employ capable managers, the enterprise would require his personal attention. We suspect that few of the billionaires willing to write large checks to super PACs are willing to manage political organizations themselves.

Contributions to super PACs have advantages over independent expenditures apart from the fact that they save contributors from the need to manage political organizations and take personal responsibility for the messages they send. An early contribution to a super PAC ensures that funds will be available throughout a campaign. A promise to make independent expenditures throughout a campaign is less reliable. The independent spender’s promise may not be kept, especially if the benefitted candidacy starts to founder. Moreover, a contributor may feel freer to discuss policy (*i.e.*, what he wants) with a candidate after making a contribution to a super PAC than he would if he were making continuing expenditures on the candidate’s behalf. When an irrevocable donation precedes an “ask,” the donation is not conditioned on receiving the desired response, and criminal prosecution becomes less likely.<sup>135</sup>

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buying clout. See Alschuler, *supra* note , at 455-56. Moreover, rejecting *SpeechNow* would restore Congress’s authority to curb these workarounds.

<sup>133</sup> Alschuler, *supra* note , at 423.

<sup>134</sup> *Buckley*, 427 U.S. at 47.

<sup>135</sup> *But see* Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 *FORDHAM L. REV.* 463, 479-82 (2015) (discussing “stream of benefits” or “course of conduct” bribery).

## Part IV

## THE APPEARANCE OF CORRUPTION

## A. WEALTH DISPARITY, MISTRUST, AND CORRUPTION

[S]ocial trust is a social good to be protected . . . . When it is damaged, the community as a whole suffers; and when it is destroyed, societies falter and collapse.

SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 27 (1978).

For more than forty years, the Supreme Court has held that Congress may restrict political contributions to prevent corruption and the appearance of corruption. This Section examines the appearance of corruption that unlimited super PAC contributions have produced. The material it presents should be viewed against the background of America's large and growing disparity in the distribution of wealth and the lack of social trust that invariably accompanies a high level of economic inequality.

In 2011, the Nobel Prize-winning economist Joseph Stiglitz published an influential article titled "*Of the 1%, By the 1%, For the 1%.*"<sup>136</sup> Here's how it began:

It's no use pretending that what has obviously happened has not in fact happened. The upper 1 percent of Americans are now taking in nearly a quarter of the nation's income every year. In terms of wealth rather than income, the top 1 percent control 40 percent. Their lot in life has improved considerably. Twenty-five years ago, the corresponding figures were 12 percent and 33 percent. . . . While the top 1 percent have seen their incomes rise 18 percent over the past decade, those in the middle have actually seen their incomes fall. For men with only high-school degrees, the decline has been precipitous—12 percent in the last quarter-century alone. All the growth in recent decades—and more—has gone to those at the top. In terms of income equality, America lags behind [every] country in . . . Europe . . . . [T]he vast inequalities that seemed so troubling in the mid-19th century . . .

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<sup>136</sup> Joseph E. Stiglitz, *Of the 1%, By the 1%, For the 1%*, Vanity Fair, Mar. 31, 2011, <http://www.vanityfair.com/news/2011/05/top-one-percent-201105>.

are but a pale shadow of what we are seeing in America today.<sup>137</sup>

Some additional data:

- Although the richest 1% of Americans currently receive over 20% of all income (slightly more than the top 1% did in the era of Rockefeller and Carnegie), they received only 10% in the decades from 1950 to 1980.<sup>138</sup> A “great compression” occurred mostly during World War II, and it produced a “middle class society” that endured for three decades.<sup>139</sup> Among the possible causes of increased inequality since then have been less progressive taxation, less powerful labor unions, an increased number of women entering the workforce at low wages, a minimum wage that lagged behind inflation, the export of manufacturing jobs, increased international trade, and technological change. In recent decades, top managers and shareholders have captured nearly all gains from increased productivity and trade.<sup>140</sup>
- The net worth of America’s wealthiest 400 individuals exceeds the net worth of half of all American households.<sup>141</sup>

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<sup>137</sup> *Id.* Stiglitz’s article observed that popular protests were occurring throughout the world in places where a small fraction of the population controlled most of the wealth and where corruption had become a way of life. He wrote, “As we gaze out at the popular fervor in the streets, one question to ask ourselves is this: When will it come to America?” *Id.*

<sup>138</sup> See Emmanuel Saez, Striking it Richer: The Evolution of Top Incomes in the United States (updated with 2013 preliminary estimates) at Figure 2 (2015), <https://eml.berkeley.edu/~saez/saez-UStopincomes-2013.pdf>.

<sup>139</sup> See Claudia Goldin & Robert A. Margo, *The Great Compression: The Wage Structure in the United States at Mid-Century*, 107 Q. J. ECON. 107 (1992).

<sup>140</sup> See *Causes of Income Inequality in the United States*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Causes\\_of\\_income\\_inequality\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/Causes_of_income_inequality_in_the_United_States) (last visited May 29, 2017).

<sup>141</sup> *Politifact Wisconsin* reviewed the relevant sources and spoke with several respected economists after filmmaker Michael Moore made this claim, and it rated the claim True. For its review of the sources, see Tom Kertscher, *Michael Moore Says 400 Americans Have More Wealth than Half of All Americans Combined*, POLITIFACT WISCONSIN, Mar. 10, 2011, <http://www.politifact.com/wisconsin/statements/2011/mar/10/michael-moore/michael-moore-says-400-americans-have-more-wealth/>.



- The six heirs of Wal-Mart’s founder have as much wealth as the bottom 41.5% of all Americans.<sup>142</sup>
- Fifty years ago, the average compensation of the CEOs of the largest U.S. firms was twenty times greater than that of the average worker. It is more than 300 times greater today.<sup>143</sup>
- The United States is “the most unequal rich country on earth” not only because its rich are especially rich but also because, among developed countries, its poor are especially poor.<sup>144</sup>

Social trust is strongly correlated with equality in the distribution of wealth. This trust is typically measured by responses to the survey question, “Generally speaking, would you say most people can be trusted or that you can’t be too careful in dealing with people?”<sup>145</sup> In the nations in which social trust is highest, more than 60% of respondents say that most people can be trusted. These nations are the most equal in the distribution of wealth—places like Norway, Sweden, and Finland. In the nations in which social trust is lowest, fewer than 10% say that most people can be trusted. These nations are among the least equal—places like Columbia, Brazil, Ecuador, and Peru.<sup>146</sup> Studies employing multivariate analysis in various

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<sup>142</sup> Again, *Politifact Wisconsin* did impressive research after an advocacy group made this claim, and it rated the claim True. Tom Kertscher, *Just How Wealthy is the Wal-Mart Walton Family?*, POLITIFACT WISCONSIN, Dec. 8, 2013, <http://www.politifact.com/wisconsin/statements/2013/dec/08/one-wisconsin-now/just-how-wealthy-wal-mart-walton-family/>.

<sup>143</sup> Lawrence Mishel & Alyssa Davis, *Top CEOs Make 300 Times More than Typical Workers* (Economic Policy Institute Issue Brief #399) (2015), <http://www.epi.org/publication/top-ceos-make-300-times-more-than-workers-pay-growth-surpasses-market-gains-and-the-rest-of-the-0-1-percent/>; see Executive Paywatch, AFL-CIO, <https://aflcio.org/paywatch> (reporting that the average compensation of the CEO’s of S&P 500 Index companies was 347 times greater than the compensation of the average American worker).

<sup>144</sup> Jonathan Fisher & Timothy M. Smeeding, *Income Inequality*, PATHWAYS: SPECIAL ISSUE: THE POVERTY AND INEQUALITY REPORT 2016 at 32, 34, 36 (The Stanford Center on Poverty and Inequality 2016), <http://inequality.stanford.edu/sites/default/files/Pathways-SOTU-2016.pdf>. The poorest 10% of the U.S. population has more real income per capita than the poorest 10% in Italy, but it has less per capita income than the poorest 10% in Norway, Sweden, France, Germany, Ireland, the United Kingdom, and Australia. *Id.* at 34.

<sup>145</sup> See, e.g., PEW RESEARCH CENTER, *AMERICANS AND SOCIAL TRUST: WHO, WHERE, AND WHY 2* (2007), <http://www.pewsocialtrends.org/files/2010/10/SocialTrust.pdf>.

<sup>146</sup> See ESTEBAN ORTIZ-OSPINA & MAX ROSER, *TRUST* (2016) (published online at OurWorldinData.org), <https://ourworldindata.org/trust> (describing levels of trust); Richard

settings confirm what the raw figures suggest—that economic inequality is a strong predictor of mistrust.<sup>147</sup>

Studies of changing attitudes over time show the same pattern as studies of geographical variation. As wealth disparities increased in America, the proportion of Americans who believe that most people can be trusted fell—from 46% in 1972-74 to 33% in 2010-12.<sup>148</sup> Trust levels are positively correlated with wealth as well as with equality, but the United States now departs from the pattern. Although the U.S. ranks high among developed nations in median household income, it ranks low among these nations in social trust.<sup>149</sup>

Trust is a major component of what economists, sociologists, and political scientists call social capital. The political scientist Eric Uslander explains:

Trust is the chicken soup of social life. It reputedly brings us all sorts of good things—from a willingness to get involved in our communities to higher rates of economic growth, to satisfaction with government performance, to making daily life more pleasant. . . . An active and engaged citizenry is motivated by a shared sense of common purpose that ultimately helps people find compromises to difficult issues.<sup>150</sup>

Resentment of “the one percent” by a significant part of “the ninety-nine percent” may rest partly on jealousy of their mansions, but our guess is that it stems much more from the perception that “the one percent” have bought government favors and made government less democratic. The \$2.7 million electric train set in Robert Mercer’s basement probably troubles people less than the perception that “Mercer has surrounded [President Trump] with *his*

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Wilkinson, *How Economic Inequality Harms Societies*, TED (2011), [https://www.ted.com/talks/richard\\_wilkinson/transcript](https://www.ted.com/talks/richard_wilkinson/transcript) (describing the correlation between trust and levels of economic inequality).

<sup>147</sup> See Henrik Jordahl, *Inequality and Trust* at 17 (Research Institution of Industrial Economics 2007), <http://www.ifn.se/wfiles/wp/wp715.pdf> (reviewing the empirical literature and declaring that the “relationship shows up consistently in different studies, although in a few of them it is not statistically significant”); Bo Rothstein & Eric M. Uslander, *All for All: Equality, Corruption, and Social Trust*, 58 *WORLD POLITICS* 41 (2005).

<sup>148</sup> Jean M. Twenge *et al.*, *Trust in Others and Confidence in Institutions Among American Adults and Late Adolescents, 1972-2012*, 25 *PSYCH. SCI.* 1914, 1916 (2014).

<sup>149</sup> Lila Shapiro, *Money and Trust: Richer, More Equal Countries Are More Trusting, Study Finds*, *HUFF. POST*, Jun. 20, 2011, [http://www.huffingtonpost.com/2011/04/20/trust-wealth\\_n\\_851519.html](http://www.huffingtonpost.com/2011/04/20/trust-wealth_n_851519.html).

