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Turning Cash into Votes: The Law and Economics of Campaign Contributions

Brett Silverberg*

As a result of the recent Citizens United decision and its “Super PAC” spawn, individuals, corporations, and unions are allowed to independently spend unlimited amounts to influence elections. The ramifications of the Citizens United ruling have seemingly had a grave impact on the 2016 Presidential Election. In addition to examining the laws—and their loopholes—of political campaign contributions, this Essay will also explore the economics of campaign contributions. Ultimately, there are two reasons as to why corporations provide such large sums of money: one is rent creation, which is the attempt to gain political favors for “special interests;” the second is rent extraction, which is an attempt to avoid political disfavor. As the behavior of candidates continues to resemble the practices of bribery and extortion, campaign finance reform efforts are likely to become more aggressive—in an effort to curb corruption, or the appearance of corruption. Moreover, in the wake of Justice Scalia’s death, the Court may consider revisiting and overturning Citizens United. As such, this Essay will investigate potential solutions to combat the lax campaign finance laws.

* J.D./M.B.A. Candidate 2018, University of Miami School of Law; B.A., 2013, University of Michigan. The author would like to thank Professor Fred McChesney for his invaluable guidance and insight.

I. INTRODUCTION	112
II. PAY TO PLAY: THE ECONOMICS BEHIND CAMPAIGN CONTRIBUTIONS	115
A. <i>Legalized Bribery: The Concept of Rent Creation</i>	117
B. <i>Political Extortion: The Concept of Rent Extraction</i>	119
III. CURRENT CAMPAIGN CONTRIBUTION LAWS: THE BACK DOOR IS OPEN	124
IV. THE IMPLICATIONS OF THE CURRENT CAMPAIGN CONTRIBUTION LAWS	126
A. <i>Joint Fundraising: Do Candidates and Super PACs Actually Operate at Arm's Length?</i>	126
B. <i>A State of Flux: Why Have Campaign Finance Offenses Not Been Enforced?</i>	132
V. POST-SCALIA: WHERE DO WE GO FROM HERE?	134
VI. CONCLUSION.....	139

I. INTRODUCTION

[Lobbyists] are not people who are [giving money] because they like the color of [Jeb Bush's] hair . . . [Lobbyists] are highly sophisticated killers. And when they give five million dollars, or two million, or a million to Jeb, they have him just like a puppet. He'll do whatever they want. He is their puppet.¹

In the wake of the Court's decision in *Citizens United v. FEC*,² the floodgates have opened for unlimited amounts of money to be funneled into political campaigns.³ As such, there is a growing sentiment that the political candidate who raises the most money is at a competitive advantage over the field of candidates with respect to winning an election.⁴

¹ Philip Bump, *Donald Trump Says He'd Be 'Obligated' to Big Donors. But He's Raising Money from Them.*, THE WASH. POST: THE FIX (Aug. 25, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/08/25/donald-trump-says-pols-are-beholden-to-big-donors-so-why-is-he-raising-super-pac-funds/> (quoting Donald Trump).

² See generally *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876 (2010).

³ See Beth Rowen, *Super PACs Explained*, INFOPLEASE, <http://www.infoplease.com/us/government/super-pacs.html> (last visited Jan. 26, 2016).

⁴ See Wesley Lowery, *91% of the Time the Better-Financed Candidate Wins. Don't Act Surprised.*, THE WASH. POST: THE FIX (Apr. 4, 2014), <https://www.washingtonpost.com/ne>

The 2008 Presidential Election reinforced the truism that money wins elections, as President Obama amassed a nearly two-to-one monetary advantage over Senator John McCain.⁵ Indeed, conventional wisdom is that money wins elections because money allows candidates to spend on advertising, which ultimately translates to votes.⁶

Campaign spending, however, has not always been as influential in elections as conventional wisdom holds. In the pre-*Citizens United* era, candidates had to adhere to more stringent campaign finance laws and accept limited contributions from donors.⁷ From 1976 to the early 2000s, most presidential candidates relied on the public funding program to subsidize their campaigns.⁸ Through the imposition of strict spending limits, the presidential public funding program reduced the fundraising frenzy that now surrounds presidential races, enabling candidates without access to large sums of money to still run viable campaigns.⁹ As a result of *Citizens United* and the proliferation of Super PACs, however, presidential candidates have instead chosen to fund their campaigns with private contributions to avoid being subjected to the strict spending limits imposed by the presidential public funding program.¹⁰

Now six years removed from the *Citizens United* decision and in the midst of the 2016 Presidential Race, “[b]ehind-the-scenes jockeying to raise big bucks from bundlers connected to super-PACs and third-party groups is well underway.”¹¹ The cost of campaigning has risen to new heights, as fundraising experts have predicted that the total cost of the 2016 Presidential Campaign will reach \$5 billion—almost double the cost of the

ws/the-fix/wp/2014/04/04/think-money-doesnt-matter-in-elections-this-chart-says-youre-wrong/.

⁵ Jeb Bush’s 2016 presidential campaign, however, casts doubt on this truism. See Ashley Killough, *Jeb Bush’s Doomed Campaign*, CNN POLITICS, <http://www.cnn.com/2016/02/21/politics/jeb-bushs-doomed-campaign/> (last updated Feb. 22, 2016, 11:56 AM).

⁶ See Philip Bump, *Does More Campaign Money Actually Buy More Votes: An Investigation*, THE WIRE (Nov. 11, 2013, 3:45 PM), <http://www.thewire.com/politics/2013/11/does-more-campaign-money-actually-buy-more-votes-investigation/71473/> (portraying the correlation between spending differential and voter differential).

⁷ See Aliyah Frumin, *Money Has Too Much of an Influence in Politics, Americans Say*, MSNBC, <http://www.msnbc.com/msnbc/money-has-too-much-influence-politics-say-americans> (last updated June 2, 2015, 9:12 PM).

⁸ See *The Presidential Public Funding Program*, FEC (Apr. 1993), <http://www.fec.gov/info/pfund.htm>.

⁹ *Id.*

¹⁰ See Tarini Parti, *Will 2012 Be the End of the Presidential Public Financing System?*, OPENSECRETS.ORG (Aug. 5, 2011), <http://www.opensecrets.org/news/2011/08/the-end-of-presidential-public-financing/>.

¹¹ Amie Parnes & Kevin Cirilli, *The \$5 Billion Presidential Campaign?*, THE HILL (Jan. 21, 2015, 4:54 PM), <http://thehill.com/blogs/ballot-box/presidential-races/230318-the-5-billion-campaign>.

2012 Presidential Campaign.¹² Unsurprisingly, spending by outside groups has ballooned during the three federal election cycles following *Citizens United*.¹³ Given that candidates now have to compete with the messages and money spent by Super PACs, political appetites for campaign contributions are even more voracious. Using President Obama's 2012 re-election campaign as a benchmark, candidates must raise \$1.1 billion to meet the cost of a winning presidential campaign.¹⁴ Acknowledging the trend in the deregulation of campaign finance, former Senator Robert Byrd states, "[t]he incessant money chase that currently permeates every crevice of our political system is like an unending circular marathon And it is a race that sends a clear message to people that it is money, money, money—not ideas, not principles, but money—that reigns supreme in American politics."¹⁵

This begs the following question: are the current campaign contribution limits enough to prevent corporations from having a corrupting influence—through independent expenditures—on federal officeholders? Indeed, as big money continues to flow through the political process, the appearance of corruption has become a growing concern given that it both suggests a high likelihood of actual corruption, and results in the erosion of public trust in the government.¹⁶ Implicit in this notion is that politicians are neglecting the common good in favor of special interest groups. At the first 2016 Democratic presidential debate, Senator Bernie Sanders vehemently asserted that as a result of *Citizens United*, "our campaign finance system is corrupt and is undermining American democracy. Millionaires and billionaires are pouring unbelievable sums of money into the political process in order to fund super PACs and to elect candidates who represent their interests, not the interests of the working people."¹⁷ The overarching point of Senator Sanders' argument is that

¹² *Id.*

¹³ Outside groups spent over \$330 million in the presidential campaign preceding *Citizens United*. In contrast, in the first presidential election following *Citizens United*, outside groups spent over \$600 million and collected over \$800 million in contributions. See Albert W. Alschuler, *Limiting Political Contributions after McCutcheon*, *Citizens United*, and *SpeechNow* 26-28 (Univ. of Chi. Law Sch.: Pub. Law and Legal Theory Working Papers, Paper No. 485, 2014), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1945&context=public_law_and_legal_theory.

¹⁴ See Parti, *supra* note 10.

¹⁵ Major Garrett, *Money, Politics, and the First Amendment* (Cato Inst. Briefing Papers, Paper No. 30, 1997), <http://object.cato.org/sites/cato.org/files/pubs/pdf/bp030.pdf>.

¹⁶ ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 55 (2014).

