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THE MCCAIN-FEINGOLD COORDINATION RULES: THE ONGOING PROGRAM TO KEEP POLITICS UNDER CONTROL

*Robert F. Bauer**

There is a quality even meaner than outright ugliness or disorder, and this meaner quality is the dishonest mark of pretended order, achieved by ignoring or suppressing the real order that is struggling to exist and to be served.¹

I. CAMPAIGN LAW AND CITY PLANNING: COORDINATION

Campaign finance regulation is not widely classified as “urban law,” except, of course, to the extent that municipalities, like other units of government, may impose controls on political monies raised and spent to influence city elections. This latter sense is a narrow one: it does not support the application of the term “urban law.” But there are ways of thinking about cities, about the qualities of urban life and the challenges of urban planning, that illuminate, if only by analogy, the special difficulties presented by modern attempts to regulate politics. There is always occasion for a different angle of vision on the nature of those difficulties, and this Essay attempts to present one.

The particular thought about cities that provides the point of departure is that of Jane Jacobs. Jacobs sharply criticized urban planning that did not respect the special rhythms and inner structure of city life. The tradition of planning she assailed in her book, *The Death and Life of Great American Cities*, exhibited, to her mind, “great disrespect for the subject matter itself—cities.”² Of Ebenezer Howard, the English planner responsible for the concept of the Garden City, she wrote that “he hated the city and thought it an outright evil and an affront to nature.”³ It was, for him, a

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1. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 21 (1993).

2. *Id.* at 567.

3. *Id.* at 28.

“Megalopolis, Tyrannapolis, Necropolis, a monstrosity, a tyranny, a living death.”⁴ Howard proposed, in effect, to subdue the city, for he “conceived of planning also as essentially paternalistic, if not authoritarian. He was uninterested in the aspects of the City which could not be abstracted to serve his Utopia. In particular, he simply wrote off the intricate, many-faceted, cultural life of the metropolis.”⁵

Howard, and others like him, could not see cities as “lively, diverse, intense”⁶ or examples of “organized complexity”⁷ constructed from the “interrelations of . . . many factors.”⁸ Planners with his vision saw them instead as a form of corruption, an enemy of nature, inconsistent with “purity, nobility and beneficence.”⁹

This manner of thinking that reveals anxiety toward disorder and the threat of “corruption” it poses, might also bring to mind the contemporary conceptions of politics on which modern campaign finance reforms rest. Politics in its natural state is restless, untamed, and aggressive, and its way is that of ceaseless bargaining, untrammelled speech, and shifting alliances—all shaped by both high ideals and ruthless self-interest. The law of the land has progressed steadily toward a comprehensive regime of controls, a form of planning, enforced by legal sanction, and intended to introduce into the political form “purity, nobility and beneficence.”¹⁰ This consists of conceptions of “clean” politics conducted through elevated dialogue on the “merits” without the contamination of self-interested pursuits or the special advantages achieved through the possession of great wealth.¹¹

The field of political regulation affords many examples of how this vision has been pursued, but none seems as apt for the present purpose as the restrictions imposed in the most recent round of campaign finance reform known as McCain-Feingold (or in the House, Shays-Meehan).¹²

4. *Id.*

5. *Id.* at 26.

6. *Id.* at 585.

7. *Id.* at 564.

8. *Id.* at 566.

9. *Id.* at 580.

10. *Id.*

11. There is vast literature on what is wrong with politics and what could be done to right it. See, e.g., ELIZABETH DREW, *MONEY IN POLITICS* (1980); see BROOKS JACKSON, *HONEST GRAFT: BIG MONEY AND THE AMERICAN POLITICAL PROCESS* (1988); see also AMITAI ETZIONI, *CAPITOL CORRUPTION: AN ASSAULT ON AMERICAN DEMOCRACY* (1984). There is also recent case history pertaining to unhappiness with money in politics. See *McConnell v. FEC*, 540 U.S. 93 (2003).

12. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) [hereinafter BCRA].