<sup>150</sup> Eric M. Uslander, *Producing and Consuming Trust*, 115 *POL. SCI. Q.* 569, 569 (2000-2001).

people, and his people have an outsized influence over the running of our country, simply because Robert Mercer paid for their seats.”<sup>151</sup>

As trust in other people has declined, trust in government has too. The percentage of Americans who believed they could trust the federal government most of the time was 77% in 1964. It is 19% today.<sup>152</sup> In 1964, only 29% of respondents said that the government was “pretty much run by a few big interests looking out for themselves.” Now more than three-quarters take that view.<sup>153</sup> The perceived capture of government by a wealthy minority contributes to the belief that the system of economic distribution is unfair. Middle-income Americans may bristle at revelations that many of the super-rich pay taxes at a lower rate than they do<sup>154</sup> and that the federal program for providing medical care to seniors is prohibited by law from seeking lower drug prices.<sup>155</sup>

Government corruption—broadly defined as the capture of government by special interests<sup>156</sup>—seems to make everyone angry, from the Tea Party through the Occupy Movement. Other than opposition to terrorism, corruption may be the only issue that unites all of America.<sup>157</sup>

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<sup>151</sup> David M. Magerman, *The Oligarchy of the 0.001 Percenters*, PHILADELPHIA INQUIRER, March 1, 2017, [http://www.philly.com/philly/blogs/inqu-phillydeals/Billionaires\\_and\\_Democracy\\_Magerman\\_Mercer\\_Renaissance\\_Trump\\_Bannon\\_Conway.html](http://www.philly.com/philly/blogs/inqu-phillydeals/Billionaires_and_Democracy_Magerman_Mercer_Renaissance_Trump_Bannon_Conway.html) (op-ed by an executive of Robert Mercer’s hedge fund); see Jane Mayer, *The Reclusive Hedge-Fund Tycoon Behind the Trump Presidency: How Robert Mercer Exploited America’s Populist Insurgency*, THE NEW YORKER, Mar. 27, 2017, <http://www.newyorker.com/magazine/2017/03/27/the-reclusive-hedge-fund-tycoon-behind-the-trump-presidency>.

<sup>152</sup> PEW RESEARCH CENTER, BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT: TRUST IN GOVERNMENT, 1958-2015 (2015), <http://www.people-press.org/2015/11/23/1-trust-in-government-1958-2015/>.

<sup>153</sup> *Id.*

<sup>154</sup> See, e.g., Warren E. Buffett, *Stop Coddling the Super-Rich*, N.Y. TIMES, Aug. 14, 2011, <http://www.nytimes.com/2011/08/15/opinion/stop-coddling-the-super-rich.html> (“[W]hat I paid was only 17.4 percent of my taxable income—and that’s actually a lower percentage than was paid by any of the other 20 people in our office . . . . My friends and I have been coddled long enough by a billionaire-friendly Congress.”).

<sup>155</sup> See Theodore T. Lee *et al.*, *The Politics of Medicare and Drug-Price Negotiation (Updated)*, HEALTH AFFAIRS BLOG, Sept. 19, 2016, <http://healthaffairs.org/blog/2016/09/19/the-politics-of-medicare-and-drug-price-negotiation/>.

<sup>156</sup> See ARISTOTLE’S POLITICS 114 (Benjamin Jowett, trans. 1920) (“The true forms of government . . . are those in which the one, or the few, or the many, govern with a view to the common interest; but governments which rule with a view to the private interest . . . are perversions.”).

<sup>157</sup> Cf. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 1 (2014) (“When the rate of return on capital exceeds the rate of growth of output and income, . . . capitalism automatically generates arbitrary and unsustainable inequalities that radically undermine the meritocratic values on which democratic societies are based.”).

A 2012 Gallup survey found that 87% of Americans regard “reducing corruption in the federal government” as either extremely important or very important, placing this goal slightly behind “creating good jobs” but ahead of dealing with terrorism and other international threats, reducing the federal budget deficit, ensuring the long-term stability of Social Security and Medicare, improving the nation’s public schools, making health care available and affordable, overcoming political gridlock, making college education available and affordable, and dealing with environmental concerns such as global warming.<sup>158</sup> A 2015 Gallup survey reported that 75% of Americans view government corruption as “widespread,” an increase from 67% in 2007.<sup>159</sup>

Empirical studies validate the belief that our government responds more to the agendas of wealthy elites than to the desires of the majority. Martin Gilens and Benjamin Page write:

In the United States, our findings indicate, the majority does *not* rule—at least not in the causal sense of actually determining policy outcomes. When a majority of citizens disagrees with economic elites or with organized interests, they generally lose. . . . [E]ven when fairly large majorities favor policy change, they generally do not get it.<sup>160</sup>

Many other studies have made similar findings.<sup>161</sup>

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<sup>158</sup> Jeffrey M. Jones, *Americans Want Next President to Prioritize Jobs, Corruption*, GALLUP, July 30, 2012, <http://www.gallup.com/poll/156347/Americans-Next-President-Prioritize-Jobs-Corruption.aspx>.

<sup>159</sup> 75% in U.S. See *Widespread Government Corruption*, GALLUP, Sept. 19, 2015, <http://www.gallup.com/poll/185759/widespread-government-corruption.aspx>.

A Chapman University survey in 2015 found that more Americans were afraid or very afraid of government corruption than were afraid of terrorist attacks, cyber terrorism, bio-warfare, or economic collapse. Sheri Ledbetter, *What Americans Fear Most—Chapman University’s Second Annual Survey of American Fears Released*, Chapman University Press Room, Oct. 13, 2015, <https://blogs.chapman.edu/press-room/2015/10/13/what-americans-fear-most-chapman-universitys-second-annual-survey-of-american-fears-released/>.

<sup>160</sup> Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPECTIVES ON POLITICS 564, 576 (2014). See also Martin Gilens & Benjamin I. Page, *Critics Argued with our Analysis of U.S. Political Inequality: Here are 5 Ways They’re Wrong*, WASH. POST, May 23, 2016, [https://www.washingtonpost.com/news/monkey-cage/wp/2016/05/23/critics-challenge-our-portrait-of-americas-political-inequality-heres-5-ways-they-are-wrong/?utm\\_term=.c28236371254](https://www.washingtonpost.com/news/monkey-cage/wp/2016/05/23/critics-challenge-our-portrait-of-americas-political-inequality-heres-5-ways-they-are-wrong/?utm_term=.c28236371254).

<sup>161</sup> See, e.g., LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2008); MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012); JACOB S. HACKER &

## B. DEFINING CORRUPTION AND THE APPEARANCE OF CORRUPTION

*Citizens United* took a narrow view of corruption. The Supreme Court declared, “When *Buckley* identified a sufficiently important interest in preventing corruption of the appearance of corruption, that interest was limited to *quid pro quo* corruption.”<sup>162</sup> The Court said that “[i]ngratiation and access . . . are not corruption,”<sup>163</sup> and “[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.”<sup>164</sup> In fact, “[t]he practices *Buckley* noted would be covered by bribery laws if a *quid pro quo* arrangement were proved.”<sup>165</sup>

Four Supreme Court Justices have called these statements dicta,<sup>166</sup> and if the holding of *Citizens United* was that “the Government cannot restrict political speech based on the speaker’s corporate identity,”<sup>167</sup> these Justices were correct. None of the Court’s statements concerning cognizable corruption advanced the Court’s holding in any way.

Nevertheless, in the discussion that follows, we accept all of the Court’s dicta but one. When we say that super PAC contributions create the appearance of corruption, we mean *quid pro quo* corruption, and we do not include ingratiation and access. We balk, however, at *Citizens United*’s indication that Congress may limit political contributions and expenditures only to prevent criminal bribery or the appearance of this bribery.

Like several other broad declarations in the *Citizens United* opinion,<sup>168</sup> the statement that “[t]he practices *Buckley* noted would be covered by bribery laws if a *quid pro quo* arrangement were proved” probably was not meant literally. Justice Kennedy might not have had the definition of criminal bribery precisely in mind when he wrote those words, and he might not have meant to bind Congress’s regulatory power tightly to this narrow,

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PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010); KAY LEHMAN SCHLOZMAN, ET. AL, THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY (2012); Lawrence R. Jacobs & Benjamin Page, *Who Influences Foreign Policy?*, 99 AM. POLY SCI. REV. 107 (2005); Elizabeth Rigby & Gerald C. Wright, *Political Parties and Representation of the Poor in American States*, 57 AM. J. POL. SCI. 552 (2013).

<sup>162</sup> *Citizens United v. FEC*, 558 U.S. 310, 345 (2010) (quoting *Buckley*, 424 U.S. at 25) (internal quotation marks omitted).

<sup>163</sup> *Id.* at 360.

<sup>164</sup> *Id.* at 359.

<sup>165</sup> *Id.* at 356.

<sup>166</sup> *McCutcheon v. FEC*, 134 S. Ct. 1434, 1471 (2014) (Breyer, J., joined by Ginsburg, Sotomayor, & Kagan, JJ., dissenting).

<sup>167</sup> *Id.* at 346.

<sup>168</sup> See Part IIC *supra*.

contestable definition of a crime. In *McCormick v. United States*,<sup>169</sup> the Supreme Court held that campaign contributions may be treated as bribes only when “the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.”<sup>170</sup>

In fact, Justice Kennedy himself criticized the Court’s requirement of an “explicit” *quid pro quo* one year after *McCormick*. He wrote in a concurring opinion that a public official and his benefactor “need not state the *quid pro quo* in express terms, for otherwise the law’s effect could be frustrated by knowing winks and nods.”<sup>171</sup> It seems unlikely that *Citizens United* meant to exclude from the category of *quid pro quo* corruption conduct that Justice Kennedy would treat as felonious.

Moreover, *Citizens United* purported to follow *Buckley*, which spoke, not of bribes, but of “undue influence,”<sup>172</sup> “improper influence,”<sup>173</sup> and “post-election special favors.”<sup>174</sup> *Buckley* in fact rejected the argument that “contribution limitations must be invalidated because bribery laws and narrowly drawn disclosure requirements constitute a less restrictive means of dealing with ‘proven and suspected *quid pro quo* arrangements.’”<sup>175</sup> The Court explained, “[L]aws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence government action.”<sup>176</sup> *Buckley* upheld contribution limits, not because they prevented bribery “arrangements” that might be difficult to prove, but because they blocked influences less “blatant and specific” than bribes. The Court in fact pointed to several “deeply disturbing examples” of what it called *quid pro quo* corruption, and none of them involved

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<sup>169</sup> 500 U.S. 257 (1991).

<sup>170</sup> *Id.* at 273. Although the Eleventh Circuit has concluded that a later Supreme Court decision modified *McCormick*, see *United States v. Siegelman*, 640 F.3d 1159, 1171 (11th Cir. 2011) (discussing *Evans v. United States*, 504 U.S. 255 (1992)), at least seven other courts of appeals insist that an explicit agreement remains necessary. See *United States v. Ring*, 706 F.3d 460, 465-66 (D.C. Cir. 2013); *United States v. Turner*, 684 F.3d 244, 253-54, 258 (1st Cir. 2012); *United States v. Ganim*, 510 F.3d 134, 142-43 (2d Cir. 2007); *United States v. Antico*, 275 F.3d 245, 256-61 (3d Cir. 2001); *United States v. Abbey*, 560 F.3d 513, 515-19 (6th Cir. 2009); *United States v. Giles*, 246 F.3d 966, 971-72 (7th Cir. 2001); *United States v. Kincaid-Chauncey*, 556 F.3d 923, 936-37 (9th Cir. 2009).

<sup>171</sup> *Evans v. United States*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring). For a defense of *McCormick*’s “explicit” *quid pro quo* requirement, see Alschuler, *Criminal Corruption*, *supra* note , at 482-84.

<sup>172</sup> *Buckley*, 424 U.S. at 53, 70, 76.

<sup>173</sup> *Id.* at 29, 30, 45, 58, 96.

<sup>174</sup> *Id.* at 67. Taken literally, the Court’s statement that “[t]he practices *Buckley* noted would be covered by bribery laws if a *quid pro quo* arrangement were proved” was a statement of fact, and the factual statement was false.

<sup>175</sup> *Id.* at 27.