¹⁷ *Full Transcript: Democratic Presidential Debate*, THE NEW YORK TIMES (Oct. 14, 2015), http://www.nytimes.com/2015/10/14/us/politics/democratic-debate-transcript.html?_r=0.

because of *Citizens United*, Wall Street now regulates Congress—as opposed to vice versa.¹⁸ Nonetheless, given the recent passing of Justice Scalia, who was part of the 5-4 majority that ruled in favor of striking down the ban on corporate independent expenditures, there is a greater likelihood that the Court will choose to revisit, and perhaps overrule, *Citizens United*.¹⁹

II. PAY TO PLAY: THE ECONOMICS BEHIND CAMPAIGN CONTRIBUTIONS

Imagine a scene out of the television drama *House of Cards*, where political candidates spend the majority of their time courting millionaires and billionaires behind closed doors—instead of allocating the time to meet with constituents—in an effort to solicit campaign contributions.²⁰ Indeed, these types of encounters between candidates and wealthy individuals seem to be commonplace, especially at the beginning of election cycles.²¹ But, what exactly is being discussed—or better yet, exchanged—behind these closed doors?

Contrary to conventional wisdom, money does not actually buy elections.²² Money does, however, buy politicians—even if the politicians do not intend to be bought.²³ The public perception is that elective offices are sold to the highest bidder, and campaign contributions are the

¹⁸ *Id.*

¹⁹ This notion will be further explored in Section V.

²⁰ See Jonathan Soros, *Soros: Big Money Can't Buy Elections – Influence is Something Else*, REUTERS: THE GREAT DEBATE (Feb. 10, 2015), <http://blogs.reuters.com/great-debate/2015/02/09/soros-there-is-no-idyllic-pre-citizens-united-era-to-return-to/> (“The quest for campaign cash suffuses political life. Candidates in competitive elections can spend more than 60 percent of their time raising money.”).

²¹ See DAVID MAGLEBY & CANDICE J. NELSON, *THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM 66* (1990) (“Early money is generally considered especially important, not only because it helps pay for necessary polling and research, staff, organizing and planning, and developing a media strategy, but because it works to establish credibility, which in turn helps to secure funding for the latter stages of the campaign.”).

²² See Bump, *supra* note 1; see also Stephen J. Dubner, *How Much Does Campaign Spending Influence the Election? A Freakonomics Quorum*, FREAKONOMICS (Jan. 17, 2012, 9:40 AM), <http://freakonomics.com/2012/01/17/how-much-does-campaign-spending-influence-the-election-a-freakonomics-quorum/> (illustrating that candidate spending has diminishing marginal returns and is an inadequate predictor of success).

²³ “A wealthy individual or entity could threaten to bankroll a large Super PAC working against an elected official up for reelection in the event that official acts inconsistently with the wealthy individual or entity’s interests. Even without an explicit threat or quid pro quo, an elected official could be influenced out of fear that the wealthy individuals or entities will bankroll her opposition.” Richard L. Hasen, *Super PAC Contributions, Corruption, and the Proxy War Over Coordination*, 9 DUKE J. CONST. L. & PUB. POL’Y 1, 9 (2014) (footnote omitted).

functional equivalent of bribes.²⁴ Correspondingly, many experts have theorized that big check donors are driven by business and ego, and they contribute to ideologically like-minded candidates who are beholden to lobbyists, donors, and special interests.²⁵ But, what exactly are these big check donors paying for? The myopic view is that private interest contributions purport to buy access and influence, which can be leveraged for political favors.²⁶ Although this view is not incorrect, it is only partially the answer.²⁷ The other part of the answer—which is frequently overlooked—is that contributions “to politicians often are made not for particular political favors, but to avoid particular political disfavor.”²⁸

Economists have arrived at the realization “that, as a strictly positive matter, government regulation ha[s] the power to create benefits that [are] unavailable other than through politics, or [are] more cheaply available through politics.”²⁹ These benefits are referred to as “rents,” a term that “economists apply to any return obtained by virtue of controlling a scarce or unique factor of production.”³⁰ Together, the rent creation and rent extraction economic models of regulatory activity, which are both based on payments to politicians in exchange for services, explain why private interests are paying, and what they are paying for.³¹ In a nutshell, both concepts are driven by political self-interest, where politicians—the “suppliers” of such rents—seek to maximize their total returns “by equating at the margin the returns from votes, contributions, bribes, power, and other sources of personal gain. All these, in turn, are positive functions not only of private benefits [politicians] confer[,] but also of private costs [they] agre[e] not to impose.”³² While the two models of regulatory activity need not be mutually exclusive, “a combined strategy of rent creation and rent extraction is not necessarily optimal to politicians.”³³

²⁴ See Jeffrey Milyo, *Campaign Finance*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS 52 (David R. Henderson ed., 2d ed. 2007).

²⁵ See Transcript of CNN Newsroom from 10:00 – 11:00 AM ET, CNN (Dec. 26, 2015), <http://transcripts.cnn.com/TRANSCRIPTS/1512/26/cnr.02.html>.

²⁶ FRED S. MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICIAN EXTORTION 2 (1997).

²⁷ See *id.*

²⁸ *Id.*

²⁹ *Id.* at 9-10.

³⁰ Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 562 (1969).

³¹ See MCCHESENEY, *supra* note 26, at 2, 53.

³² Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101, 105 (1987).

³³ *Id.* at 110.

A. Legalized Bribery: The Concept of Rent Creation

Rent creation is the orthodox economic theory of regulation.³⁴ When rent seeking is extended to rent creation, there are three seeming propositions that follow: (1) you have to “pay to play,” as politicians will not provide something for nothing; (2) parties who contribute to politicians are purchasing special treatment, which comes at the expense of those who are not paying enough; and (3) by examining the extent to which parties “pay to play,” one can identify the parties receiving special treatment.³⁵

In short, the rent creation economic model can be explained in the following manner: “[i]f expected political rents net of the costs of organizing and procuring favorable regulation are positive, then producers will demand—pay for—regulation. If payments sufficient to compensate politicians for the costs of creating regulation are forthcoming, they will supply it.”³⁶ This model takes into account that there is a market for regulation as there is for any other economic good; the market, however, is an auction market, “where various groups of potential winners and losers vie for the amounts and kinds of rent creation that government can supply.”³⁷ The rent creation model further posits the rule that regulation is acquired by the donor and is designed and operated primarily for the donor’s benefit.³⁸ The more inelastic industry demand is for the regulation, the greater the relative attraction of political rent creation.³⁹ Accordingly, “if industry supply is perfectly elastic, there is no producers’ surplus and so no opportunity for rent extraction. On the other hand, when industry demand is perfectly elastic, extraction of private rents is the only plausible political strategy.”⁴⁰

Indeed, the rent creation model presupposes that there is an exchange between the politician and the donor.⁴¹ As such, the two contracting parties discuss what benefits the politician can provide the donor, and what the costs are of obtaining those benefits.⁴² In such an exchange, the politician demands either votes or money, and in return offers a monopoly profit as consideration.⁴³ Although this arrangement appears to be a win-win for

³⁴ *Id.* at 104.

³⁵ See “Pay to Play” *Politics Examined, With Lessons for Campaign-Finance Reform*, FPO (Jan. 1. 2002), <http://www.freepatentsonline.com/article/Independent-Review/84017560.html>

³⁶ MCCHESENEY, *supra* note 26, at 9.

³⁷ MCCHESENEY, *supra* note 26, at 16.

³⁸ MCCHESENEY, *supra* note 26, at 9.

³⁹ MCCHESENEY, *supra* note 26, at 35.

⁴⁰ *Id.*

⁴¹ MCCHESENEY, *supra* note 26, at 9.

⁴² *Id.*

⁴³ See McChesney, *supra* note 32, at 104.

both sides, competition for the monopoly profit “produces additional social loss from rent-seeking.”⁴⁴ From a welfare economics standpoint, society bears the burden of the excessive regulation costs—especially when opportunity costs are considered—that flow from the demonstrated opportunistic behavior by politicians and their consumers.⁴⁵

Applying the rent creation model to the context of campaign contributions, donors are paying for access and influence, which they leverage for regulations favorable to their particular interests. Rent-seeking efforts by big check donors can range from lobbying for public subsidies in order to be given wealth that has already been created, to imposing regulations on competitors, thereby enabling the donor to command a greater market share.⁴⁶ By virtue of giving large campaign contributions to induce political action, private interests groups are essentially bribing candidates in an effort to capture the rents.⁴⁷ Absent explicit *quid pro quo* agreements, campaign contributions can still effectively function as “implicit bribes.”⁴⁸ Presumably, the larger the contribution given to the candidate, the likelier it becomes that the candidate will exercise his or her discretionary power to create and allocate rents to benefit the donor, provided that the candidate takes office.⁴⁹ Given that there is no guarantee a candidate will win an election, however, donors could potentially see no return on their investments; but such a risk is a necessary undertaking if the donors desire to “pay to play” the rent-seeking game and reap the potential rewards.⁵⁰

⁴⁴ *Id.*

⁴⁵ “The complete cost of all rent seeking activities is the summation of resources exhausted in seeking rents plus the consumer surplus that could be created if rent seeking resources were switched to productive endeavors.” See Tyler Cowen & Alexander Tabarrok, *The Opportunity Costs of Rent Seeking*, ALEX TABARROCK, <https://mason.gmu.edu/~atabarro/TheOpportunityCostsofRentSeeking.pdf> (last visited Jan. 28, 2016).

⁴⁶ See MCCHESENEY, *supra* note 26, at 14-15 (depicting the economics behind the “raising-rivals”-cost model”).

⁴⁷ See MCCHESENEY, *supra* note 26, at 22.

⁴⁸ See generally Brian F. Jordan, *Disclosing Bribes in Disguise: Campaign Contributions as Implicit Bribery and Enforcing Violations Impartially*, 17 U. PA. J. CONST. L. 1435 (2015).