Among its provisions, in particular, are those restricting “coordination” with candidates and political parties.¹³ The “coordination” rules are intended to enforce the limits on contributions to candidates and parties.¹⁴ Congress is concerned specifically with circumvention of those limits: the threat of circumvention is addressed by restricting political communications and also political relationships.¹⁵ More than most features of campaign finance reform, “coordination rules,” in the name of law enforcement, attack the roots of political discourse and commerce. Additionally, more than most features, they illustrate how a fundamental distrust of political life in its lush variety and “organized complexity” shapes the rules applied to politics, but not logically or clearly for the better.

II. A BRIEF HISTORY OF “COORDINATION”

A. “Expressive Coordinated Expenditures” and the Christian Coalition

The Federal Election Campaign Act of 1971 defines various limits on contributions to candidates and political committees, and certain forms of spending.¹⁶ For example, contributions from corporations and unions are banned altogether.¹⁷ The limits apply to the direct donation of cash, but also to the in-kind payment of goods and services supplied to the candidate.¹⁸ The law for some years contained a limitation in the form of an anti-coordination rule, providing generally that an “expenditure” of funds would be treated as a contribution to a candidate if made “in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate.”¹⁹ The idea was straightforward: if candidate Wilson hypothetically could not pay for 1000 brochures, but prevailed upon the Chamber of Commerce to do so, and then the Chamber financed a benefit for the candidate, it would be properly treated as a “contribution” subject to the same legal requirements as any other.

For some time, it was unclear how the coordination rules were much different in nature than the proposition that a contribution could be made

13. *See id.* § 214.

14. *See id.*

15. *See McConnell*, 540 U.S. at 350-58.

16. *See* 2 U.S.C. § 431 (2002).

17. *Id.* § 441a(a)(5).

18. *Id.* § 431(8)(A)(i).

19. *Id.* § 441a(a)(7)(A)-(B)(i).

directly or in-kind. In other words, the coordination provision of the law was a standard regulatory measure, perhaps redundant, but not, in interpretation or enforcement, very intrusive or significant.

Toward the end of the last century this changed when complaints arose over substantial spending for advertising and other public communications by large, influential membership organizations.²⁰ This was the era of “soft money,” and especially ushered in the use of these funds to finance “issue advertising” by political parties, unions, and corporations.²¹ The path to the reformed “coordination” rules started with a partisan complaint and a lawsuit.

The Christian Coalition drew the complaint, and subsequently entered into protracted conflict with the Federal Election Commission over its distribution of voter guides and “Congressional scorecards,” assigning ratings, favorable and unfavorable, to candidates with voting records on the issues important to the Coalition.²² The complainants, followed by the government, alleged that the Coalition had “coordinated” its distribution with candidates and political party committees and, hence, made illegal contributions to them.²³ This dispute came before United States District Court Judge Joyce Hens Green in the case *Christian Coalition v. FEC*.²⁴

Judge Green was concerned that the FEC have available tools to enforce the law, but also that the tools be fashioned with care. She focused particular attention on a certain type of expenditures, which she termed “expressive coordinated expenditures.”²⁵ These were, like the Coalition’s voter guides, beneficial to the candidates favorably rated in them, but also “expressively” significant to the Coalition in setting out its views on public policy. The judge defined communications of this kind as ones for which “the spender is responsible for a substantial part of the speech and for which the spender’s choice of speech has been arrived at after coordination with the [candidate’s] campaign.”²⁶

Judge Green wished to balance protection of the “expressive” elements of the communication with enforcement of the most direct forms of coordination that represent the specter of “circumvention” of the

20. See *McConnell*, 540 U.S. at 169-70.

21. See *id.* at 126-42.

22. See *Christian Coalition v. FEC*, 52 F. Supp. 2d 45 (D.D.C. 1999).

23. See *id.*

24. See *id.*

25. *Id.* The Court coined the term “expressive coordinated expenditures,” while stating that it was “loathe to add to the already arcane vocabulary of campaign finance regulation” *Id.* at 85 n.45.