<sup>176</sup> *Id.* at 27-28.

bribery.<sup>177</sup>

Post-*Buckley* decisions were equally clear. The Court wrote in 2000 that its concern was “not confined to bribery of public officials, but extend[ed] to the broader threat from politicians too compliant with the wishes of large contributors.”<sup>178</sup> A year later it declared that corruption must be “understood not only as quid pro quo arrangements, but also as undue influence on an officeholder’s judgment.”<sup>179</sup> Three years later, the Court wrote, “Congress’ legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing ‘undue influence.’”<sup>180</sup> The Court added that it was “not only plausible, but likely, that candidates would feel grateful for . . . donations and that donors would seek to exploit that gratitude.”<sup>181</sup> An unexplained one-sentence dictum should not cast into the void all of the Court’s prior descriptions of cognizable corruption.

In fact, a post-*Citizens United* opinion joined by Justice Kennedy and three other members of the *Citizens United* majority made clear that cognizable corruption is broader than the “nothing but bribery” dictum

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<sup>177</sup> *Buckley*, 424 U.S. at 26-27. Immediately after noting that the integrity of “our system of representative democracy” can be undermined by large contributions “given to secure a political quid pro quo,” the Court wrote, “Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.” It then cited the D.C. Circuit’s recitation of these examples in its own *Buckley v. Valeo* opinion. *Id.* at 27 n.28 (citing *Buckley v. Valeo*, 519 F.2d 821, 839-40 & nn. 36-38 (D.C. Cir. 1975) (per curiam)).

One of the illustrations to which the Supreme Court referred was “the revelation [of] the extensive contributions by dairy organizations to Nixon fund raisers, in order to gain a meeting with White House officials on price supports.” 519 F.2d at 839 n.36. Another was “lavish contributions by groups or individuals with special interests to legislators from both parties, e.g., . . . by H. Ross Perot, whose company supplies data processing for Medicare and Medicaid programs, to members of the House Ways and Means and Senate Finance Committees.” *Id.* at 839 n.37. The third was the appointment of campaign contributors as ambassadors, a practice whose “scale and volume” revealed a “widespread understanding that such contributions were a means of obtaining the recognition needed to be actively considered.” *Id.* at 840 n.38. The *Buckley* Court had no doubt of Congress’s power to limit these “pernicious” and “deeply disturbing” practices.

<sup>178</sup> *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000).

<sup>179</sup> *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001) (*Colorado II*).

<sup>180</sup> *McConnell v. FEC*, 540 U.S. 93, 150 (2003). *See also* *FEC v. National Conservative PAC*, 470 U.S. 480, 497 (1985) (“Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns.”).

<sup>181</sup> *Id.* at 145. *Citizens United* disapproved *McConnell*’s statement that Congress could restrict political speech simply because the speaker was a corporation, but it did not disapprove most of the *McConnell* opinion or reject *McConnell*’s definition of corruption.

suggests. Chief Justice Roberts' plurality opinion in *McCutcheon v. FEC*<sup>182</sup> gave this explanation of why *Buckley* upheld contribution limits: "The propriety of large contributions to individual candidates turned on the subjective intent of donors, and the Court concluded that there was no way to tell which donors sought improper influence over legislators' actions."<sup>183</sup>

It would be difficult to improve on this description of *Buckley*'s rationale. According to the *McCutcheon* plurality, seeking improper influence justifies restricting campaign contributions. Moreover, because there is no practical way to determine when this corrupt intent exists, Congress may prohibit contributions large enough to pose a significant risk of this improper motivation.

If, as the *McCutcheon* plurality recognized, deliberately seeking improper influence is corrupt, so is deliberately providing it. Favoritism for donors is not itself bribery. Every definition of criminal bribery requires either a corrupt understanding or a corrupt mental state at the time a benefit is received. None includes subsequent favoritism for a benefactor.<sup>184</sup> But even when a payoff of government benefits has not been arranged in advance, this payoff is corrupt. Using public dollars to repay private favors is what *Buckley* meant when it spoke of *quid pro quo* corruption. Both before and after *Citizens United*, the Supreme Court has treated this corruption as sufficient to justify contribution limits. Despite *Citizens United*'s confusing dictum, we adhere in the discussion that follows to the Court's longstanding view.<sup>185</sup>

*Buckley* said that Congress may limit political contributions to prevent not only corruption but also the appearance of corruption.<sup>186</sup> Although "appearance" has myriad meanings,<sup>187</sup> the Court has left the term undefined for more than forty years.

We think this term should be understood narrowly. The "appearance of

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<sup>182</sup> 134 S. Ct. 1434 (2014).

<sup>183</sup> *Id.* at 1447.

<sup>184</sup> See Alschuler, *Criminal Corruption*, *supra* note , at 481.

<sup>185</sup> There are good reasons for not punishing deliberate favoritism as a crime. If an official were subject to imprisonment whenever a jury could be persuaded that he acted deliberately to benefit someone who once did a favor for him, only a fool would take the job. The law of bribery accordingly requires a stronger inference—an inference that, at the time an official accepted a benefit, he agreed at least implicitly to provide some governmental action in return. Seeking to reduce deliberate favoritism through campaign finance law and other specific *ex ante* regulation, however, does not threaten imprisonment on the basis of *ex post* inferences of improper intent. There is no good reason for not including this favoritism among the kinds of corruption that can justify *ex ante* regulation.

<sup>186</sup> *E.g.*, *Buckley*, 424 U.S. at 27 (quoting *Civil Service Comm. v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973)).

<sup>187</sup> See Adam M. Samaha, *Regulation for the Sake of Appearance*, 1125 HARV. L. REV. 1563, 1573 (2012).



corruption” is not “anything that smells a bit like corruption.” It is instead “something that is believed or suspected to *be* corruption.” Of course the suspected corruption must be of the kind that justifies regulation.

Moreover, an unreasonable belief in the existence of corruption cannot justify limiting speech. The appropriate remedy for an unreasonable belief is not limiting speech but “more speech.”<sup>188</sup> Thus the “appearance of corruption” should be understood to mean “something that is reasonably believed or suspected to be corruption” or “something that might in fact be corruption of the sort that justifies regulation.”

Of course, as the *McCutcheon* plurality recognized, motives are often mixed and rarely revealed, and inferences about particular situations and particular actors are likely to be speculative and fallible. These inferences may reflect an observer’s trust or cynicism as much as or more than they reflect the actual motivations of public officials.

Consider an exchange that occurred at the Senate hearing on the confirmation of Betsy DeVos to be Secretary of Education. When Senator Bernie Sanders asked the nominee how much her family had contributed to the Republican Party over the years, she replied that she did not know. She conceded, however, that \$200 million was “in the ballpark.” Sanders then asked, “Do you think, if you were not a multi-billionaire, if your family had not made hundreds of millions of dollars of contributions to the Republican Party, that you would be sitting here today?” DeVos replied, “Senator, as a matter of fact, I do think that there would be that possibility. I’ve worked very hard on behalf of parents and children for the last almost 30 years . . . .”<sup>189</sup>

In the absence of DeVos’ family’s contributions, her nomination might have been “possible” just as she said, but she could no more deny that these contributions had prompted her nomination than Sanders could show that they had done so. When the actions of elected officials benefit their supporters (as of course they usually do), these actions may reflect policy or principle rather than corruption. Even when officials give corrupt payoffs to benefactors, however, they can almost always offer colorable public explanations.

Although judgments about particular situations and particular actors are often problematic, global assessments—or judgments of statistical likelihood—can be easy. When favor-seekers make multi-million-dollar

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<sup>188</sup> See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

<sup>189</sup> Valerie Strauss, *Sanders to DeVos: Would You be Trump’s Education Nominee if You Weren’t a Billionaire?*, WASH. POST ANSWER SHEET, Jan. 18, 2017, [https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/18/sanders-to-devos-would-you-be-trumps-education-nominee-if-you-werent-a-billionaire/?utm\\_term=.2e27e4b78907](https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/18/sanders-to-devos-would-you-be-trumps-education-nominee-if-you-werent-a-billionaire/?utm_term=.2e27e4b78907).

contributions to super PACs, one needs no more than a rudimentary understanding of human nature to expect more than occasional corruption. When elected officials then appear to advance the interests of wealthy donors rather than the public,<sup>190</sup> the intuition seems confirmed. In explaining why the appearance of corruption can justify limiting contributions, *Buckley* noted the importance of the public's perception of government generally: "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative government is not to be eroded to a disastrous extent.'"<sup>191</sup>

Although *Buckley* upheld Congress's power to limit political contributions, *SpeechNow* effectively abrogated it. Since then, *Buckley*'s dark prophecy appears to have been fulfilled. Confidence in the system of representative government has been "eroded to a disastrous extent." The following sections of this Article provide some evidence.

### C. THE PRESIDENTIAL CAMPAIGN OF 2016

In the Democratic presidential primaries of 2016, Senator Bernie Sanders received more than 12 million votes, 43% of the total.<sup>192</sup> Sanders' refusal to accept any support from super PACs was a prominent feature of his campaign. By the campaign's end, audiences were chanting with him the amount of the average contribution he received—\$27.<sup>193</sup> He said of his principal primary opponent, "Are you qualified to be President of the United States when you're raising millions of dollars from Wall Street whose greed, recklessness and illegal behavior helped to destroy our economy?"<sup>194</sup>

When Sanders announced his candidacy, he offered this view of the corruption produced by unlimited political contributions: "[T]he American political system has been totally corrupted, and the foundations of American democracy are being undermined. What the Supreme Court essentially said was that it was not good enough for the billionaire class to own much of our

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<sup>190</sup> See text at notes *supra*.

<sup>191</sup> *Buckley*, 424 U.S. at 27 (quoting *Civil Service Comm. v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973)).

<sup>192</sup> 2016 Democratic Popular Vote, RealClear Politics, [https://www.realclearpolitics.com/epolls/2016/president/democratic\\_vote\\_count.html](https://www.realclearpolitics.com/epolls/2016/president/democratic_vote_count.html).

<sup>193</sup> Scott Bigsby *et al.*, *Thousands Turn Out for Bernie Sanders Rally Ahead of Primary—As it Happened*, THE GUARDIAN, Apr. 13, 2016, <https://www.theguardian.com/us-news/live/2016/apr/13/us-election-campaign-live-sanders-clinton-trump-cruz-kasich> (report at 20:43).

<sup>194</sup> Sam Frizell, *Clinton and Sanders Clash on Qualifications as Democratic Race Gets Bitter*, TIME, Apr. 7, 2016, <http://time.com/4284934/bernie-sanders-hillary-clinton-qualified-new-york-primary/>.

economy. They could now own the U.S. government as well.”<sup>195</sup> Sanders added, “We now have a political situation where billionaires are literally able to buy elections and candidates. Let’s not kid ourselves: That is the reality right now.”<sup>196</sup>

The nominee of Democratic Party for President was former senator and Secretary of State Hillary Clinton. The principal super PAC supporting her candidacy, Priorities USA Action, received donations of \$1 million or more from 77 individuals—and donations of \$200,000 or more from 759 individuals.<sup>197</sup> Clinton nevertheless sharply criticized America’s system of campaign finance. She promised to “fight hard to end the stranglehold that the wealthy and special interests have on so much of our government,”<sup>198</sup> to “appoint Supreme Court justices who will get money out of politics,”<sup>199</sup> and “if necessary [to] pass a constitutional amendment to overturn *Citizens United*.”<sup>200</sup>

The Republican Party’s nominee, developer Donald Trump, portrayed himself as an “outsider” determined to “drain the swamp in Washington, D.C.”<sup>201</sup> Although Trump later reconsidered,<sup>202</sup> he initially pledged, “I will not be controlled by the donors, special interests, and lobbyists who have corrupted our politics and politicians for far too long. I have disavowed all Super PAC’s, requested the return of all donations made to said PAC’s, and

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<sup>195</sup> *Bernie’s Announcement*, BERNIE, May 26, 2015, <https://berniesanders.com/bernies-announcement/>.