⁴⁹ See Hasen, *supra* note 23, at 4 (“Some supporters of [contribution] limits worry not just about outright bribery, but also that, thanks to human nature and feelings of reciprocity, candidates who receive extremely large contributions will feel grateful to large donors and will take legislative and other steps to favor the donors.”); see also Garrick B. Pursley, *The Campaign Finance Safeguards of Federalism*, 63 EMORY L.J. 781, 820-22 (2014) (“As independent expenditures have become functionally equivalent to direct contributions, we should expect them to generate influence for donors proportional to their amounts.”).

⁵⁰ See, e.g., Emily Flitter, *Why U.S. Billionaires May Not Be Able to Buy the 2016 Election*, REUTERS (June 2, 2016, 10:06 AM), <http://www.reuters.com/article/us-usa-election-billionaires-idUSKBN0OI07120150602> (stating billionaire Sheldon Adelson contributed more than \$100 million in 2012 to unsuccessful political campaigns).

From the public's perspective, it is the economic model of rent creation that engenders concerns over the looming presence of big money in campaigns, as special interest groups continue to come away as the winners of the "pay to play" rent-seeking game.⁵¹ Concerns over the implicit relationships forged between candidates and campaign contributors coincide with the notion that the selling of access gives rise to the appearance of corruption.⁵² The Court has held, however, that spending money to "garner influence over or access to" elected officials does not create *quid pro quo* corruption.⁵³ While it is seemingly conceivable that rent creation can be treated as a source of corruption in the form of usurpation of public power for private gains, the Court remains unwilling to impose sanctions for implicit agreements involving campaign contributions—effectually incentivizing the formation of rent-creation contracts.⁵⁴ Nevertheless, as the law continues to allow agreements involving money in exchange for political favors, rent-creation contracts will continue to arouse public revulsion.⁵⁵ Given that such agreements are legal, however, Congress would have to enact legislation if it intends to deter the formation of rent-creation contracts.

B. Political Extortion: The Concept of Rent Extraction

As Professor Fred McChesney explains in *Money For Nothing: Politicians, Rent Extraction, and Political Extortion*, the rent creation model cannot stand alone, as it is part of a larger economic theory of regulation based upon rent extraction—a theory that has seldom been considered.⁵⁶ Moreover, among the inherent flaws in the rent creation model is the following: the model treats politicians as rational individuals who seek to maximize their own personal welfare, and in so doing, fails to give credence to the view that politicians attempt to maximize utility.⁵⁷ In

⁵¹ See McChesney, *supra* note 35, at 348, 351.

⁵² See *McConnell v. FEC*, 540 U.S. 93, 297-98 (2003) (Kennedy, J., concurring in judgment in part and dissenting in part).

⁵³ *McCutcheon v. FEC*, 134 S.Ct. 1434, 1450-51; 1462 (2014) (quoting *Buckley v. Valeo*, 424 U.S. 1, 26 (1976)).

⁵⁴ See Brian F. Jordan, *supra* note 48, at *passim*. This issue will be further discussed in Section IV.

⁵⁵ See MCCHESENEY, *supra* note 26, at 54 (“[T]he popular revulsion against paying politicians presupposes that payments are made for special favors, since the calls for reform constantly focus on limiting what individuals can give—not the total of what politicians can take.”).

⁵⁶ See McChesney, *supra* note 32, at 102; see also Douglas Ginsburg, *A New Economic Theory of Regulation: Rent Extraction Rather Than Rent Creation*, 97 MICH. L. REV. 1771, 1773 (1999) (reviewing FRED S. MCCHESENEY, *MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICIAN EXTORTION* (1997)).

⁵⁷ MCCHESENEY, *supra* note 26, at 17.

this sense, the rent creation model implicitly treats politicians as passive brokers, who wait for rent seekers to approach them to begin a rent-creation auction, and redistribute wealth in response to competing private demands.⁵⁸ Such a misconception, however, ignores the fact that politicians “actively see[k] votes, campaign contributions, and other forms of recompense, contracting to receive a supply of goods or services from private parties in response to [the politicians’] demands.”⁵⁹ Furthermore, the rent creation model is also deficient in two other related aspects: (1) it does not examine ways other than rent creation that a politician can obtain benefits from private parties, and (2) it fails to consider how politicians are able to gain not by creating rents for some, but rather by causing losses to others.⁶⁰

Contrary to popular belief, a politician has alternative ways to engage private parties in exchange.⁶¹ Depending on market conditions, a politician may demand votes or money in exchange for a monopoly profit, as in the rent creation economic model; however, “a politician may also make his demands on private parties, not by promising benefits, but by threatening to impose costs—a form of political extortion.”⁶² The latter strategy, which essentially amounts to political blackmail, epitomizes the economic model of rent extraction.⁶³ As long as the expected cost of the “act threatened exceeds the value of the consideration that the private parties must give up to avoid legislative action,” rational private parties will be just as willing to surrender the tribute demanded of them to avoid the imposition of costs as they would be to pay legislators to have rents created, provided that marginal utility of wealth is constant.⁶⁴ Indeed, bribery and extortion are the two forms of interactions observed in the world that enable politicians to elicit large contributions—aside from contributions tied to altruistic motives.⁶⁵ Unlike the model of rent creation, however, the model of rent extraction is able to answer the overarching question: “[h]ow does a politician gain from imposing net losses?”⁶⁶

The basic notion of rent extraction is ultimately quite simple. Given that political office confers a property right not just to create rents, but also to impose costs that would destroy private rents, politicians can legally

⁵⁸ MCCHESENEY, *supra* note 26, at 18.

⁵⁹ MCCHESENEY, *supra* note 26, at 17.

⁶⁰ MCCHESENEY, *supra* note 26, at 18-19.

⁶¹ MCCHESENEY, *supra* note 26, at 21-22.

⁶² *Id.*

⁶³ *See* MCCHESENEY, *supra* note 26, at 22-23.

⁶⁴ MCCHESENEY, *supra* note 26, at 22.

⁶⁵ *See* MCCHESENEY, *supra* note 26, at 21-23.

⁶⁶ *See* MCCHESENEY, *supra* note 26, at 19.

extract wealth from private parties.⁶⁷ Unlike the rent creation model, the rent extraction model focuses primarily on politicians, and views them as independent actors making their own demands on private parties.⁶⁸ In short, by first threatening to exercise their rights to impose burdensome restrictions on private actors “and then by forbearing from the expropriation of private rents already in existence,” politicians stand to gain by means of extortion payments.⁶⁹ In this sense, “rent extraction—receiving payments not to take or destroy private wealth—is ‘money for nothing.’”⁷⁰ As opposed to politically created rents, the private rents described in this economic model “represent returns to their owners’ entrepreneurial ability and firm-specific private investments.”⁷¹ Unlike the payments made in the rent creation model, the payments made in the rent extraction model are aimed at protecting existing rents.⁷² Indeed, a politician threatening to expropriate private wealth is paid to allow consumers to continue earning returns on capital they have already invested for themselves.⁷³ Because “[t]he passage of sharply focused taxes and regulations will reduce the returns that private capital owners receive from their skills and investments[,]” private owners are incentivized to strike bargains with politicians in order to protect their returns, provided that “the side payments to politicians are lower than the expected losses from compliance with the threatened law.”⁷⁴ This begs the question: after identifying private capital stocks whose returns will come out of producers’ surplus, how can a politician extract a share of that surplus?⁷⁵

There are ultimately two different methods of extracting private rents that politicians have at their disposal. Seemingly, the more prominent and preferred strategy of the two is to first threaten, and then forbear from expropriating private rents already created, as previously discussed. The strategy of cost forbearance, however, can assume several forms.⁷⁶ Perhaps the most blatant form is the threat of price controls aiming to deregulate a previously cartelized industry.⁷⁷ For example, the threat of implementing a price ceiling, which mandates prices below the level of the prevailing market price, could induce the targeted firms to pay for

⁶⁷ See McCHESENEY, *supra* note 26, at 41.

⁶⁸ See McCHESENEY, *supra* note 26, at 19.

⁶⁹ See *id.*

⁷⁰ See McCHESENEY, *supra* note 26, at 3.

⁷¹ McCHESENEY, *supra* note 32, at 102.

⁷² See McCHESENEY, *supra* note 26, at 35.

⁷³ See McCHESENEY, *supra* note 26, at 26.

⁷⁴ McCHESENEY, *supra* note 32, at 102.

⁷⁵ McCHESENEY, *supra* note 26, at 26.

⁷⁶ McCHESENEY, *supra* note 26, at 23.