26. *Id.*

contribution limits.²⁷ The judge held that this sort of “express coordinated expenditure” could only be treated as “coordinated” for legal purposes, that is, restricted under the contribution limits, if the candidate had direct control over the expenditure, or had engaged in “substantial discussion” with the spender over its contents, timing, location, intended audience, or other material factors bearing on its creation and distribution.²⁸ The discussion would have to rise, for this purpose, to a particular level, such that the candidate and spender would have achieved a meeting of the minds, acting as “partners or joint venturers.”²⁹

The FEC proceeded to incorporate Judge Green’s holding into an administrative rule. The rule tracked her decision closely, adopting the twin standards of candidate control and substantial discussion resulting in “collaboration or agreement.”³⁰ It provided further that “substantial discussion or negotiation may be evidenced by one or more meetings, conversations or conferences regarding the value or importance of the communication for a particular election.”³¹ The FEC also provided that the candidate or the spender would be liable under the rule for the actions of their “agents,” but not for answering “an inquiry regarding the candidate’s or party’s positions on legislative or public policy positions.”³²

The *Christian Coalition* decision marked a shift in the significance of the “coordination” rule. It was no longer a regulatory aid of uncertain scope and effectiveness in the enforcement of the contribution limits. It had become a more detailed mechanism for screening conversations about political matters, or contacts between political allies—for imposing order where disorder might breed “circumvention.” The rule was concerned specifically with “communication”—by its terms it established the basis for government inquiry into “discussions,” obligating the agency, upon its own initiative or upon complaint, to inquire into those details, and specifically the “substantiality” of communications between political allies.³³ One “meeting, conversation or conference” would suffice to bring those discussions within the sphere of regulation and place those involved at risk of liability.³⁴

27. *See id.*

28. *Id.* at 92.

29. *Id.*

30. 11 C.F.R. § 100.23(c)(2)(iii) (2005).

31. *Id.*

32. *Id.* § 100.23(d), (e)(3).

33. *Id.* § 100.23(c)(2)(iii).

34. *Id.*

B. McCain-Feingold and “Coordination”

With intense attention to “issue advertising,” financed with “soft money,” reform efforts in campaign finance proceeded with fresh momentum, resulting in the development and the passage of the Bipartisan Campaign Reform Act (“BCRA”).³⁵ In the course of the 1996 presidential campaign cycle, the FEC had confronted new claims that large organizations, in the labor and business communities, had “coordinated” massive expenditures, illegally, with candidates and political party committees.³⁶ Extensive investigations had failed to produce enforcement actions, motivating the sponsors of BCRA to develop among its proposed provisions new, more comprehensive anti-coordination rules.³⁷

The original proposals for strengthening the “coordination” rules drew immediate expressions of concern, from a variety of quarters, about serious impediments to political speech and association.³⁸ Concerned that these objections would endanger passage of the bill, Senator McCain supported a “reasonable compromise.”³⁹ While he stood by the position that “coordinated” activities constituted “a major circumvention of the law,” McCain agreed that Congress should direct the FEC to develop a new rule rather than prescribe one in detail.⁴⁰ As Senator Feingold stated on the floor, the approach was to “give some guidance to the FEC . . . without actually dictating the result.”⁴¹

Section 214 of BCRA provided that guidance, repealing the rule inspired by *Christian Coalition*, while directing the FEC to promulgate a new one with attention to specific factors. The law required the FEC to “address” in the new rules:

- Payments for the republication of campaign materials;
- Payments for the use of a common vendor;

35. BCRA, Pub. L. No. 107-155, 116 Stat. 81 (2002).

36. See *AFL-CIO v. FEC*, 177 F. Supp. 2d 48 (D.D.C. 2001); see also *In re Coalition*, Nat’l Republican Cong. Comm., Fed. Election Comm’n MUR 4624 (Sept. 6, 2001) (statements for the Record, Commissioner Karl J. Sandstrom), available at <http://eqs.sdrdc.com/eqsdocs/0000018C.pdf>.

37. See 147 CONG. REC. S3184 (daily ed. Mar. 30, 2001) (statement of Sen. Feingold).

38. *Id.*

39. See 147 CONG. REC. S3184 (daily ed. Mar. 30, 2001) (statement of Sen. McCain).

40. *Id.*

41. 147 CONG. REC. S3185 (daily ed. Mar. 30, 2001) (statement of Sen. Feingold).

- Payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and
- Payments for communications made by a person after substantial discussion about the communication with a candidate or political party.⁴²

Other than these factors, the law mandated that the FEC exclude from the rule any requirement of “agreement or formal collaboration to establish coordination.”⁴³ From these factors, along with the elimination of any requirement of agreement or formal collaboration, it was apparent that a major regulatory expansion of coordination restrictions was likely.

Before the FEC could develop the rule, however, it was required to defend the statute from constitutional challenge. In *McConnell v. FEC*, the Court was asked to rule specifically on the constitutional implications of excluding from any final coordination rule a requirement of agreement or formal collaboration.⁴⁴ The Court made short work of this concern, stressing that the coordination rules only restricted expenditures that failed the test of “total independence” of the candidate.⁴⁵ The Court held that those expenditures falling short of “total independence” presented a legitimate threat of circumvention of contribution limits through subtle understandings between candidates and spenders.⁴⁶

The Court also noted, somewhat disingenuously, that the coordination rules had gone without constitutional challenge for some three decades, suggesting to the justices that there was little evidence of “chilled” speech.⁴⁷ Of course, the coordination rules had changed shape, as had enforcement policies, over the course of those three decades, and at least as of the 1990s, the *Christian Coalition* and *AFL-CIO* cases suggested a mounting conflict between political activity and the “coordination” restrictions. The Court took a reassuring view of matters, rejecting a challenge premised on a likely “chilling” of political activity.⁴⁸

42. BCRA, Pub. L. No. 107-155, § 214(c)(1)-(4), 116 Stat. 81 (2002).

43. *Id.*

44. *See* 540 U.S. 93 (2003). The constitutional implications were possible freedom of speech violations. *Id.*

45. *Id.* at 221.

46. *See id.*

47. *See id.* at 222-23.

48. *See id.*

III. THE POST-BCRA FEC “COORDINATION” RULES

The Commission did as the statute commanded, and it promulgated rules “addressing” each of the factors specified in Section 214.⁴⁹ The direction taken by the FEC added to the complexity of the rules, but also to their invasiveness as applied to political communication and association. Additionally, it did so without achieving clarity or internal consistency. The agency could not be faulted, as the escalated treatment of coordination was commanded by the terms of the new law.

The rules defined “coordinated communications” in terms of a three-pronged test, which examined both the “content” of the speech and the “conduct” of the candidates, the spender, and those associated with them. An expenditure could only be coordinated if it met one or more of both the “content” and “conduct” standards.

“Content” for coordination purposes would include:

- An “electioneering communication.” A public communication that refers to a clearly identified candidate, financed by a corporation or union, or any other entity, within 30 days of a primary election or 60 days of a general election;⁵⁰
- The public dissemination, distribution or republication of a candidate’s own campaign materials;⁵¹
- A public communication that (a) refers to a political party or a clearly identified Federal candidate; (b) is publicly distributed or disseminated within 120 days of an election; *and* (c) is directed to voters where the candidate seeks election or in which the party has candidates running;⁵² or

49. See 11 C.F.R. § 109.20 (2002).

50. *Id.* § 109.21(c)(1). It should be noted that a United States District Court struck down section 109.21(c), holding that it undermined the essential purposes of the law. *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004). The Federal Election Commission appealed this ruling, however, and the appeal is pending as of this writing. See Press Release, Federal Election Commission, FEC Votes on Specifics of *Shays v. FEC* Appeal (Oct. 29, 2004), available at <http://www.fec.gov/press/press2004/20041029shays.html>; see also 11 C.F.R. § 100.26 (stating that a “public communication” includes broadcast communications, print advertising, direct mail, and phone banking (with direct mail and phone banking defined as mailed or phoned communications consisting of more than 500 identical or substantially similar messages transmitted within a thirty day period)).

51. 11 C.F.R. § 109.21(c)(2).

52. *Id.* § 109.21(c)(4)(ii)-(iii).

- A public communication that expressly advocates the election or defeat of a clearly identified candidate.⁵³

If the “content” standard is satisfied, then the question is whether the communication occurred with the involvement of the candidate or any of the candidate’s agents.⁵⁴ This is the “conduct” standard, and any of the following kinds of “conduct,” that is, involvement by the candidate or her agents, would subject a communication with the described content to a finding of “coordination.”