<sup>196</sup> Paul Kane & Phillip Rucker, *An Unlikely Contender, Sanders Takes On “Billionaire Class” in 2016 Bid*, WASH. POST, Apr. 30, 2015, [https://www.washingtonpost.com/politics/sanders-takes-on-billionaire-class-in-launching-2016-bid-against-clinton/2015/04/30/4849fe32-ef3a-11e4-a55f-38924fca94f9\\_story.html?utm\\_term=.54f797ec0db6](https://www.washingtonpost.com/politics/sanders-takes-on-billionaire-class-in-launching-2016-bid-against-clinton/2015/04/30/4849fe32-ef3a-11e4-a55f-38924fca94f9_story.html?utm_term=.54f797ec0db6).

<sup>197</sup> *Priorities USA Action, Contributors 2016 Cycle*, Open Secrets.Org, <https://www.opensecrets.org/pacs/pacgave2.php?sort=A&cmte=C00495861&cycle=2016&Page=1> (last visited June 17, 2017). See also Paul Blumenthal, *Hillary Clinton’s Super PAC Has Raised More Money than Any Super PAC Ever: Nearly All of the Money Has Come From Seven-Figure Donors*, HUFFPOST, Oct. 27, 2016, [http://www.huffingtonpost.com/entry/hillary-clinton-super-pac\\_us\\_5812833ce4b0990edc303558](http://www.huffingtonpost.com/entry/hillary-clinton-super-pac_us_5812833ce4b0990edc303558).

<sup>198</sup> *Issues: Campaign Finance Reform*, Hillary Clinton Campaign, <https://www.hillaryclinton.com/issues/campaign-finance-reform/>.

<sup>199</sup> *Transcript, Hillary Clinton’s DNC Speech, Annotated*, L.A. TIMES, July 28, 2016, <http://www.latimes.com/politics/la-na-pol-hillary-clinton-convention-speech-transcript-20160728-snap-htmlstory.html>.

<sup>200</sup> *Id.*

<sup>201</sup> *Trump’s First Hundred Days?*, WALL ST. J., Oct. 23, 2016, <https://www.wsj.com/articles/trumps-first-hundred-days-1477271323>.

<sup>202</sup> Dave Leventhal, *Donald Trump Embraces Donors, Super PACs He Once Decried*, TIME, June 17, 2016, <http://time.com/4373124/donald-trump-donors-super-pacs/>.

I am calling on all Presidential candidates to do the same.”<sup>203</sup>

Trump contended:

[I]t’s not just the political system that’s rigged. It’s the whole economy. It’s rigged by donors who want to keep down wages. It’s rigged by big businesses who want to leave our country, fire our workers, and sell their products back to the U.S. with absolutely no consequences for them. It’s rigged by bureaucrats who are trapping kids in failing schools. It’s rigged against you, the American people.<sup>204</sup>

In a primary debate, Trump declared, “These Super PACs are a disaster by the way, folks, very corrupt. . . . There is total control of the candidates. I know it better than anybody that probably ever lived. . . . I know it so well because I was on both sides of it. . . . I’ve always made large contributions.”<sup>205</sup> He said of a Republican donor and a primary opponent, “Sheldon Adelson is looking to give big dollars to Rubio because he feels he can mold him into his perfect little puppet. I agree!”<sup>206</sup> He said of other opponents, “I wish good luck to all of the Republican candidates who traveled to California to beg for money, etc. from the Koch Brothers.

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<sup>203</sup> Benjy Sarlin, *Trump Says No to Super PACs, Demands Others Do Same*, MSNBC, Oct. 23, 2015, <http://www.msnbc.com/msnbc/donald-trump-says-no-super-pacs-demands-others-do-same>.

<sup>204</sup> *Full Transcript: Donald Trump NYC Speech on Stakes of the Election*, POLITICO, June 22, 2016, <http://www.politico.com/story/2016/06/transcript-trump-speech-on-the-stakes-of-the-election-224654>. Trump also said, “The choice in this election is a choice between taking our government back from the special interests, or surrendering our last scrap of independence to their total and complete control.” *Id.*

<sup>205</sup> *Transcript of Republican Debate in Florida*, N.Y. TIMES, Mar. 11, 2016, <https://www.nytimes.com/2016/03/11/us/politics/transcript-of-the-republican-presidential-debate-in-florida.html>. In an earlier debate, Trump said, “I give to everybody. When they call, I give. And do you know what? When I need something from them two years later, three years later, I call them, they are there for me. And that’s a broken system.” *Annotated Transcript: The Aug. 6 GOP Debate*, WASH. POST, Aug. 6, 2015, [https://www.washingtonpost.com/news/post-politics/wp/2015/08/06/annotated-transcript-the-aug-6-gop-debate/?utm\\_term=.5641289719f7](https://www.washingtonpost.com/news/post-politics/wp/2015/08/06/annotated-transcript-the-aug-6-gop-debate/?utm_term=.5641289719f7). In still another debate, Trump called super PACs “a scam” and said, “They cause dishonesty. And you better get rid of them because they are causing a lot of bad decisions to be made by some very good people. And I’m not blaming these folks—well, I guess I could.” *Transcript: Republican Presidential Debate*, N.Y. TIMES, Oct. 28, 2015, <https://www.nytimes.com/2015/10/29/us/politics/transcript-republican-presidential-debate.html>.

<sup>206</sup> @realDonaldTrump, Oct. 13, 2015, <https://twitter.com/realDonaldTrump/status/653884577300267008>.

Puppets?”<sup>207</sup>

Trump called his Democratic opponent “Crooked Hillary,”<sup>208</sup> and he addressed her roughly during the final debate of the campaign: “I sat there watching ad after ad, false ad. All paid for by your friends on Wall Street that gave you so much money because they know you’re going to protect them.”<sup>209</sup>

The Presidential campaign of 2016 revealed that the appearance of corruption in America is widespread and intense. Unfettered super PAC contributions have become, in the eyes of many, a potent symbol of America’s deep corruption.

#### D. SOME VIEWS OF ELECTED OFFICIALS, LOBBYISTS, AND DONORS

Like presidential candidates, federal officeholders, lobbyists, and super PAC donors have decried the corruption produced by America’s campaign-finance system. In 2015, former President Jimmy Carter said that America has become

an oligarchy, with unlimited political bribery being the essence of getting the nominations for president or to elect the president. And the same thing applies to governors and U.S. senators and congress members. So now we’ve just seen a complete subversion of our political system as a payoff to major contributors, who want and expect and sometimes get favors for themselves after the election’s over.<sup>210</sup>

Former Vice President Al Gore wrote in 2013, “American democracy has been hacked. . . . The United States Congress . . . is now incapable of passing laws without permission from the corporate lobbies and other

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<sup>207</sup> @realDonaldTrump, Aug. 2, 2015, <https://twitter.com/realDonaldTrump/status/627841345789558788>.

<sup>208</sup> Amber Jamieson, *Trump Calls Clinton “Crooked Hillary”—Should She Ignore it or Fight Back?*, THE GUARDIAN, May 25, 2016, <https://www.theguardian.com/us-news/2016/may/25/donald-trump-crooked-hillary-clinton-nickname-ignore-fight> (noting that Trump employed the insult at least 50 times within a six-week period).

<sup>209</sup> *Transcript of the Third Debate*, N.Y. TIMES, Oct. 20, 2016, <https://www.nytimes.com/2016/10/20/us/politics/third-debate-transcript.html>. For other Trump quotations in the same vein as those presented here, see Rick Claypool, *Donald Trump: Clean Government Reformer?*, PUBLIC CITIZEN, Nov. 15, 2016, <https://www.citizen.org/sites/default/files/trump-reform-quotes-report.pdf>.

<sup>210</sup> *President Jimmy Carter: The United States is an Oligarchy*, THOM HARTMAN PROGRAM, Jul. 28, 2015, <https://www.thomhartmann.com/bigpicture/president-jimmy-carter-united-states-oligarchy>.

special interests that control their campaign finances.”<sup>211</sup>

Representative Michele Bachmann spoke in 2011 of “the corrupt paradigm that has become Washington, D.C., whereby votes continually are bought rather than representatives voting the will of their constituents.”<sup>212</sup>

Senator John McCain, the Republican nominee for President in 2008, said in 2012, “What we have done is make contributions limits a joke.” He added, “I promise you there will be huge scandals, because there’s too much money washing around, too much of it we don’t know who’s behind it and too much corruption associated with that kind of money. There will be major scandals.”<sup>213</sup>

Senator John Kerry, the Democratic nominee for President in 2004, said in his last speech to the Senate before becoming Secretary of State in 2013, “The truth requires that we call the corrosion of money in politics what it is—it is a form of corruption and it muzzles more Americans than it empowers, and it is an imbalance that the world has taught us can only sow the seeds of unrest.”<sup>214</sup>

Senator Lindsay Graham said in 2015, “We’ve got to figure out a way to fix this mess, because basically 50 people are running the whole show.”<sup>215</sup>

Senator Angus King said in 2016, “[W]e can look around the world where oligarchs control the government, and we’re allowing that to happen here before our very eyes.”<sup>216</sup>

Senator Amy Klobuchar said in 2016, “This for me is the biggest issue of our time in our country because I have seen what this money has done to Washington.”<sup>217</sup>

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<sup>211</sup> AL GORE, *THE FUTURE* \_\_ (2013).

<sup>212</sup> David A. Patten, *Michele Bachman: The Newsmax Interview*, NEWSMAX, Jan. 26, 2011, <http://www.newsmax.com/InsideCover/bachmann-newsmax-interview-romney/2011/06/26/id/401507/>.

<sup>213</sup> Alina Selyukhn, *John McCain Predicts “Huge Scandals” in the Super PAC Era*, HUFFPOST, Mar. 27, 2012, [http://www.huffingtonpost.com/2012/03/27/john-mccain-citizens-united-campaign-finance\\_n\\_1383230.html](http://www.huffingtonpost.com/2012/03/27/john-mccain-citizens-united-campaign-finance_n_1383230.html).

<sup>214</sup> Seth Klein, *Retiring Senators Lament Money in Politics: Senators Kerry, Harkin, and Levin All Decried the State of Campaign Finance in Retiring Remarks*, U.S. NEWS, Mar. 8, 2013, <https://www.usnews.com/news/articles/2013/03/08/retiring-senators-lament-money-in-politics>.

<sup>215</sup> Andy Sullivan, *Here’s One White House Hopeful Who Wants to Get Big Money Out of Politics*, REUTERS, Apr. 18, 2015, <http://www.reuters.com/article/us-usa-election-money-idUSKBN0N90SY20150418?feedType=RSS&feedName=politicsNews>.

<sup>216</sup> King, *Colleagues Unveil New Campaign Finance and Government Reform Package*, Angus King Press Release, June 9, 2016, <https://www.king.senate.gov/newsroom/press-releases/king-colleagues-unveil-new-campaign-finance-and-governmental-reform-package>.