⁷⁷ McCHESENEY, *supra* note 26, at 26-27.

regulatory forbearance.⁷⁸ In such a scenario, it behooves the firms to pay in order to prevent potential dilution of their market shares. Additionally, instead of threatening to institute an industry-wide price reduction, politicians can threaten to increase costs.⁷⁹ Regulations that threaten to impose additional costs on private firms could include any of the following measures: enacting excise taxes; placing costly reporting requirements on financial service firms; and mandating benefit payments on insurance firms.⁸⁰ Any one of these examples would presumably “elicit offers of payment from affected producers in exchange for [the politician] withdrawing the proposed [legislation].”⁸¹ Political opportunities for rent extraction abound because valuable specific capital is an inevitable by-product of a firm’s financial activities.⁸² Nevertheless, rent extraction in any context “can succeed only to the extent that threats to expropriate private rents are credible.”⁸³

Alternatively, politicians are able to extract rents not just by threatening to impose costs and subsequently forbearing, but also by actually enacting regulation to create a demand for them to mitigate the costs.⁸⁴ On the one hand, “politicians can always legislate now and sell repeal later.”⁸⁵ On the other hand, to make credible and convincing threats to reduce others’ capital, it may be necessary at times for politicians to intervene and enact legislation to extract private rents from those who fail to pay.⁸⁶ In this regard, the use of specialized agencies to impose costs could help the politician generate greater credibility.⁸⁷ In addition to providing politicians with market insights, the bureaucrats can take responsibility for threatened government intervention; despite working on behalf of the politician, the bureaucrats will be perceived by some voters as independent actors.⁸⁸ In a sense, this illusion masks the politician’s opportunistic behavior. As such, the bureaucrats can impose costs on private parties, and in so doing they create opportunities for politicians to extract concessions from affected consumers looking to buy legislative repeal.⁸⁹

⁷⁸ *Id.*

⁷⁹ See MCCHESENEY, *supra* note 26, at 29.

⁸⁰ McChesney, *supra* note 32, at 116.

⁸¹ MCCHESENEY, *supra* note 26, at 26-27.

⁸² See MCCHESENEY, *supra* note 26, at 41.

⁸³ McChesney, *supra* note 32, at 109.

⁸⁴ See MCCHESENEY, *supra* note 26, at 37.

⁸⁵ MCCHESENEY, *supra* note 26, at 39.

⁸⁶ See MCCHESENEY, *supra* note 26, at 39.

⁸⁷ *See id.*

⁸⁸ See MCCHESENEY, *supra* note 26, at 37.

⁸⁹ One such example of this arrangement is the FTC’s “Used Car Rule,” where the FTC promulgated a rule—at Congress’ request—to impose costly auto-defect disclosure

Applying the rent extraction model to the context of campaign contributions, it seems that the attitudes of candidates are more in keeping with the rent extraction model as opposed to the rent creation model. In other words, it would be preposterous to think that candidates are passive players in the rent-seeking game—a presupposition of the rent creation model.⁹⁰ Candidates' attitudes unequivocally reflect an active need to raise money and seek out campaign contributors.⁹¹ Moreover, viewed through the lens of rent extraction, candidates would seek out contributions in return for future regulatory inaction, provided that they take office. Candidates are incentivized to uphold their promises because if they fail to do so, their campaign contributors will take their money and vote elsewhere in the next election cycle. Assuming a non-incumbent candidate wins an election and takes office, however, any contributions given to the newly elected official to honor the contracts previously negotiated would yield no rents.⁹² Rather, such contributions would protect against unforeseen costs that the newly elected official could otherwise impose.⁹³

Given that rent creation is to rent extraction as bribery is to extortion, the rent creation game is certainly more desirable from the perspective of producers.⁹⁴ Needless to say, the rent extraction game is not one that is conducive to buying special treatment in the political marketplace. Private parties instead are compelled to pay to avoid wealth expropriation. Although the politician personally benefits from either creating or extracting private rents, the two strategies have strikingly different implications for private actors. "Of course, producers themselves would rather buy new rents than pay to protect their own existing rents."⁹⁵ In some markets, however, opportunities for rent creation may be slight compared to the opportunities for rent extraction.⁹⁶ Nevertheless, it is the politician who has the power to decide what game will be played: rent creation or rent extraction.

requirements. "On promulgation of the rule, used-car dealers and their trade association descended on Congress, spending large sums of money for relief from the proposed rule's costs. When the concessions were forthcoming, Congress vetoed the very rule it had ordered." McChesney, *supra* note 32, at 114.

⁹⁰ See MCCHESENEY, *supra* note 26, at 17-18.

⁹¹ See MCCHESENEY, *supra* note 26, at 47.

⁹² See MCCHESENEY, *supra* note 26, at 23.

⁹³ See *id.*

⁹⁴ See MCCHESENEY, *supra* note 26, at 31.

⁹⁵ MCCHESENEY, *supra* note 26, at 35.

⁹⁶ See MCCHESENEY, *supra* note 26, at 36.

III. CURRENT CAMPAIGN CONTRIBUTION LAWS: THE BACK DOOR IS OPEN

The intended purpose of campaign finance laws is to protect American democracy from corruption, and preserve the integrity of elections.⁹⁷ Yet, current campaign finance laws are a farce: they have the deceiving appearance of imposing strict limits, but in reality the laws are littered with loopholes and the limits are easily circumvented.⁹⁸ At the heart of the campaign finance “loophole” is the distinction drawn between campaign contributions and campaign expenditures.⁹⁹

Dating back to 1976, *Buckley v. Valeo*'s contribution-expenditure distinction has been the touchstone of the campaign finance framework.¹⁰⁰ In *Buckley*, the Court held that the First Amendment protects both political contributions and political expenditures.¹⁰¹ Moreover, the Court invalidated several sections of the 1971 Federal Election Campaign Act (FECA), as amended in 1974, that placed limits on campaign contributions to candidates, campaign expenditures, and on expenditures by individuals or organizations so long as the expenditures were not coordinated with any political candidates.¹⁰² Although the Court in *Buckley* upheld the contribution limits to prevent *quid pro quo* corruption, or its appearance, the Court struck down the limits placed on independent expenditures because such limits did not implicate the government's interest in preventing corruption.¹⁰³ The *Buckley* decision, however, led to the

⁹⁷ See Jeffrey H. Birnbaum, *For Campaign Contributions by the Wheelbarrow, the Back Door Is Open*, WASH. POST (May 20, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/19/AR2008051902172.html> (quoting Taylor Lincoln) (“Campaign finance limits are supposed to prevent the undue influence of big contributors.”).

⁹⁸ See *McCutcheon v. FEC*, 134 S.Ct. 1434, 1466 (2014) (Breyer, J., dissenting) (The majority's opinion “creates a loophole that will allow a single individual to contribute millions of dollars to a political party or to a candidate's campaign.”).

⁹⁹ See Todd Paulson & David Schultz, *Bucking Buckley: Voter Attitudes, Tobacco Money, and Campaign Contribution Corruption in Minnesota Politics*, 19 HAMLINE J. PUB. L. & POL'Y 449, 453 (1998) (Due to a lack of restrictions upon expenditures, wealthy individuals would be able to subvert contribution limits, rendering the latter meaningless).

¹⁰⁰ J. Robert Abraham, *Saving Buckley: Creating A Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078, 1078 (2010).

¹⁰¹ See *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

¹⁰² Paulson & Schultz, *supra* note 99, at 449-50.

¹⁰³ See Paulson, *supra* note 99, at 449-50.; see also Jordan May, “*Are We Corrupt Enough Yet?*” *The Ambiguous Quid Pro Quo Corruption Requirement in Campaign Finance Restrictions*, 54 WASHBURN L.J. 357, 370-71 (2015) (“*Buckley* distinguished campaign contributions from expenditures because expenditures lacked prearrangement and coordination that could give rise to a *quid pro quo* arrangement.”).

unforeseen “soft money” loophole that enabled parties and candidates to circumvent the FECA’s contribution limits.¹⁰⁴

While the 2002 Bipartisan Campaign Reform Act (BCRA) closed the “soft money” loophole, the influence of “soft money” on elections has since been displaced by the influence of Super PACs and independent expenditures on elections in the post-*Citizens United* era.¹⁰⁵ Indeed, the *Citizens United* ruling changed campaign finance law, shifting campaign finance jurisprudence in a deregulatory direction.¹⁰⁶ The decision reaffirmed the limits placed on contributions; however, the Court overturned its own precedent by holding that regulations prohibiting non-party organizations (such as for-profit corporations and unions) from making independent expenditures for electioneering communications are unconstitutional abridgements of the First Amendment right to free speech.¹⁰⁷ Consequently, the longstanding ban on direct corporate spending on campaigns has been lifted, and corporations are now free to spend as much as they want to generate influence and help elect or defeat candidates.¹⁰⁸ Given the unregulated nature of outside spending, the question that now arises in the aftermath of *Citizens United* is whether large independent expenditures generate more influence on campaigns than direct campaign contributions?

As it currently stands, the Federal Election Commission (FEC) contribution limits allow individuals to donate a maximum of \$5,400 directly to candidates—\$2,700 for the primary and \$2,700 for the general election—and up to \$33,400 per year to a national party committee’s general fund.¹⁰⁹ In addition, individuals can donate \$5,000 per year to a

¹⁰⁴ See Jeffrey P. Geiger, *Preparing for 2006: A Constitutional Argument for Closing the 527 Soft Money Loophole*, 47 WM. & MARY L. REV. 309, 319 (2005) (Political party activities, such as “sham issue advocacy,” were exempt from hard money limits, and by carving out such activities from the hard money limits, political parties created a “soft money” loophole that allowed the parties to generate large “soft money” contributions from individuals).

¹⁰⁵ See Pursley, *supra* note 49, at 815 (After the BCRA’s ban on parties’ use of soft money was upheld in *McConnell v. FEC*, many “soft money” donors shifted their contributions from the parties to outside groups unaffiliated with the parties.).