The “conduct standards” are structured to include whether:

- The communication is created, produced or distributed at the request, suggestion or with the assent of the beneficiary;⁵⁵
- The beneficiary is materially involved in decisions over: (a) content; (b) intended audience; (c) means or mode; (d) specific media outlets; (e) timing or frequency; or (f) size, prominence or duration;⁵⁶
- There have been one or more substantial discussions between the payor and the beneficiary where material information about plans, projects, or needs is conveyed;⁵⁷
- The payor uses a common vendor to create, produce or distribute the communications,⁵⁸ when (a) the vendor has provided certain services to the beneficiary,⁵⁹ and (b) the vendor then uses or conveys to the payor material information about the beneficiary’s plans, projects or needs, or information used

53. *Id.* § 109.21(c)(3).

54. *See id.* § 109.21(d).

55. *Id.* § 109.21(d)(1)(i)-(ii).

56. *Id.* § 109.21(d)(2)(i)-(vi).

57. *Id.* § 109.21(d)(3).

58. *Id.* § 109.21(d)(4).

59. *Id.* § 109.21(d)(4)(ii). These services include: development of media strategy; selection of audiences; polling; fundraising; developing the content of a public communication; producing a public communication; identifying voters or developing lists; selecting personnel, contractors, or subcontractors; or consulting or otherwise providing political or media advice. *Id.* § 109.21(2)(4)(ii)(A)-(I).

previously in providing services to the beneficiary;⁶⁰ or

- The person financing the communication was, or employs someone who was, an employee or independent contractor of the beneficiary during the current election cycle; and that person then uses or conveys material information about the beneficiary's plans, projects or needs, or material information used previously in providing services to the beneficiary.⁶¹

The three prongs work as follows. First, someone other than the candidate, such as a corporation, a union, or any person, must have paid for a "communication."⁶² Second, the communication must meet one of the "content" standards, such as a communication expressly advocating a candidate's election or defeat.⁶³ Third, there must be some connection between the communication having the required content and some "conduct" by the candidate and the spender, or their political allies.⁶⁴ The candidate must have requested or suggested the expenditure; been "materially involved" in its creation or distribution; or engaged in "substantial discussions" about the expenditure with some "material" effect on how it was created or distributed.⁶⁵ This connection might be direct, linking the candidate and the spender in these contacts or discussions, or might be indirectly achieved by the candidate's "agents" or even former employees of the candidate who carry this information with them to the spender.⁶⁶

The coordination rules are necessarily intricate in design and aggressive in their impact because the problem they define is notoriously difficult to solve.⁶⁷ The activities they seek to control are the very stuff of politics: negotiations and discussions, the relationships with allies and operatives, the struggle for control between politicians and interests, and the broad range of communications to the public that, while expressing only indirectly their true election influencing purpose, have that purpose at their core. Politics is not an all frontal attack, but vastly more complex in its

60. *Id.* § 109.2(d)(4)(iii).

61. *Id.* § 109.21(d)(5).

62. *Id.* § 109.21(a)(1).

63. *Id.* § 109.21(a)(2).

64. *Id.* § 109.21(a)(3).

65. *Id.* § 109.21(d)(1)-(3).

66. *Id.* § 109.21(d)(5).

67. See 147 CONG. REC. S3184 (daily ed. Mar. 30, 2001) (statement of Sen. Feingold) (remarking on the difficulty of the problem).

working and varied in the strategies adopted and tactics employed. The coordination rules have been built out to exacting specifications to identify and restrict those features of these activities considered important to “law enforcement.” In short, the coordination rules seek to impose a form of legal order on a system of creative disorder—to clear a path of sorts through the political clamor that is perceptible to all and effectively enforceable.

Rules of this kind are unsurprisingly hard to write clearly and sharply, without doing damage to the environment in which they operate. This is apparent from considering the key rules at closer quarters, with attention to how the federal agency has explained their design and function.