<sup>217</sup> Ben Jacobs & David Smith, “*Politics Are Corrupt*”: *Fears About Money and Its*



Jack Abramoff, a former lobbyist who served a prison term for bribery, said that, even apart from his illegal conduct, “I was participating in a system of legalized bribery. All of it is bribery, every bit of it.”<sup>218</sup>

Even some billionaire donors view unlimited super PAC contributions as corrupting. Donald Sussman, who gave \$39 million to Democratic super PACs and allied groups in 2016,<sup>219</sup> told the *Washington Post*, “It’s very odd to be giving millions when your objective is actually to get the money out of politics.”<sup>220</sup> Sheldon Adelson, who gave \$78 million to Republican super PACs and allied groups in 2016,<sup>221</sup> told an interviewer, “I’m against very wealthy people attempting to or influencing elections, but as long as it’s doable I’m going to do it.”<sup>222</sup>

### E. PUBLIC OPINION

Opinion surveys also indicate the depth of the appearance of corruption in America.<sup>223</sup> In a 2016 Rasmussen survey, 61% of likely voters agreed

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*Influence on Elections Loom Large*, THE GUARDIAN, July 8, 2016, <https://www.theguardian.com/us-news/2016/jul/08/trump-clinton-sanders-super-pacs-election-money>.

<sup>218</sup> LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 8 (2011).

<sup>219</sup> *2016 Top Donors to Outside Spending Groups*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?disp=D> (last visited June 20, 2017).

<sup>220</sup> Matea Gold, *Hedge Fund Manager S. Donald Sussman Gave \$21 Million to Pro-Clinton Super PAC Priorities USA*, WASH. POST, Oct. 20, 2016, [https://www.washingtonpost.com/news/post-politics/wp/2016/10/20/hedge-fund-manager-s-donald-sussman-gave-21-million-to-pro-clinton-super-pac-priorities-usa/?utm\\_term=.d12a7a98fbb2](https://www.washingtonpost.com/news/post-politics/wp/2016/10/20/hedge-fund-manager-s-donald-sussman-gave-21-million-to-pro-clinton-super-pac-priorities-usa/?utm_term=.d12a7a98fbb2).

<sup>221</sup> *2016 Top Donors to Outside Spending Groups*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?disp=D> (last visited June 20, 2017).

<sup>222</sup> Steven Bertoni, *Billionaire Sheldon Adelson Says He Might Give \$100M to Newt Gingrich Or Other Republican*, FORBES, Feb. 21, 2012, <http://www.forbes.com/sites/stevenbertoni/2012/02/21/billionaire-sheldon-adelson-says-he-might-give-100m-to-newt-gingrich-or-other-republican/>.

<sup>223</sup> A Court that looks to the appearance of corruption as the test of Congress’s power to limit political contributions cannot reasonably dismiss polls showing that this appearance is pervasive. In other contexts, however, judges do not bend to opinion polls, and the *McCutcheon* plurality declared that it would brave public opinion on campaign finance issues as well:

Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects. If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech



that most members of Congress were “willing to sell their vote for either cash or a campaign contribution.” The same percentage called it likely that their own representatives had done so.<sup>224</sup>

Fifty-four percent of the respondents to a 2012 Pew Research Center survey described the United States government as “mostly corrupt.”<sup>225</sup>

In a 2011 survey by the Center for Competitive Politics/Cooperative Congressional Election Study, 59.2% of respondents agreed that a contribution of \$5,000 or more could exert a corrupting influence on a candidate for Congress.<sup>226</sup>

In a 2012 Democracy Corps/Public Campaign Action Fund survey, 59% of voters in 54 competitive congressional districts agreed that “[w]hen someone gives 1 million dollars to a super PAC, they want something big in return from the candidates they are trying to elect.”<sup>227</sup>

A 2012 Brennan Center for Justice survey focused specifically on super

despite popular opposition.

134 S. Ct. at 1441 (plurality opinion).

In our view, this passage reflects an error that has infected much of the Supreme Court’s campaign-finance jurisprudence. The First Amendment protects Nazi parades and other offensive speech, but the public does not oppose money in politics because it is offended by the *content* of the messages this money may send—“vote Democratic” or “vote Republican.” Rather, the public is troubled because campaign cash can persuade elected officials in the same way that expense-paid trips to the Super Bowl can persuade them, and persuasion of that kind is entitled to no First Amendment protection. We believe that speech-facilitating activity should not be entitled to a strong presumption of constitutional protection when the reason for limiting it is unrelated to the message it advances. See *United States v. O’Brien*, 391 U.S. 367 (1968); John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1491–1502 (1975). Nevertheless, we leave that proposition for another day and simply note that the *McCutcheon* plurality was not entitled to claim the anti-censorship mantle of Milton, Mill, Holmes, and Brandeis. Regulating political contributions and expenditures in an effort to prevent *quid pro quo* corruption has little in common with suppressing unpopular speech.

<sup>224</sup> *Congressional Performance: Voters Still Say Congress is For Sale*, RASMUSSEN REPORTS, Feb. 22, 2016, [http://www.rasmussenreports.com/public\\_content/politics/mood\\_of\\_america/congressional\\_performance](http://www.rasmussenreports.com/public_content/politics/mood_of_america/congressional_performance).

<sup>225</sup> *Growing Gap in Favorable Views of Federal, State Governments*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, Apr. 26, 2012, <http://www.people-press.org/files/legacy-pdf/4-26-12%20Govt%20Favorability.pdf>.

<sup>226</sup> Jason M. Farrell & Nima Veisoh, *Public Perception and the “Appearance of Corruption” in Campaign Finance* 7-8, CTR. FOR COMPETITIVE POLITICS, Dec. 16, 2011, <http://www.campaignfreedom.org/wp-content/uploads/2012/11/Public-Perception-and-the-Appearance-of-Corruption-in-Campaign-Finance-Report-Final.pdf>.

<sup>227</sup> Stan Greenberg et al., *In Congressional Battleground, Voters Intensely Concerned About Money in Politics* 4, DEMOCRACY CORPS, Oct. 1, 2012, <http://www.democracycorps.com/attachments/article/910/dcor.pcaf.memo.093012.v4.pdf>.

PACs. It reported that 69% of respondents (74% of Republicans and 73% of Democrats) agreed that “new rules that let corporations, unions and people give unlimited money to Super PACs will lead to corruption.” Seventy-three percent of respondents (75% of Republicans and 78% of Democrats) agreed that “there would be less corruption if there were limits on how much could be given to Super PACs.” Sixty-eight percent of respondents (71% of Democrats and 71% of Republicans) agreed that “a company that spent \$100,000 to help elect a member of Congress could successfully pressure him or her to change a vote on a proposed law.”<sup>228</sup>

In a March 2012 ABC News/Washington Post survey, 69% of respondents stated that super PACs should be illegal.<sup>229</sup>

The Supreme Court said in *Citizens United*, “[T]he appearance of influence or access will not cause the electorate to lose faith in this democracy.”<sup>230</sup> Seven years after *Citizens United* and *SpeechNow*, however, faith in our democracy appears to be at a nadir. The polling data reveal that unlimited super PAC contributions have played a significant part in intensifying public perceptions of corruption.

## Part V

### CHALLENGING *SPEECHNOW*

When a presidential candidate promises to appoint Supreme Court justices who will overrule *Citizens United*,<sup>231</sup> her audience may imagine that *Citizens United* would not last long if the candidate were elected and kept her promise. Whenever a majority of the Court was prepared to overrule *Citizens United*, someone would bring an appropriate case, and the decision would vanish. The obstacles to bringing an appropriate case, however, are substantial. Whatever its composition, the Supreme Court may not have an

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<sup>228</sup> *National Survey: Super PACs, Corruption, and Democracy*, BRENNAN CTR. FOR JUSTICE, Apr. 24, 2012, <https://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-democracy> (summary and appendix).

<sup>229</sup> Damla Ergun, *Seven in 10 Would Send Super PACs Packing*, ABC NEWS, Mar. 13, 2012, <http://abcnews.go.com/blogs/politics/2012/03/seven-in-10-would-send-super-pacs-packing/>; *Washington Post-ABC News Poll*, WASH. POST, Mar. 10, 2012, [http://www.washingtonpost.com/wp-srv/politics/polls/postabcpoll\\_031012.html](http://www.washingtonpost.com/wp-srv/politics/polls/postabcpoll_031012.html) (question 33).

<sup>230</sup> *Citizens United*, 558 U.S. at 314.

<sup>231</sup> See *Transcript, Hillary Clinton's DNC Speech, Annotated*, L.A. TIMES, July 28, 2016, <http://www.latimes.com/politics/la-na-pol-hillary-clinton-convention-speech-transcript-20160728-snap-htmstory.html>. Of course popular rhetoric does not distinguish between *Citizens United* and *SpeechNow*. Politicians and the public blame the Supreme Court for everything.

opportunity to overrule *Citizens United*.

Similarly, although the Court has not addressed the issue decided by *SpeechNow*, it may never be able to do so. The authors of this Article are among the lawyers currently representing members of Congress and candidates for Congress who are attempting to bring this issue before the Court. The Federal Election Commission (FEC) is opposing their efforts on grounds that, if successful, could keep the Court from ever deciding the issue.

A court's ability to reconsider a decision upholding a statute differs from its ability to reconsider a decision striking a statute down. When a court upholds a challenged statute, its ruling binds the party who has challenged this statute, but someone else threatened with enforcement can bring another challenge and ask the court to overrule its earlier decision. If this party fails, a third party can bring a third challenge. The challengers of a statute can keep trying until (because new judges are appointed or because minds or circumstances change) victory is won. *Citizens United*, which overruled two prior decisions upholding federal election laws, illustrates the process.<sup>232</sup>

Once a court holds a statute unconstitutional, however, enforcement of the statute usually comes to a halt. Non-enforcement of the statute then becomes an injury shared by all members of the public, and no one may have standing to challenge it.<sup>233</sup> The law of standing may thus place decisions about the constitutionality of statutes on a one-way ratchet. Any triumph of a statute's defenders may prove transient, but any triumph of a challenger (even at the hands of a closely divided Supreme Court) may prove permanent and incontestable. Constitutional litigation can become a game of sudden death, but only for one side. Although a "presumption of constitutionality"<sup>234</sup> is thought to tilt the game board against litigants who challenge a statute's constitutionality, the law of standing appears to tilt the

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<sup>232</sup> See *Citizens United*, 558 U.S. at 365-66 (overruling *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), and a portion of *McConnell v. FEC*, 540 U.S. 93 (2003)).

<sup>233</sup> See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974) (denying standing to litigants who sought to assert "only the generalized interest of all citizens in constitutional governance"); *United States v. Richardson*, 418 U.S. 166, 177 (1974) (denying standing because the injury asserted was "undifferentiated and 'common to all members of the public'"); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940) (litigants must show injury to "a particular right of their own, as distinguished from the public's interest in the administration of the law"); *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923) (declaring it insufficient that a litigant "suffers in some indefinite way in common with people generally").

<sup>234</sup> See, e.g., *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257-58 (1930).

board in the opposite direction.

When the Justice Department failed to seek Supreme Court review of the *SpeechNow* decision<sup>235</sup> and the FEC acquiesced in this decision,<sup>236</sup> the enforcement of federal limits on super PAC contributions ceased. For a time, several states and one municipality continued to enforce their own limits, but the federal courts of appeals sustained challenges to their efforts.<sup>237</sup> None of the states sought Supreme Court review,<sup>238</sup> and the petition for certiorari filed by the municipality did not address the *SpeechNow* syllogism the court of appeals had endorsed. Indeed, this petition did not include *SpeechNow* among the five cases it cited.<sup>239</sup>

With the denial of the municipality's petition and the failure of the states to seek review, the path to the Supreme Court seemed almost closed. Nevertheless, John Bonifaz, the president of the public-interest organization Free Speech For People; Ronald A. Fein, the group's legal director; and some volunteer lawyers including the authors of this Article sought ways to bring the constitutionality of limiting super PAC contributions before the Court.

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<sup>235</sup> See text at note *supra*.

<sup>236</sup> FED. ELECTION COMM'N, ADVISORY OPINION 2010-11, <http://saos.fec.gov/aodocs/AO%202010-11.pdf> (Commonsense 10).