¹⁰⁶ See May, *supra* note 103, at 369 (*Citizens United* rejected the Rehnquist line of cases because they were inconsistent with the Court’s original intention in *Buckley*.); see also *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686 (D.C. Cir. 2010) (following the precedent established by *Citizens United* and holding that limits on contributions to groups that make independent expenditures are unconstitutional).

¹⁰⁷ See *Citizens United v. Fed. Election Comm’n*, 130 S.Ct. 876, 877 (2010).

¹⁰⁸ See *The Court’s Blow to Democracy*, N.Y. TIMES (Jan. 21, 2010), http://www.nytimes.com/2010/01/22/opinion/22fri1.html?_r=1&scp=31&sq=citizens%20united&st=cse.

¹⁰⁹ See FED. ELECTION COMM’N, CITIZENS GUIDE (2004), <http://www.fec.gov/pages/brochures/citizens.shtml>.

Political Action Committee (“PAC”).¹¹⁰ On the other hand, individuals, corporations, and unions can contribute unlimited sums of money to Super PACs; unlike PACs, Super PACs are not subject to contribution limits because they cannot contribute directly to candidates.¹¹¹ Accordingly, Super PACs are subject to two other limitations: (1) they cannot coordinate directly with candidates,¹¹² and (2) they must report their expenditures and contributors to the FEC.¹¹³ Despite these restrictions, there are loopholes in both the coordination and disclosure laws. As such, the coordination and disclosure laws have inadvertently created backdoor funding channels—effectually rendering the current contribution limits meaningless.¹¹⁴

IV. THE IMPLICATIONS OF THE CURRENT CAMPAIGN CONTRIBUTION LAWS

A. Joint Fundraising: Do Candidates and Super PACs Actually Operate at Arm’s Length?

In addition to the First Amendment, the Court’s basis for nullifying independent expenditure limits—allowing Super PACs to roam free—is predicated on the notion that private interest groups operate independently of the candidates they support.¹¹⁵ Because Super PACs are “independent,” the government has no anti-corruption interest in limiting their spending.¹¹⁶ This notion, however, is misguided and warrants reconsideration, given the rapid emergence of single-candidate Super

¹¹⁰ *Id.*

¹¹¹ See *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014) (discussing distinction between PACs and Super PACs).

¹¹² See 52 U.S.C. § 30116(a)(7)(B) (2012) (Any Super PAC expenditure that is coordinated with a candidate is treated as a “contribution” to that candidate rather than as a legally allowed “expenditure.”).

¹¹³ See Center for Competitive Politics, *Super PACs*, <http://www.campaignfreedom.org/external-relationships/super-pacs/> (last visited February 2, 2016).

¹¹⁴ This notion will be further explored in the next section. See, e.g., Katla McGlynn, *Jon Stewart, Stephen Colbert Expose More Super PAC Loopholes Without ‘Coordinating,’* HUFFINGTON POST (Feb. 23, 2012), http://www.huffingtonpost.com/2012/01/18/jon-stewart-stephen-colbert-expose-super-pac-loopholes_n_1212670.html [<http://perma.cc/AP3K-LV7Y>] (mocking the current coordination laws for allowing coordination between candidates and Super PACs).

¹¹⁵ See *Citizens United v. Fed. Election Comm’n*, 130 S.Ct. 876, 902 (2010) (“[T]he independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process [because] [t]he absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”).

¹¹⁶ See *id.*

PACs.¹¹⁷ Absent restrictions on independent expenditures, coordination laws¹¹⁸ serve as the only line of defense in preventing outside groups from making “disguised contributions” to candidates.¹¹⁹ Yet, the real-world application of this new spending paradigm manifests that the current coordination laws are far from ideal. Despite the coordination ban, candidates have grown increasingly dependent and entwined with Super PACs. Take the following hypothetical:

Suppose a candidate for Congress attends a fundraising event held by a Super PAC set up specifically to support (and which in practice *only* supports) that candidate. During the event, the candidate offers some brief welcoming remarks to the guests—most of whom have already contributed the maximum allowable amount of [\$5400] directly to the candidate for that election. The candidate asks that each individual attendee make a \$5000 contribution—the maximum amount that an individual would be legally permitted to contribute to a PAC governed by traditional campaign finance limits—to the Super PAC, which the candidate says he hopes ‘will be used for a good cause.’ Two minutes later, the candidate leaves to attend another event; one of the organizers of the fundraising event, acting on behalf of the Super PAC, then asks that each attendee give \$100,000 instead of \$5000, to be put to the benefit of the candidate who just left the room.¹²⁰

While some may dismiss this arrangement as preposterous, it nevertheless seems common in the world of campaign finance; such an arrangement is entirely legal given that it is a “non-coordinated” political activity.¹²¹ As long as candidates and Super PACs are not formally

¹¹⁷ “This basic notion of Super PACs as independent of candidates is becoming increasingly attenuated with the growth and development of Super PACs, especially a new form of Super PAC focused on electing a single candidate.” Note, *Working Together for an Independent Expenditure: Candidate Assistance with Super Pac Fundraising*, 128 HARV. L. REV. 1478, 1483 (2015).

¹¹⁸ “[C]ourts and commentators refer to the concomitant [coordination] rules as coordination laws.” Brent Ferguson, *Beyond Coordination: Defining Indirect Campaign Contributions for the Super Pac Era*, 42 HASTINGS CONST. L.Q. 471, 524 (2015) (quoting *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003)) (Under the coordination laws, expenditures are treated as contributions if made “in cooperation, consultation, or concert with” a candidate).

¹¹⁹ See 52 U.S.C. § 30116(a)(7)(B) (2012); McChesney, *supra* note 32.

¹²⁰ Note, *supra* note 117, at 1478.

¹²¹ Note, *supra* note 117, at 1478.

“coordinating,” they are entitled to establish cordial working relationships. Given the recent trend of collaborative fundraising, the distinction between “coordinated” and “non-coordinated” political activities is further attenuated. In addition to allowing candidates attend Super PAC fundraisers, the FEC also permits the following: single-candidate Super PACs can be run by former staffers of the candidate; Super PACs and candidates can hire the same consultants; and Super PACs can run footage of candidates in their advertisements.¹²² Moreover, the FEC allows candidates and Super PACs to publicize their campaign plans over the Internet, which ultimately enables them to share strategies with one another.¹²³ Perhaps the greatest enigma is the FEC’s recent stance on closed-door meetings between candidates and Super PACs. The FEC recently issued an advisory opinion that gave permission to candidates to meet privately with just one other wealthy donor and one Super PAC representative to discuss fundraising—further eroding the boundaries between candidates and allied Super PACs.¹²⁴ Acknowledging the increased collaboration between candidates and Super PACs, a former chairman of the FEC concedes, “Super PACs are essentially another bank account for candidates—one that, because of *Citizens United*, can accept unlimited money.”¹²⁵ Nevertheless, the increased collaboration between candidates and Super PACs is legal, and thus, Congress must pass a new law if it intends to hinder such collaboration.

As Super PACs continue to garner more influence, outspend candidates, and ultimately do the heavy lifting, campaign efforts to circumvent the coordination laws will continue to be aggressive. Such a notion is emblematic of Jeb Bush’s 2016 presidential campaign, which exploited another loophole in the coordination laws. While many candidates tend to have informal connections with Super PACs, Jeb Bush has enjoyed an even closer structural relationship with his allied Super PAC, “Right to Rise.”¹²⁶ Prior to officially announcing his 2016

¹²² Pursley, *supra* note 49, at 817-18.

¹²³ See Pursley, *supra* note 49, at 817-18.

¹²⁴ “All that is required [for this private meeting] is a written invitation, a formal program and a disclaimer that the candidate is appearing as a “special guest” who is not soliciting large checks.” Matea Gold, *Now it’s even easier for candidates and their aides to help super PACs*, WASH. POST (Dec. 24, 2015), https://www.washingtonpost.com/politics/now-its-even-easier-for-candidates-and-their-aides-to-help-super-pacs/2015/12/24/d8d1ff4a-a989-11e5-9b92-dea7cd4b1a4d_story.html.