<sup>237</sup> See the decisions cited in note \_\_ *supra*.

<sup>238</sup> See Letter from Brian A. Sutherland, Assistant Solicitor General of the State of New York, to Mae A. D'Agostino, Judge of the United States District Court for the Northern District of New York, May 23, 2014 (on file with Professor Alschuler); email from Jonathan Mitchell, Solicitor General of the State of Texas, to Albert Alschuler, Dec. 21, 2013 (on file with Professor Alschuler).

<sup>239</sup> See Petition for Writ of Certiorari, *City of Long Beach v. Long Beach Area Chamber of Commerce*, 526 U.S. 896 (2010) (No. 10-155).

The Ninth Circuit argument on the validity of the Long Beach ordinance limiting super PAC contributions occurred before the Supreme Court's decision in *Citizens United*. After *Citizens United* and before *SpeechNow*, the parties filed supplemental briefs on the significance of *Citizens United*. The Ninth Circuit decided the case on April 30, 2010, a little more than a month after the D.C. Circuit decided *SpeechNow*. *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010). The court quoted and relied on the *SpeechNow* syllogism. *Id.* at 697-98.

The Long Beach ordinance presented the validity of limiting contributions to super PACs in a peculiar way. It did not directly impose any limit, and a contributor could not violate the ordinance. The ordinance, however, forbade a super PAC that accepted contributions in excess of certain specified amounts from making any expenditure. The Ninth Circuit was uncertain whether this ordinance imposed contribution limits or an expenditure limit, but it concluded that the *SpeechNow* syllogism made that issue immaterial. *Id.* at 692-93, 697-98. The prevailing party in the Ninth Circuit did not respond to the city's petition for certiorari, and the Supreme Court did not request a response. The Court denied certiorari on the first day of its October 2010 Term, approximately eight months after it decided *Citizens United*. *City of Long Beach v. Long Beach Area Chamber of Commerce*, 526 U.S. 896 (2010).

One potential route to Supreme Court review was the enactment of legislation incompatible with the right declared by *SpeechNow*. A stream of legislation following *Roe v. Wade*<sup>240</sup> had given the Court repeated opportunities to overrule that decision. Defenders of post-*Roe* restrictions on abortion could argue that these restrictions were consistent with *Roe* or, in the alternative, that *Roe* should be overruled. Unlike *Roe*, however, *SpeechNow* did not create a right whose boundaries were uncertain. Legislatures can resist *SpeechNow* only by enacting and enforcing limits on super PAC contributions similar to those the D.C. Circuit struck down.

Free Speech For People encourages legislatures to enact these limits, especially in places where federal courts of appeals have not yet ruled on their validity. Unlike some legislative efforts to limit abortion, these limits would not defy the courts' authority; they might instead enable the Supreme Court to consider an issue it has not yet addressed.

In May 2017, the House of Representatives in Connecticut voted to approve legislation limiting super PAC contributions,<sup>241</sup> but the legislative session ended without action by the Senate. Legislation limiting super PAC contributions is currently under consideration in Massachusetts. In June 2017, the St. Petersburg, Florida City Council voted five-to-three to consider an ordinance limiting super PAC contributions drafted primarily by Mr. Fein. The Council is expected to vote on this ordinance in September.<sup>242</sup>

Federal election law pointed a second route to Supreme Court review. Although the failure to enforce a statute is usually seen as an injury shared by everyone and challengeable by no one, there are exceptions, and the 1974 statute establishing the FEC created one of these exceptions.

The Federal Election Campaign Act of 1971 (FECA) as amended by the 1974 statute and other enactments provides that anyone may complain to the FEC about any violation of federal election law and that anyone "aggrieved" by either the dismissal of his complaint or the failure of the Commission to act within 120 days may secure a judicial ruling on whether

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<sup>240</sup> 410 U.S. 113 (1973).

<sup>241</sup> Christine Stewart, *Divided Connecticut House Forwards Campaign Bill to Senate*, NEW HAVEN REGISTER, May 25, 2017, <http://www.nhregister.com/government-and-politics/20170525/divided-connecticut-house-forwards-campaign-bill-to-senate>.

<sup>242</sup> See Seán Kinane, *St. Pete Moves Forward with Campaign Finance Reform*, 88.5WMNF, June 22, 2017, <http://www.wmfn.org/st-pete-moves-forward-with-campaign-finance-reform/>. See also Darden Rice & Scott Greytak, *Keep Super PAC Cash Out of St. Petersburg Elections*, TAMPA BAY TIMES, July 15, 2016, <http://www.tampabay.com/opinion/columns/column-keep-super-pac-cash-out-of-st-petersburg-elections/2285582>; Editorial: *Good Campaign Finance Idea—If it Won't Cost St. Petersburg Taxpayers*, TAMPA BAY TIMES, Nov. 11, 2016, [HTTP://WWW.TAMPABAY.COM/OPINION/EDITORIALS/EDITORIAL-GOOD-CAMPAIGN-FINANCE-IDEA-8212-IF-IT-WONT-COST-ST-PETERSBURG/2302523](http://www.tampabay.com/opinion/editorials/editorial-good-campaign-finance-idea-8212-if-it-wont-cost-st-petersburg/2302523).

the FEC’s action or inaction is “contrary to law.”<sup>243</sup>

The Supreme Court has held that federal courts may afford review in accordance with these provisions when a complainant satisfies Article III standing requirements.<sup>244</sup> The complainant must show among other things a threat of “injury in fact” that is “fairly traceable” to the agency’s failure to enforce the law. The “injury in fact” requirement imposed by Article III is thought to be more demanding than the statutory requirement that the complainant be a “party aggrieved.”<sup>245</sup>

The ability of private parties to secure judicial enforcement of federal election law is a crucial part of FECA’s enforcement mechanism. The FECA provides that no more than three of the FEC’s six members may be members of the same party.<sup>246</sup> Four must agree before the agency can act.<sup>247</sup> The agency is widely regarded as dysfunctional.<sup>248</sup> One current FEC commissioner commented, “Congress set this place up to gridlock. This agency is functioning as Congress intended.”<sup>249</sup> When the FEC fails to enforce the law, however, citizens may go to court.

The people most clearly threatened with “injury in fact” by the FEC’s acquiescence in *SpeechNow* and its failure to enforce the federal limits on contributions to super PACs are candidates for federal office—especially candidates opposed by super PACs that receive contributions above the limit. Free Speech For People identified six elected officeholders and candidates who wished to challenge the FEC’s failure to enforce the limit. They were Representative Ted Lieu (D-Cal); Representative Walter Jones (R-NC); Senator Jeff Merkley (D-Or); former state senator John Howe, a

<sup>243</sup> 52 U.S.C.A. § 30109(a)(1), (a)(8)(A), (a)(8)(C) (West 2016).

<sup>244</sup> *FEC v. Akins*, 524 U.S. 11, 13 (1998).

<sup>245</sup> *Id.* at 19-21.

<sup>246</sup> 52 U.S.C.A. § 30106(a)(1) (West 2016).

<sup>247</sup> *Id.* at § 30106(c).

<sup>248</sup> See, e.g., Ann M. Ravel, *Dysfunction and Deadlock at the Federal Election Commission*, N.Y. TIMES, Feb. 20, 2017, <https://www.nytimes.com/2017/02/20/opinion/dysfunction-and-deadlock-at-the-federal-election-commission.html? r=0>; Eliza Newlin Carney, *The FEC’s Open Hostilities, Dysfunction, and Intimidation Foreshadowed the Trump Era*, THE AMERICAN PROSPECT, Mar. 2, 2017, <http://prospect.org/article/fec%E2%80%99s-open-hostilities-dysfunction-and-intimidation-foreshadowed-trump-era>; Will Tucker, *The FEC: “Acting” Like an Enforcement Agency*, OPENSECRETSBLOG, June 17, 2016, <https://www.opensecrets.org/news/2016/06/the-fec-acting-like-an-enforcement-agency/>; Robin Bravender & Dave Leventhal, *FEC Dysfunction—It’s Personal*, POLITICO, Dec. 13, 2011, <http://www.politico.com/story/2011/12/the-fecs-healthy-ugly-discourse-070396>.

<sup>249</sup> Eric Lichtbau, *F.E.C. Can’t Curb 2016 Election Abuse, Commission Chief Says*, N.Y. TIMES, May 2, 2015, <https://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html> (quoting Commissioner Lee E. Goodman).



Republican candidate for Congress in Minnesota; Michael Wager, a Democratic candidate for Congress in Ohio; and Zephyr Teachout, a Democratic candidate for Congress in New York. A number of lawyers volunteered to work with Free Speech For People in representing these complainants, including Anne Weismann, Stephen A. Weisbrod, Brad Deutsch, Malcolm Seymour, Andrew Goodman, and us.

On July 7, 2016, with the general election campaigns of 2016 barely underway, Representative Lieu and the others filed their complaint with the FEC.<sup>250</sup> The FEC might have dismissed this complaint promptly, citing its earlier acquiescence in *SpeechNow*. The complainants then could have sought review in the U.S. District Court for the District of Columbia. That court, which was bound to follow *SpeechNow*, also might have denied relief quickly. The complainants then could have appealed to the court of appeals and urged it to overrule *SpeechNow*. The likelihood that the court of appeals would overrule its unanimous *en banc* decision was small, however, and a three-judge panel of the court would not have had authority to do so.<sup>251</sup> If the court of appeals denied relief, the complainants could have sought Supreme Court review. This four-tribunal path to review may look straightforward, but in fact it is filled with booby-traps.

The statutory period of 120 days ended without an FEC ruling, and little agency activity seems to have occurred within this period. The Lieu complaint listed as respondents ten super PACs that had campaigned against one or more of the complainants and that had accepted contributions above the statutory limit. It noted 39 contributions above the limit from 27 contributors these super PACs had received. After receiving the complaint, the FEC sent “notification letters” not only to the named respondents but also to all of the contributors identified in the complaint.<sup>252</sup> Many of the mostly well-known law firms representing the contributors and the super PACs then sought extensions of time, and 22 ultimately filed responses to the complaint. We imagine that these firms billed their clients thousands of dollars to inform the FEC of something the FEC’s records and the clients’ own disclosures already revealed—that the clients did accept contributions above the limit, just as *SpeechNow* and an FEC advisory opinion authorized them to do. The statute provides that, although the FEC must notify respondents that a complaint has been filed, it need not invite responses before dismissing the complaint.<sup>253</sup>

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<sup>250</sup> A copy of the complaint appears at <https://freespeechforpeople.org/wp-content/uploads/2016/07/FINAL-FEC-Complaint-PDF-7-7-16.pdf>.

<sup>251</sup> See *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (“One three-judge panel . . . does not have the authority to overrule another three-judge panel of the court.”).

<sup>252</sup> See 11 C.F.R. § 111.5(a).

<sup>253</sup> 52 U.S.C.A. § 30109(a)(1) (West 2016).



On November 4, 2016, four days before Election Day, the complainants filed suit in the Federal District Court for the District of Columbia. They alleged that the FEC's failure to act within the statutory period was contrary to law.<sup>254</sup>

On reading the statute, one might have thought that the FEC's failure to act would be contrary to law if it had failed to enforce the law—in other words, if it had not acted on a meritorious complaint within 120 days. This straightforward reading of the statute would have allowed complainants to seek judicial enforcement when the agency itself did not enforce the law promptly. Congress apparently realized that, when the remedy for an election-law violation comes after an election, it is likely to come too late.<sup>255</sup>

In 1986, however, the D.C. Circuit rejected the view that the FEC's inaction can be contrary to law simply because the agency failed to enforce the law.<sup>256</sup> It also declined to impose a requirement or even a presumption that the FEC must rule on a complaint within a single election cycle.<sup>257</sup> The court held that the agency's failure to act on a complaint is contrary to law only when its delay has been arbitrary and capricious. It added that a judge should consider the resources available to the agency, the press of other business, the complexity of the case, and other circumstances in determining whether the agency's delay has been arbitrary and capricious.<sup>258</sup>

The FEC filed an answer to the complainants' (now plaintiffs') lawsuit. It also sought and obtained a protective order to prevent the plaintiffs from disclosing confidential information they might receive during the litigation. It served interrogatories asking the plaintiffs to describe how they had been injured by its non-enforcement of the limits on super PAC contributions. The plaintiffs served interrogatories inquiring about the reasons for the FEC's delay and the actions it had taken since they filed their complaint.

On June 1, 2017, nearly eleven months after the plaintiffs filed their administrative complaint, the FEC sent them a letter rejecting it.<sup>259</sup> After receiving the letter, the plaintiffs moved to amend their district court complaint to challenge the FEC's rejection of their administrative

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<sup>254</sup> See Matea Gold, *Legal Team Seeking to Undo Super PACs Files Suit to Push FEC to Act*, WASH. POST, Nov. 4, 2016, [https://www.washingtonpost.com/news/post-politics/wp/2016/11/04/legal-team-seeking-to-undo-super-pacs-files-suit-to-push-fec-to-act/?utm\\_term=.54f53c748937](https://www.washingtonpost.com/news/post-politics/wp/2016/11/04/legal-team-seeking-to-undo-super-pacs-files-suit-to-push-fec-to-act/?utm_term=.54f53c748937).

<sup>255</sup> See, e.g., 52 U.S.C.A. § 30108 (a)(2) (requiring the FEC to issue an advisory opinion within twenty days when a candidate has requested this opinion within 60 days of an election).

<sup>256</sup> *FEC v. Rose*, 806 F.2d 1081, 1084 (D.C. Cir. 1986).

<sup>257</sup> *Id.* at 1084-85.

<sup>258</sup> *Id.* at 1084 & n.6.

<sup>259</sup> See *FEC Dismisses Lawmakers' Complaint Against Super PACs*, BLOOMBERG BNA, June 15, 2017, <https://www.bna.com/fec-dismisses-lawmakers-n73014453387/>.

complaint. The FEC opposed this motion, and, at the time of this writing, the court has not ruled.

A plaintiff's standing is ordinarily judged at the time a complaint is filed.<sup>260</sup> By forcing the plaintiffs to re-file their complaint rather than amend it, the FEC apparently hopes to move the date for assessing their standing from shortly before the election of 2016 (a time when some plaintiffs were actively opposed by super PACs that accepted contributions above the limit) to seven or eight months after the election (a time when the campaigns of 2016 had ended).

Of course, if the FEC had rejected the plaintiffs' complaint within 120 days, no one could have doubted the appropriateness of a determination of standing on the pre-election date. Refusing an amendment would reward the FEC's delay in dismissing the complaint and encourage it to delay in other cases. Whenever a candidate sought prospective relief, the FEC might delay action on his case until after Election Day in the hope that his ability to challenge an adverse ruling would vanish.

The FEC argues that, because the district court complaint challenging the agency's unlawful delay is now moot, the court lacks jurisdiction to amend the complaint. The agency thus maintains that its ruling deprived the plaintiffs of the ability to challenge its delay (by making the delay moot) while its delay deprived them of the ability to challenge its ruling (by pushing the date for determining their standing beyond Election Day).<sup>261</sup> This sort of bind is called a Catch-22.<sup>262</sup>

The FEC also argues that the court should refuse to allow amendment because amendment would be futile; it contends that the amended complaint would be subject to dismissal on several grounds. The plaintiffs respond that a complaint is not always futile simply because a trial court must dismiss it. In 1951, for example, Supreme Court precedent required a trial court to deny relief to the plaintiffs in *Brown v. Board of Education*,<sup>263</sup> but the complaint of these plaintiffs changed history. The plaintiffs contend that the court has discretion to amend the complaint before considering whether to dismiss it.

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<sup>260</sup> *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 190-91 (2000); *Hardaway v. D.C. Housing Authority*, 843 F.3d 973, 978 (D.C. Cir. 2016).

<sup>261</sup> The plaintiffs respond in part that, because the FEC's delay is capable of repetition and likely to evade review, the initial complaint is not moot. *See, e.g., Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 324-35 (D.C. Cir. 2009) (holding that a claim of unreasonable delay in issuing a license was not mooted by issuance of the license because the agency was likely to engage in similar delay when the plaintiff sought other licenses).

<sup>262</sup> *See* JOSEPH HELLER, CATCH-22 (1955).

<sup>263</sup> 98 F. Supp. 797, 800 (D. Kans. 1951) (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896) and *Gong Lum v. Rice*, 275 U.S. 78 (1927)), *rev'd*, 347 U.S. 483 (1954).

The FEC argues that its acquiescence in *SpeechNow* would be “contrary to law” only if its decision was “arbitrary or capricious or an abuse of discretion.” The plaintiffs maintain that any ruling based on an erroneous view of the law is contrary to law.

The FEC claims that, whether or not its acquiescence in *SpeechNow* was contrary to law, it was required to dismiss the plaintiffs’ complaint. In an advisory opinion sought by a super PAC, it had authorized super PACs to accept contributions above the statutory limit,<sup>264</sup> and the FECA provides that someone who relies in good faith on an FEC advisory opinion “shall not . . . be subject to any sanction provided by this Act.”<sup>265</sup> Although the plaintiffs have sought only declaratory relief, the FEC maintains that declaratory relief is itself a sanction. Because the agency’s advisory opinion deprived it of the ability to impose this sanction, it was required to reject the plaintiffs’ complaint.

The FEC’s position abandons the usual meaning of the word “sanction”—a penalty or detriment imposed for violation of a legal requirement.<sup>266</sup> Moreover, judicial acceptance of the FEC’s conclusion would provide a way for the agency to insulate all rulings allowing unlawful practices from judicial review. It would be enough for the agency to announce its rulings in advisory opinions.<sup>267</sup> The FECA, however, allows courts to review FEC failures to enforce the law,<sup>268</sup> and a construction of the statute that would allow the FEC to nullify this provision cannot be

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<sup>264</sup> See FED. ELECTION COMM’N, ADVISORY OPINION 2010-11, <http://saos.fec.gov/aodocs/AO%202010-11.pdf> (Commonsense 10).

<sup>265</sup> 52 U.S.C.A. § 30108(c)(2) (West 2016).

<sup>266</sup> See *Alabama v. North Carolina*, 560 U.S. 330, 340 (2010) (“A ‘sanction’ (in the sense the word is used here) is ‘[t]he detriment, loss of reward, or other coercive intervention, annexed to a violation of a law as a means of enforcing the law.’ Webster’s New International Dictionary 2211 (2d ed. 1954) . . . ; see Black’s Law Dictionary 1458 (9th ed. 2009) (“A penalty or coercive measure that results from failure to comply with a law, rule, or order.”)).

<sup>267</sup> Suppose, for example, that, the FEC defied the conventional understanding that administrative agencies may not themselves declare statutes unconstitutional. See, e.g., *Panitz v. District of Columbia*, 112 F.2d 29, 41-42 (D.C. Cir. 1940). Suppose that, rather than acquiesce in the *SpeechNow* decision, the FEC *invented* the *SpeechNow* decision. Although no court had yet ruled on the question, the FEC announced in an advisory opinion sought by a super PAC (1) that all limits on contributions to super PACs were unconstitutional and (2) that the FEC would no longer enforce these limits. Suppose that the FEC also invented the *Citizens United* decision. In an advisory opinion sought by a corporation, it announced that any statute restricting political expenditures by corporations and only corporations was unconstitutional. Would no federal court be able to review the agency’s rulings because an FEC advisory opinion precludes “sanctions” and because “sanctions” include everything the FEC might do in response to a citizen complaint?

<sup>268</sup> 52 U.S.C.A. § 30109(a)(8)(C).

correct.<sup>269</sup>

The FEC maintains that, because its advisory opinion authorized the respondents' conduct, it could not find this conduct unlawful. In this argument, the FEC appears to enter the realm of legal philosophy, agreeing with some legal positivists that any conduct not subject to legal sanction is lawful. From this perspective, if diplomats have immunity from legal sanctions when they commit murder, it is lawful for diplomats to murder.<sup>270</sup>

Just as the FECA bars administrative sanctions when people have relied on FEC advisory opinions, a number of doctrines bar criminal punishment when defendants have relied reasonably on apparently authoritative assurances that their conduct would be lawful. These doctrines have such names as "official authorization,"<sup>271</sup> "entrapment by estoppel,"<sup>272</sup> "advice of counsel,"<sup>273</sup> and "mistake of law."<sup>274</sup>

The D.C. Circuit has said, for example, that a defendant charged with a specific-intent crime "is entitled to an advice-of-counsel instruction showing: (1) he made full disclosure of all material facts to his attorney before receiving the advice at issue; and (2) he relied in good faith on the counsel's advice that his course of conduct was legal."<sup>275</sup> Although a lawyer who provides erroneous advice can thus give his client a defense, this lawyer cannot amend the law. The client's conduct, although excused, remains unlawful.<sup>276</sup> A mistake of law does not change the law—not even when it rests on an advisory opinion issued by the FEC.<sup>277</sup>

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<sup>269</sup> The FEC maintains that its odd definition of the word "sanctions" is entitled to *Chevron* deference. See *Chevron U.S.A., Inc. v. Natural Resources Def. Council*, 467 U.S. 837 (1984). The plaintiffs maintain that it is not.

<sup>270</sup> For extended criticism of this version of legal positivism, see ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 139-50 (2000).

<sup>271</sup> See *Keathley v. Holder*, 696 F.3d 644, 646-47 (7th Cir. 2012).

<sup>272</sup> See *Raley v. Ohio*, 360 U.S. 423 (1959); *United States v. Tallmadge*, 829 F.2d 767, 773-75 (9th Cir. 1987).

<sup>273</sup> See *United States v. DeFries*, 129 F.3d 1293, 1308 (D.C. Cir. 1997).

<sup>274</sup> See *United States v. Albertini*, 830 F.2d 985, 989 (9th Cir. 1987) ("[T]he government argued that mistake of law is never a defense. There is an exception to the mistake of law doctrine, however, in circumstances where the mistake results from the defendant's reasonable reliance upon an official—but mistaken or later overruled—statement of the law.").

<sup>275</sup> *DeFries*, 129 F.3d at 1308.

<sup>276</sup> Similarly, the Model Penal Code provides a defense when an actor has acted in reasonable reliance on a subsequently invalidated statute, a judicial decision or opinion, an administrative order or grant of permission, or an official interpretation of the law by an officer charged with its enforcement. MODEL PENAL CODE § 2.04(3) (Am. Law Inst., Proposed Official Draft 1962). The MPC calls this defense, not "Law Amendment by Government Agencies and Enforcement Officials," but "Ignorance or Mistake." *Id.*

<sup>277</sup> See H.L.A. HART, *THE CONCEPT OF LAW* 139 (1961) (noting the inaccuracy of

When the plaintiffs sought declaratory relief from the FEC, they expected not to get it. The chance of victory before their case reached the Supreme Court was small. The plaintiffs, however, have been required to fight many battles just to keep their case on the track that heads toward the Court. The FEC's strenuous efforts, not to defend its actions, but to block any review of its actions may bring to mind such classics as Charles Dickens' *Bleak House*,<sup>278</sup> Rod Serling's *The Twilight Zone*,<sup>279</sup> and Philip K. Howard's *The Death of Common Sense*.<sup>280</sup>

Skirmishes in the back alleys of federal procedure will continue in *Lieu v. FEC* for some time. If the FEC succeeds in delivering a fatal blow to the case in one of these skirmishes, it may prevent the Supreme Court from ever considering whether the D.C. Circuit's decision in *SpeechNow* is correct. Moreover, any ground that prevents the Supreme Court from considering of the validity of *SpeechNow* is likely to block the Court from reviewing or reconsidering any other final decision striking down an election law, including *Citizens United*. Even people who applaud *SpeechNow* and *Citizens United* should be troubled by constitutional law's one-way ratchet and by decisions that permanently immunize lower court decisions and five-to-four Supreme Court decisions from reconsideration.<sup>281</sup>

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reducing law to the proposition that "the score is what the scorer says it is").