¹²⁵ Trevor Potter, *Five myths about super PACs*, WASH. POST (Apr. 13, 2012), https://www.washingtonpost.com/opinions/five-myths-about-super-pacs/2012/04/13/gIQAGPnEFT_story.html

¹²⁶ See Aliyah Frumin, *Jeb Bush exploits major loophole in campaign finance rule*, MSNBC (May 2, 2015, 11:47 AM) <http://www.msnbc.com/msnbc/jeb-bush-exploits-huge-loophole-campaign-money-rule>.

presidential bid, Jeb Bush ostensibly worked alongside Right to Rise and spearheaded the committee's fundraising efforts, accumulating enough money to run a competitive campaign.¹²⁷ By delaying his formal announcement of candidacy for President, Jeb Bush strategically circumvented the "hard money" campaign contribution limits imposed on all presidential candidates.¹²⁸ Given that the coordination laws apply solely between Super PACs and a candidate's official campaign, Bush was legally permitted to solicit unlimited funds for his allied Super PAC because he had not yet announced his formal candidacy—even though it was clear that Bush was vying for the Republican nomination.¹²⁹ Indeed, the "candidate" label is what triggers the coordination laws from taking effect, and by pretending to "test the waters" and contemplate announcing his candidacy, Bush was able to effectually expose a loophole in the coordination laws and collude with Right to Rise.¹³⁰ Accordingly, by delaying his formal announcement, Bush gave himself more time to coordinate with Right to Rise and develop a strategy for how it will later spend money on his behalf.¹³¹ Although Bush suspended his 2016 presidential campaign, his fundraising tactics are likely to be mimicked by future candidates seeking to raise unlimited funds, which would make it even more difficult to police the coordination laws—and would be counterintuitive to the Court's determination that Super PACs operate independently of candidates.¹³²

As Jeb Bush's campaign demonstrates, Super PACs are increasingly functioning as an arm of a candidate's campaign. Candidates are now outsourcing ordinary campaign tasks to Super PACs; the outsourcing of such tasks is legal, and thus, Congress must pass new legislation if it intends to prevent the delegation of campaign tasks to Super PACs. Accordingly, Super PACs now control advertising, direct mailing, and voter registration, all of which are tasks that a candidate's campaign would frequently handle.¹³³ Viewed in this light, how are Super PACs functionally any different from traditional PACs? Indeed, there is a growing sentiment that single-candidate Super PACs now serve as the

¹²⁷ *See id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² "The whole theory behind Citizens United is large money can't corrupt because it's independent. It might not even help the candidate because it's not being done with any coordination What Jeb Bush is doing undermines that . . . Giving money to the super PAC is just about the same as giving it to him." *Id.* (quoting Professor Rick Hasen).

¹³³ *Id.*

virtual, but legally far less encumbered, alter egos of candidates.¹³⁴ This notion presupposes that committees are “organized to back a specific candidate or [are] formed at the behest of party leaders.”¹³⁵ Given that these alter ego Super PACs continue to function as extensions of candidates’ campaigns, there is a growing belief that contributions made to these candidate-specific Super PACs should be treated as “disguised contributions” to candidates.¹³⁶ As a result of the FEC’s paralysis, the only conceivable way to effectively deter coordination between candidates and their alter ego Super PACs is for Congress to take action.¹³⁷

Single-candidate Super PACs, or “alter ego” Super PACs, are not the only type of Super PACs created. Rather, as the 2012 Presidential Election demonstrated, Super PACs can be divided into two broad categories: (1) the aforementioned alter ego Super PACs, and (2) shadow party organizations.¹³⁸ The latter type of Super PAC essentially supplanted 527 organizations, which were interest groups organized under Section 527 of the Internal Revenue Code—thus granted tax-exempt status—and were run by party insiders who broadly served their respective party’s campaign agenda.¹³⁹ Like the alter ego Super PACs, shadow party Super PACs can collect unlimited contributions and engage in independent expenditures.¹⁴⁰ Whereas alter ego Super PACS serve a more prominent role in the primaries, shadow party Super PACs take center stage during the general election.¹⁴¹ Nevertheless, shadow party Super PACs provide candidates with another vehicle to circumvent campaign contribution limits. Not only are shadow party Super PACs tasked with collecting donations outside of the contribution limits imposed on candidates, but they also engage in “election activity short of express advocacy, including voter registration, get-out-the-vote efforts, and issue advocacy in support of their party.”¹⁴² Despite the fact that the shadow party Super PACs’ spending on “issue

¹³⁴ See Michael S. Kang, *The Year of the Super Pac*, 81 GEO. WASH. L. REV. 1902, 1919 (2013).

¹³⁵ *Id.* at 1919 (quoting Richard Briffault, Super PACs, 96 MINN. L. REV. 1644, 1675-77 (2012)).

¹³⁶ Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 98 (2013).

¹³⁷ One bill recently proposed in Congress “would put teeth into the ban on coordination.” Under the bill, “a super PAC’s activity would be considered ‘coordinated’ if the group were founded or managed by a candidate’s former employees or consultants or if it communicated about campaign matters with a candidate’s relatives.” *Tightening up on super PACs*, L.A. TIMES (May 10, 2015, 5:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-clinton-20150510-story.html>.

¹³⁸ See Kang, *supra* note 134, at 1919-20.

¹³⁹ See *id.*

¹⁴⁰ *Id.* at 1921.

¹⁴¹ See *id.* at 1920-21.

¹⁴² *Id.* at 1921.

advocacy” and voter mobilization directly benefits candidates, the committees’ fundraising activities continue to be perceived as non-coordinated. Moreover, given that shadow party Super PACs are entities formally distanced from a candidate, they are “able to attack the candidate’s opponent without any worries about public blowback and the Super PACs’ long-term reputation.”¹⁴³ As such, shadow party Super PACs “serve as the attack arm of negative advertising for candidates without the countervailing deterrent of reputational accountability¹⁴⁴ that holds back candidates and parties.”

In addition to the emergence of alter ego and shadow party Super PACs, *Citizens United* has also led to the emergence of 501(c) “dark money” groups.¹⁴⁵ Although these politically active nonprofit groups are distinct from Super PACs, they have provided the means to allow Super PACs to circumvent the leniently enforced disclosure requirements. Unlike alter ego and shadow party Super PACs, candidates cannot raise money on behalf of 501(c) groups.¹⁴⁶ Nevertheless, because 501(c) groups must have a “primary purpose” other than electoral activity, they are exempt from any FECA restrictions on the donations they receive; thus, they are not required to disclose their donors to the public.¹⁴⁷ Not only can these 501(c) groups accept unlimited donations and protect their donors’ identities, but also, more profoundly, they may transfer their money to ideologically affiliated Super PACs to spend—thus avoiding the “primary purpose” restriction.¹⁴⁸ In effect, this enables Super PACs to keep the names of the donors hidden from the public. By virtue of transferring funds from 501(c) “dark money” groups to Super PACs, Super PACs easily circumvent the federal disclosure requirements. This dynamic relationship between Super PACs and 501(c) groups explains why “less than half of the independent expenditures by outside groups during the 2010 election cycle were made with disclosure of the contributors’ identities.”¹⁴⁹ Moreover, the collusion between Super PACs and 501(c) groups illustrates that, in addition to the coordination laws, there is a blatant loophole in the disclosure rules as well—further reinforcing the notion that the limitations placed on Super PACs are futile. Suffice it to say, the vast influence that

¹⁴³ *Id.* at 1922.

¹⁴⁴ *Id.* The author, however, never defines “reputational accountability.”

¹⁴⁵ *See id.* at 1916.

¹⁴⁶ *See* 11 C.F.R. § 300.65(d) (2014).

¹⁴⁷ 501(c) groups “are required to disclose information to the IRS about donors who give \$5000 or more in a single year, but this information is not made public. FEC disclosure applies to 501(c) contributors only if the contributor specifically earmarks her contribution for federal electioneering communications or express advocacy.” Briffault, *supra* note 136.

¹⁴⁸ *See* Pursley, *supra* note 49, at 817-818.

¹⁴⁹ *Id.* at 818 (quoting Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 42, 49-50 (2012)).

Super PACs have on campaigns is the by-product of the deficient coordination and disclosure laws.

B. A State of Flux: Why Have Campaign Finance Offenses Not Been Enforced?

Despite the Justice Department's recent prosecution of a Virginia campaign operative for illegal coordination, there remains a paucity of cases involving campaign finance violations.¹⁵⁰ Meanwhile, Senator Bernie Sanders came away unscathed after using campaign donations to pay his wife and daughter over \$400,000 as campaign staff members.¹⁵¹ Unsurprisingly, Senator Sanders' aforementioned expenditures contravene the laws governing the permitted uses of campaign funds.¹⁵² Such expenditures are in fact overt attempts to convert contributions to personal use—which are direct violations of the law.¹⁵³ It seems commonplace nowadays for candidates to allocate campaign funds in an improper manner analogous to Senator Sanders, and despite such malfeasance, candidates continue to evade civil and criminal liability.¹⁵⁴

Correspondingly, the widespread cooperation between candidates, Super PACs, and 501(c) groups exemplifies that the parties unhesitatingly believe that they will avoid sanctions for subverting campaign contribution limits. Given the FEC's failure to hold candidates accountable, candidates seemingly have grown apathetic towards complying with contribution laws. Former Arkansas Governor Mike Huckabee kicked off his 2016 presidential bid by asking his constituents for \$1 million donations, a clear violation of the \$2,700 contribution limit imposed on presidential primary election candidates.¹⁵⁵ Election abuses have become so prevalent that the FEC chairman admits, “[t]he likelihood of the laws being enforced is slim People think the FEC is

¹⁵⁰ See generally Matt Zapotosky & Matea Gold, *Republican operative sentenced to 2 years in landmark election case*, WASH. POST (June 12, 2015), https://www.washingtonpost.com/local/crime/feds-want-nearly-4-year-sentence-for-republican-operative-convicted-of-illegal-coordination/2015/06/11/7ecbdc72-0ed0-11e5-9726-49d6fa26a8c6_story.html.

¹⁵¹ Aleister, *Exclusive: Bernie Sanders Used Campaign Donations to Pay Family Members Over \$150,000*, PROGRESSIVE TODAY (Aug. 17, 2015) <http://www.progressives.today.com/bernie-sanders-used-campaign-donations-pay-family-members-2000-2004/>.

¹⁵² See 52 U.S.C. § 30114(a) (2016).

¹⁵³ See 52 U.S.C. § 30114(b) (2016).

¹⁵⁴ MCCHESENEY, *supra* note 26, at 49 (“In the 15 years that the personal-use prohibition has been on the books, the FEC has never punished anyone for violating it.”).