<sup>278</sup> CHARLES DICKENS, *BLEAK HOUSE* (Oxford 1996) (1853).

<sup>279</sup> See Adrienne LaFrance, *How The Twilight Zone Predicted Our Paranoid Present*, THE ATLANTIC, Dec. 31, 2013, <https://www.theatlantic.com/entertainment/archive/2013/12/how-em-the-twilight-zone-em-predicted-our-paranoid-present/282700/> (describing the television series that ran from 1959 through 1964).

<sup>280</sup> PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994).

<sup>281</sup> What position the Justice Department will take when *Lieu v. FEC* reaches the court of appeals and the Supreme Court is uncertain. In *SpeechNow*, the Justice Department defended the constitutionality of the federal statute limiting contributions to super PACs, and "a major part of the duty of the Solicitor General is to defend laws passed by Congress. The Office generally takes the position that it will defend any act of Congress for which there is a plausible argument to be made that a statute is constitutional." Stephen Wermiel, *SCOTUS for Law Students: What Does the Solicitor General Do?*, SCOTUSBLOG, May 2, 2012, <http://www.scotusblog.com/2012/05/scotus-for-law-students-what-does-the-solicitor-general-do-sponsored-by-bloomberg-law/>. The Department's duty to defend a Congressional enactment whose validity the Supreme Court has never considered should trump its obligation to defend the position of a particular federal agency that has declined to enforce this enactment in reliance on a lower court decision. The Solicitor General should decline to represent the FEC and should allow this body to be represented by other counsel. He should in fact file an amicus brief in support of the plaintiffs' position.

President Trump's denunciations of super PACs and the administration's political interests also counsel support for the plaintiffs. Championing the right to give \$20 million to a super PAC would not make any administration popular, and, in view of President Trump's strong statements on the subject, it would be especially incongruous for his

## Part VI

## CONCLUSION

A reader might well ask: If the arguments presented in this paper are sound, why have twenty-four federal circuit judges in six federal courts of appeals rejected them? The premise of the question, however, is mistaken. No judge has rejected any of the arguments presented in this paper.

Many judges have disagreed with this Article's ultimate conclusions (1) that federal limits on contributions to super PACs are valid and (2) that nothing in *Citizens United* should lead to a contrary conclusion. As the *SpeechNow* bandwagon gained momentum,<sup>282</sup> however, no court focused on any of the arguments this Article has offered in support of its position. As best we can tell, these arguments simply were not advanced in any of the cases.<sup>283</sup>

*SpeechNow* took as its premise one sentence of the *Citizens United* opinion: "We now conclude that independent expenditures . . . do not give rise to corruption or the appearance of corruption."<sup>284</sup> The D.C. Circuit declared that, if independent expenditures do not corrupt, the contributions that make these expenditures possible cannot corrupt either.<sup>285</sup>

We offered two arguments about the court's premise. First, this Supreme Court statement was dictum. It was in fact double-dictum. This statement came after the Court had resolved the case before it twice, and the statement advanced neither the Court's holding nor the "extra" ground of decision it suggested.

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administration to defend this supposed right. See text at note \_\_ & note \_\_ *supra*.

<sup>282</sup> Compare *New York Progress & Protection PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) ("Few contested legal questions are answered so consistently by so many courts and judges."), and *Texans for Free Enter. v. Texas Ethics Comm'n*, 732 F.3d 535, 527 (5th Cir. 2013) ("We tread a well-worn path."), with IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOS* (1982) (noting the tendency of groupthink to supplant independent critical thinking and describing how this phenomenon contributed to policy fiascos in five presidential administrations). One naturally tends to assume that Fifty Million Frenchmen Can't Be Wrong, see <https://www.youtube.com/watch?v=u-IP0DE2kTI>, but they probably can be.

<sup>283</sup> Before *Citizens United* and *SpeechNow*, a Fourth Circuit panel concluded that North Carolina had not shown that contributions to independent expenditure committees were sufficiently corrupting to justify their limitation. *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 293-94 (4th Cir. 2008). Judge Blane Michael, however, dissented. *Id.* at 332-37 (Michael, J., dissenting). The vote in favor of striking down limits on contributions to super PACs thus has not been unanimous.

<sup>284</sup> *Citizens United*, 558 U.S. at 357.

<sup>285</sup> *SpeechNow*, 599 F.3d at 694.

Second, the Supreme Court probably did not mean this statement literally. The D.C. Circuit’s analysis depended on reading the statement to say, not just that independent expenditures are insufficiently corrupting to justify their restriction, but also that these expenditures do not corrupt even a smidgen. Other passages of *Citizens United* and the Court’s decision in *Caperton v. A. T. Massey Coal Co.*<sup>286</sup> suggest that the Court did not mean to sweep so far beyond the issues before it. Neither *SpeechNow* nor any of the decisions that followed it focused on whether this statement was holding rather than dictum, and none paused over indications that the Supreme Court might not have meant its statement literally.

We said that the *SpeechNow* syllogism itself was fallacious. Contributions to a super PAC can corrupt even when the group’s expenditures do not corrupt and in fact do the world great good. As *Buckley v. Valeo* recognized, it is the people who write the checks, not the money spenders, who typically corrupt and create the appearance of corruption.<sup>287</sup> Neither *SpeechNow* nor any of the decisions that followed it examined challenges to the supposed syllogism.

We offered two criticisms of the syllogism’s conclusion—that “contributions to groups that make only independent expenditures . . . cannot corrupt or create the appearance of corruption.”<sup>288</sup> First, this conclusion is just silly. When a legislator agrees to vote in favor of widget subsidies in exchange for a \$1 million contribution to a super PAC supporting his candidacy, the legislator is guilty of bribery. Declaring that there “is no corrupting ‘quid’ for which a candidate might exchange a corrupt ‘quo’”<sup>289</sup> does not pass the laugh test. Yet the five courts of appeals that followed *SpeechNow* maintained straight faces, apparently because they did not notice that declaring super PAC contributions non-corrupting “as a matter of law” would make openly trading these contributions for government benefits a constitutional right.

Second, the syllogism’s conclusion cannot be reconciled with *Buckley v. Valeo*, in which the Supreme Court said, “It is unnecessary to look beyond the Act’s primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the \$1000 . . . limitation [on contributions to candidates].”<sup>290</sup> Neither the D.C. Circuit nor any of the courts that embraced its decision addressed what should have been the central issue in the cases before them—whether contributions to super PACs

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<sup>286</sup> 556 U.S. 868 (2009).

<sup>287</sup> *Buckley*, 424 U.S. at 55-56.

<sup>288</sup> *SpeechNow*, 599 F.3d at 694.

<sup>289</sup> *Id.* at 694-95.

<sup>290</sup> *Buckley*, 424 U.S. at 26.



can reasonably be distinguished from the contributions to candidates whose limitation *Buckley* upheld.

Unlike *SpeechNow* or any of the decisions that echoed it, we reviewed the distinctions *Buckley* drew between contributions and expenditures. We noted initially that each of the three reasons *Buckley* offered for treating contributions to candidates as low-value speech applies fully to contributions to super PACs. Like a donation to a candidate, (1) a super PAC contribution does not convey the underlying basis for the contributor's support; (2) its transformation into debate requires speech by someone other than the contributor; and (3) limiting it does not prevent the contribution from serving as a symbolic expression of support or restrict the contributor's ability to discuss candidates and issues. *Buckley* and its progeny require treating contribution limits as "'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression."<sup>291</sup>

Moreover, one of the *Buckley* Court's two reasons for viewing contributions to candidates as less corrupting than expenditures applies equally to contributions to super PACs. Although the rules forbidding the coordination of independent expenditures with the expenditures of a candidate are thought to inhibit corrupt transactions between candidates and super PAC managers, they cannot inhibit corrupt transactions between candidates and super PAC donors. These rules do not limit what candidates and super PAC donors may say to one another.

The *Buckley* Court's remaining distinction between contributions to candidates and independent expenditures was that direct contributions may be more valuable to candidates. Similarly, candidates may value contributions to their official campaigns more than they do contributions to super PACs. A candidate, however, does not value a \$5500 dollar contribution to his campaign more than he does a \$1 million contribution to a super PAC whose mission is to support his candidacy. The Supreme Court's ruling that Congress may prohibit the \$5500 contribution because it is corrupting or creates the appearance of corruption cannot be reconciled with the D.C. Circuit's ruling that the \$1 million contribution is protected because it does not create even an appearance of corruption. *SpeechNow* and the decisions echoing it have created a perverse campaign finance regime—one in which, although donations supporting candidates are unlimited, donors must channel these donations to less responsible, more destructive, and less authoritative speakers than the candidates themselves.

The ultimate question posed by *Buckley* is whether super PAC

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<sup>291</sup> FEC v. Beaumont, 539 U.S. 146, 161 (2003).

contributions create a sufficient appearance of corruption to justify their limitation. In 2017, the appearance of corruption in America is widespread and intense. In the presidential campaign of 2016, candidates of both parties decried government by the wealthy and denounced super PACs. Condemnations of “Wall Street,” “Silicon Valley,” “Hollywood,” “the billionaire class,” “big banks,” “super PACs,” and “the one percent” now seem as common as denunciations of ISIS. Opinion polls confirm the public’s loss of faith in our democracy, and Washington insiders voice the same discouragement and mistrust as the public. The super PACs spawned by *SpeechNow* have become powerful symbols of corruption.

Because the most recent of the decisions endorsing *SpeechNow* came in 2013, the authors of these decisions could not have known the full extent of the appearance of corruption their decisions would produce. Moreover, the judges who decided *SpeechNow* in 2010 might have been unaware, not only of the social consequences of abrogating the limits on political contributions, but also of the fact that they *were* abrogating these limits and effectively gutting *Buckley*. David Keating, the president of the nonprofit association SpeechNow and the principal architect of the *SpeechNow* litigation, told an interviewer in 2015 that using an independent expenditure group to promote a particular candidate “just never entered my mind. But it’s totally obvious when you think about it.”<sup>292</sup> Attorney General Holder said that the Justice Department did not seek Supreme Court review of *SpeechNow* because this decision would “affect only a small subset of federally regulated contributions.”<sup>293</sup> The judges of the D.C. Circuit might have been no less oblivious than the parties on both sides to the beast that was about to emerge from their opinion.

*SpeechNow* in fact transformed American politics, intensified class division and mistrust, and helped to reduce faith in our democracy to a nadir. A ruling so consequential should not have been left to the D.C. Circuit or even to six courts of appeals. Seven years after *SpeechNow*, the ability of Congress to limit super PAC contributions awaits and requires the Supreme Court’s attention.

Stay tuned.

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<sup>292</sup> Alex Altman, *Meet the Man Who Invented the Super PAC*, TIME, May 13, 2015, <http://time.com/3856427/super-pac-david-keating/>.

<sup>293</sup> Letter from Attorney General Eric H. Holder, Jr. to Senate Majority Leader Harry Reid, July 10, 2010, <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/06-16-2010.pdf>.