¹⁵⁵ See Philip Bump, *Mike Huckabee kicks off his 2016 bid with a violation of campaign finance law*, WASH. POST (May 5, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/05/05/mike-huckabee-kicks-off-his-2016-bid-with-a-violation-of-campaign-finance-law/>.

dysfunctional. It's worse than dysfunctional."¹⁵⁶ This begs the question: given the emphasis placed on preserving the integrity of the democratic process, why has our government demonstrated such incompetency with respect to enforcing the campaign contribution laws? Viewed more narrowly, why has the government failed to detect campaign offenses that resemble bribery and extortion?

There are ultimately two reasons as to why legal authorities have only sparingly detected campaign offenses resembling bribery and extortion.¹⁵⁷ First off, legal action against bribery and extortion results in a conflict of interest and prolonged political deadlock, as "agents of one group of politicians (the executive branch) . . . prosecute another group (the legislative branch), in a prosecution to be adjudicated by a third group (the judiciary) typically appointed by the first (the executive)."¹⁵⁸ Perhaps more profoundly, however, the FEC is also frequently paralyzed by deadlock due to the Republican-Democrat partisan split among the FEC's six commissioners.¹⁵⁹ Consequently, the FEC is disinclined to pursue an enforcement action, and instead allows the exposed politician to retire without facing any consequences.¹⁶⁰

The second—and perhaps more significant—reason for the government's inaction is "the similarity between illegal bribery/extortion payments and ordinary, quite legal political contributions."¹⁶¹ This reason is what ultimately makes rent creation and rent extraction so easy to practice without fear of being held accountable.¹⁶² Under the Hobbs Act, in order to prosecute a candidate for accepting large contributions, there must be an "explicit quid pro quo" agreement with the contributors.¹⁶³ In *McCormick v. U.S.*, the Court held that federal prosecutors could convict public officials under the Hobbs Act "for acting 'under color of official right' in accepting payments that are made in return for an 'explicit promise or undertaking by the official to perform or not to perform an official act.'"¹⁶⁴ Even in full compliance with the standard set forth in *McCormick*, however, public officials could still seek bribes without violating the Hobbs Act so long as there is no explicit quid pro quo

¹⁵⁶ Eric Lichtblau, *F.E.C. Can't Curb 2016 Election Abuse, Commission Chief Says*, N.Y. TIMES (May 2, 2015), http://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html?_r=0.

¹⁵⁷ See MCCHESNEY, *supra* note 26, at 53.

¹⁵⁸ *See id.*

¹⁵⁹ *See* Lichtblau, *supra* note 156.

¹⁶⁰ *See* MCCHESNEY, *supra* note 26, at 53.

¹⁶¹ *See id.*

¹⁶² *See id.*

¹⁶³ *See* Jordan, *supra* note 48, at 1440 (the Hobbs Act regulates both bribery and extortion).

¹⁶⁴ *Id.* (quoting *McCormick v. United States*, 500 U.S. 257, 272 (1991)).

arrangement.¹⁶⁵ Indeed, courts have held that “wink and nod” relationships between candidates and donors do not constitute a violation of the public corruption statutes.¹⁶⁶ Given both the lack of any incriminating paper trail left behind as well as the lack of any remedies available to address implicit quid pro quo agreements, simple “wink and nod” relationships enable candidates to easily evade civil and criminal liability.¹⁶⁷

In the absence of an explicit agreement or promise, campaign contributions ultimately function as “implicit bribes.”¹⁶⁸ Under *McCormick*, however, federal prosecutors cannot bring charges against candidates for implicit bribery involving campaign contributions—despite the subtle practical distinction between implicit and explicit agreements.¹⁶⁹ Meanwhile, with respect to explicit agreements, the courts have been split on what exactly constitutes an “explicit” quid pro quo arrangement; therefore, the courts have struggled with interpreting “explicit” quid pro quo violations of the Hobbs Act in the context of campaign contributions.¹⁷⁰ The unsettled nature of the law in this area has consequently created a disincentive for the FEC to pursue enforcement actions against candidates.¹⁷¹

V. POST-SCALIA: WHERE DO WE GO FROM HERE?

From the false dichotomy between contributions and expenditures, to the loophole-ridden coordination and disclosure laws governing Super PACs, to the “non-candidate” status exploited by Jeb Bush’s campaign, to the FEC’s paralysis, to the lack of remedies available to deter implicit quid pro quo agreements, the campaign finance system is in need of overhaul, especially in the context of campaign contributions. All of these deficiencies effectually allow candidates to bypass the contribution limits with ease. In light of the circumvention of contribution limits and the infusion of big money into the political process, public cynicism toward the integrity of the democratic process continues to grow.¹⁷² The public

¹⁶⁵ *See id.* at 1444-45.

¹⁶⁶ *See Jordan, supra* note 48, at 1436.

¹⁶⁷ *See Jordan, supra* note 48, at 1448.

¹⁶⁸ *See id.*

¹⁶⁹ *See Jordan, supra* note 48, at 1446.

¹⁷⁰ *See Jordan, supra* note 48, at 1443.

¹⁷¹ “We’re not interested in going after people unless the law is fairly clear, and we’re not willing to take the law beyond where it’s written.” Lichtblau, *supra* note 156 (quoting FEC Commissioner Caroline Hunter).

¹⁷² Surveys have revealed staggering statistics about the public’s distrust in the government. In November 2015, only 19% of the survey participants expressed trust in the government—a historic low. *See* Samantha Smith, *6 key takeaways about how Americans view their government*, PEWRESEARCHCENTER (Nov. 23, 2015), <http://www.pewresearch>

cynicism is driven by the appearance of corruption, largely in part because the American media has perpetuated images of candidates as self-interested wrongdoers who can be bought.¹⁷³

Given the practical flaws in the campaign finance system as well as the public's growing distrust, why have previous reform efforts been so ineffective? In short, the First Amendment poses a major impediment to any reform efforts. Because contributions are treated as a form of speech, the Court will only amend the contribution laws if a sufficiently compelling governmental interest is implicated.¹⁷⁴ Thus far, only one reason has been found sufficiently important to justify amending the limits: preventing quid pro quo corruption, or its appearance.¹⁷⁵ While the concept of quid pro quo corruption seems fairly straightforward, the Court has never been precise about the meaning of the appearance of corruption.¹⁷⁶ Nevertheless, given the Court's narrow definition of "corruption," Congress may only target a specific type of corruption—quid pro quo corruption.¹⁷⁷ "[B]ecause the Government's interest in preventing the appearance of corruption is equally confined to the appearance of quid pro quo corruption, the Government may not seek to limit the appearance of mere influence or access."¹⁷⁸ The implications of the Court's narrow definition of "corruption" seem quite apparent: the First Amendment protects anything short of outright bribery, including influence and access. Moreover, in light of the fact that the Court has found only one compelling reason to justify amending the contribution limits, the question becomes: where do campaign finance reform efforts go from here?

First and foremost, the implications of Justice Scalia's death should be contemplated through the lens of campaign finance reform. In *Citizens United*, the Court's conservative majority asserted itself, striking down the limits placed on independent expenditures in a 5-4 vote.¹⁷⁹ More profoundly, the majority's strong pro-First Amendment stance reflected in the decision seems to have sparked negative unintended consequences, including the spawn of Super PACs. What was the underlying reason for the Court striking down the provision of the BCRA that limited

.org/fact-tank/2015/11/23/6-key-takeaways-about-how-americans-view-their-government/.

¹⁷³ See Jordan, *supra* note 48, at 1435.

¹⁷⁴ See James Bopp, Jr., *Constitutional Limits on Campaign Contribution Limits*, 11 REGENT U. L. REV. 235 (1999).

¹⁷⁵ See *id.*

¹⁷⁶ See POST, *supra* note 16.

¹⁷⁷ *McCutcheon v. FEC*, 134 S.Ct. 1434, 1438 (2014).

¹⁷⁸ *Id.* at 1434.

¹⁷⁹ See generally *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876 (2010).

independent expenditures? In a nutshell, the BCRA provision was not invalidated on the basis of precedent, but rather was invalidated because it was inconsistent with the Court's political and ideological proclivities. The Court in *Citizens United* overturned precedent set forth in *Austin v. Michigan Chamber of Commerce*, which allowed restrictions on corporate campaign spending.¹⁸⁰ In light of the conservative majority's lack of commitment to the doctrine of *stare decisis*, the five conservative Supreme Court justices have garnered criticism for acting disingenuously in their handling of the case.¹⁸¹

In addition to being a staunch conservative and an unrelenting defender of free speech, Justice Scalia was also the longest-serving justice on the Supreme Court and its leading conservative voice. In the wake of his death, it is now possible that the pendulum will begin to swing away from the Court's absolutist view of the First Amendment in the context of campaign finance. If Scalia is eventually replaced with a liberal justice, it seemingly becomes more likely that the Court will strike more of a balance between the competing constitutional interests at stake—free speech vs. the compelling governmental interest in curbing corruption. Perhaps a 5-4 liberal majority would view corporate money as a threat to the integrity of the electoral process.

In any event, if a liberal justice were appointed as the replacement for Justice Scalia, it seems likely that the Court would revisit and perhaps overrule *Citizens United*, provided that a case challenging the decision is brought before the Court.¹⁸² As recently set forth in *Johnson v. U.S.*, “[t]he doctrine of *stare decisis* allows [the Court] to revisit an earlier decision where experience with its application reveals that it is unworkable.”¹⁸³ Indeed, “even decisions rendered after full adversarial presentation may have to yield to the lessons of subsequent experience.”¹⁸⁴ Although the Court made a good faith effort to prevent coordination and promote transparency in its *Citizens United* ruling, the practical effect seems to be increased coordination and exponential growth in dark money—a major paradigm shift. Because of *Citizens United*, donors ostensibly use Super PACs as a vehicle to circumvent the contribution limits placed on

¹⁸⁰ See *Austin v. Mich. Chamber of Comm.*, 494 U.S. 652 (1990).

¹⁸¹ See Geoffrey R. Stone, *Citizens United and Conservative Judicial Activism*, 2012 U. ILL. L. REV. 485, 488 (2012).

¹⁸² In 2012, the U.S. Supreme Court had the opportunity to overturn *Citizens United*. After granting certiorari, the U.S. Supreme Court issued a brief, unsigned order reversing a Montana Supreme Court decision, which had upheld a state law that prohibited corporate spending in state elections. The U.S. Supreme Court ultimately adhered to principles of *stare decisis* and doubled down on *Citizens United*. See *American Tradition Partnership, Inc., et al. v. Bullock*, 567 U.S. ___ (2012).

¹⁸³ *Johnson v. United States*, 135 S.Ct. 2551, 2562 (2015).

¹⁸⁴ *Id.*

candidates. Given the decision's seemingly perverse consequences and practical unworkability, the Court may become more inclined to revisit *Citizens United*.

Assuming the Court does revisit *Citizens United*, there are two alternative approaches the Court can take, upon review, to combat the influence of dark money on elections. To preface, unless the Court changes its position and holds that the government has no anti-corruption interest in limiting campaign contributions, or alternatively the government has an anti-corruption interest in limiting independent expenditures, the First Amendment, as currently interpreted, remains an impediment to the implementation of either approach. Correspondingly, a potential criticism of the two proposed solutions is that they arguably presuppose that influence is tantamount to corruption; such criticism assumes that disproportionate political influence is not necessarily a bad thing.¹⁸⁵ Despite potential criticism, the aim of both approaches is to achieve a level playing field between candidates and Super PACs.¹⁸⁶ In an effort to achieve this objective, the proposed approaches seek to strike more of a balance between the two competing constitutional interests at stake: an individual's right to engage in political speech as opposed to the public's interest in "collective speech," which involves the government's anti-corruption interest.¹⁸⁷ To strike such a balance, the Court would seemingly have to change its position on whether the First Amendment allows a broader definition of "corruption."¹⁸⁸ Although the Court currently acknowledges "*quid pro quo* corruption" as the only true form of "corruption," it seems that the solicitation of large contributions in exchange for political favors, or to avoid political disfavor, poses the same danger of drowning out the voices of the many.¹⁸⁹ Indeed, broadening the definition of "corruption" to include influence and access

¹⁸⁵ See *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 884 (2010) ("That speakers may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy.").

¹⁸⁶ Thus far, the Court has decided that it will not suppress campaign speech based on the legislative objective to level the playing field—despite the desirability of the objective. See *McCutcheon v. FEC*, 134 S.Ct. 1434, 1450 (2014).

¹⁸⁷ See *id.* (Breyer, J., dissenting).

¹⁸⁸ See *id.* at 1466. (Breyer, J., dissenting) (arguing for a broader conception of corruption).

¹⁸⁹ See *McConnell v. FEC*, 540 U.S. 93 ("Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder.").

is not unprecedented, as demonstrated by the Court's decision in *McConnell*.¹⁹⁰

Turning to the first approach, the Court can choose to limit contributions made to Super PACs in the same manner it limits direct contributions made to candidates—a return to the pre-*Citizens United* campaign finance regime. This approach recognizes that large independent expenditures may indeed give rise to the appearance of corruption.¹⁹¹ Such a judicial interpretation assumes that contributions made to Super PACs would be subject to the intermediate scrutiny standard.¹⁹² In the interest of protecting “collective speech,”¹⁹³ this approach restricts corporate campaign spending in an effort to combat the distorting effect of independent expenditures on the political process. From a practical standpoint, bids for political favors, or to avoid political disfavors, would be constrained, and thus, there would seemingly be less money flowing through the electoral process. While “[f]avoritism and influence are not . . . avoidable in representative politics,”¹⁹⁴ candidates may be less inclined to coordinate with Super PACs given the diminished financial incentive. In essence, this approach is another form of governmental price-fixing.

Alternatively, the second approach the Court can take is to strike down the caps placed on direct contributions to candidates, ultimately abolishing contribution limits altogether. Applying the same reasoning used by the Court in *Citizens United* with respect to independent expenditures, limiting the amount an individual may give to a candidate imposes a direct restraint on his or her political speech—a view that is in accord with Justice Thomas' concurring opinion in *McCutcheon*.¹⁹⁵ This judicial interpretation assumes that contribution limits would be subject to the same strict scrutiny as other forms of speech.¹⁹⁶ At first such a proposal

¹⁹⁰ See *id.* (The governmental interest in preventing “actual or apparent corruption . . . is not limited to the elimination of *quid pro quo*, cash-for-votes exchanges, but extends also to ‘undue influence on an officeholder’s judgment, and the appearance of such influence.’”).

¹⁹¹ Thus far, the Court has been reluctant to acknowledge that large independent expenditures may give rise to the appearance of corruption. See *Buckley v. Valeo*, 424 U.S. 1.

¹⁹² Currently, contributions made to Super PACs are subject to strict scrutiny. Under the intermediate scrutiny standard, however, it becomes increasingly likely that such limits would be found constitutional. See *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014).

¹⁹³ See *McCutcheon v. FEC*, 134 S.Ct. 1434.

¹⁹⁴ *Citizens United v. Fed. Election Comm’n*, 130 S.Ct. 876, 910 (2010).

¹⁹⁵ See *McCutcheon v. FEC*, 134 S.Ct. at 1464. (Thomas, J., concurring).

¹⁹⁶ Currently, direct contributions to candidates are subject to the intermediate scrutiny test; however, if the strict scrutiny test were applied, it would become far more likely that the limits would be found unconstitutional. See *McCutcheon v. FEC*, 134 S.Ct. 1434.

may seem facetious, as it amounts to “fighting fire with fire.”¹⁹⁷ From a practical standpoint, however, the current contribution limits are simply unrealistic given the steep cost of running a competitive campaign. Moreover, lifting the contribution limits may create greater transparency and accountability because less money would be siphoned away from candidates and into dark money groups, likely resulting in a more informed electorate. Because less money would be siphoned away from candidates and into special interest groups, corporations would seemingly become less likely to wield disproportionate influence over candidates. Although the lifting of contribution caps may infuse more money into the electoral process, donations would theoretically be distributed more proportionally between candidates and special interest groups. Given that the electoral process is already flooded with money, though, would large direct contributions really appear to have a corrupting effect?¹⁹⁸ At the very least, dismantling the contribution limits placed on candidates would theoretically give those who contribute directly to candidates the same freedom as those who spend money independently, creating a system that seems no worse than the current one.

On balance, the two proposed approaches—despite disparate methodologies—theoretically could generate the same outcome: a level playing field between candidates and Super PACs. However, on the flip side, the Court may face the same quandary it faced in *Citizens United* with respect to its commitment to the doctrine of *stare decisis*. After all, both of the proposed solutions—placing contribution caps on Super PACs, or alternatively repealing the contribution caps placed on direct contributions to candidates—would require the Court to overturn its own precedent set in *Citizens United*. As such, to avoid another outright rejection of the doctrine of *stare decisis*, perhaps the Court should instead take a more pragmatic approach and defer to Congress’ lawmaking power.

VI. CONCLUSION

As it currently stands, both Congress and the Court seem inclined to defer to the FEC with respect to dealing with election abuses. Without reform, however, candidates face no credible threat of prosecution for election abuses, and thus, it seems that their behavior will continue to

¹⁹⁷ Krissy Clark, *Citizens United Part II? Supreme Court takes up direct campaign donations*, MARKETPLACE (Feb. 20, 2013, 9:34 AM), <http://www.marketplace.org/2013/02/20/economy/citizens-united-part-ii-supreme-court-takes-direct-campaign-donations> (quoting Tara Malloy).

¹⁹⁸ Indeed, the Court’s rationale for limiting direct contributions to candidates was the appearance of corruption. See *Buckley v. Valeo*, 424 U.S. at 1.

resemble the corrupt practices of bribery and extortion. In an effort to obtain positive economic profits, donors will likely comply with the candidates' demands—either to gain political favors or to avoid political disfavor, as demonstrated by the application of the rent creation and rent extraction economic models. Correspondingly, in an effort to raise enough money to run competitive campaigns, candidates will continue to become increasingly reliant on, and entwined with Super PACs—an arrangement that seemingly enables the parties to legally circumvent campaign contribution caps, essentially rendering the contribution limits meaningless. The residual effect of the Super PACs' influence on elections appears to be the further erosion of the public's trust and confidence in the political process. In light of the negative practical consequences of the *Citizens United* decision, it seems prudent for the Court to defer to Congress on the issue of how to regulate campaign contributions.