A. Bad Timing

Some of the content requirements followed logically enough from the purposes of the statute. One example is the content standard tied to express advocacy of a candidate’s election or defeat, and another, closely related to the original concern with enforcing limits on in-kind contributions, is the standard concerned with the “dissemination, distribution or republication of a candidate’s own campaign materials.”⁶⁸

But a fairly dramatic expansion of the law appears in the form of a “content standard” that looks to whether the communications simply “refer to a party or candidate” within 120 days of an election.⁶⁹ The FEC explained that this standard was content neutral, but still structured to sweep up coordinated activities “reasonably close to an election.”⁷⁰ It was, the agency insisted, a “bright-line test,” and it required little “characterization of the meaning or the content of the communication, or inquiry into . . . subjective effect.”⁷¹

The Commission offered an additional justification, one particularly revealing about the systematic expansion in the coordination rules. Congress had imposed in BCRA very specific restrictions on union and corporate spending for broadcast advertising that referred to candidates within thirty to sixty days of a primary or general election, respectively.⁷² This was not a coordination rule—it applied to corporate and union spending without regard to coordination of any type with a candidate. Yet the Commission, seeking to avoid “arbitrariness” and achieve

68. 11 C.F.R. § 109.21(c)(3).

69. *Id.* § 109.21(c)(4)(i)-(iii).

70. Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 430 (Jan. 3, 2003).

71. *Id.*

72. 2 U.S.C. § 434(f)(3)(A)(i)(II)(aa)-(bb) (2004).

“consistency,” introduced into the coordination rules what it termed a “parallel requirement” for coordinated communications occurring within a specific time frame, in this instance, 120 days before an election.⁷³ In other words, the law had begun to develop according to its own internal dynamic, spinning out additional restrictions in the interests of “consistency” and avoidance of “arbitrariness.”

The path cleared by the law had significantly broadened, as the government turned attention in this way to whether a communication “referred” to a candidate within a specified period before an election.⁷⁴ Defined as a “content” standard, it was constructed also with reference to factors beyond timing: to whether the ad occurred “reasonably close to an election.”⁷⁵ So it was a content standard, but it was still more, and it was justified by the argument that since the law had asserted a comparable claim against corporations and unions, it should be applied in like fashion against anyone—individuals, associations, or political committees—that coordinated expenditures within four months of an election.

The consequences of this approach became clear in an early application of this aspect of the rule. A congressional candidate in a special election wished to have President Bush appear in her advertising.⁷⁶ The FEC held that, within 120 days of the presidential primary in her state, the appearance of the President in her ad would be a coordinated expenditure—a contribution to the President, even though he was appearing in *her* ad, for *her* benefit.⁷⁷ But because the President agreed to appear with her for this purpose, and because the ad was run with the “material involvement of the President,” it was a coordinated expenditure, a contribution to him. The FEC advised him that he could avoid the problem by paying for his share of the ad.⁷⁸ The President, in short, had to pay for the right to endorse one of his party’s candidates.

B. Subtle Speech, “Material” Speech

Another novel expansion in the rule took the form of a rule governing candidate “assent” to a proposed expenditure.⁷⁹ For the coordination restriction to apply, the candidate would not need to assent in specific

73. Coordinated and Independent Expenditures, 68 Fed. Reg. at 430.

74. *See id.*

75. *Id.*

76. *See* FEC Advisory Op. 2004-1 (Jan. 29, 2004), *available at* <http://ao.nictusa.com/ao/no/040001.html>.

77. *See id.*

78. *See id.*

79. 11 C.F.R. § 109.21(d)(1)(ii) (2005).

terms: “assent” might be indicated in a number of ways. A determination of whether the candidate had “assented” to such a request or suggestion was “fact-based.”⁸⁰ It was not enough for the candidate to be informed of the plan for an expenditure and, additionally, the FEC reassured candidates that “by rejecting the suggestion, the candidate or political party committee may unilaterally avoid any coordination.”⁸¹

The Commission also included a standard in the form of “substantial discussion,” like the one adopted by Judge Green and incorporated into the Commission’s post-*Christian Coalition* rule.⁸² Closely related to it was a standard of “material involvement” in the creation, production, and distribution of the communication.⁸³ The Commission conceded some overlap between the two standards: for example, a candidate who delivered polling to a spender might not engage in substantial discussion of a proposed expenditure, but the provision of the data would constitute “material involvement” in the creation of the ad.⁸⁴

The two standards were connected in still another way, because the Commission advised the regulated community that under the new rules, “substantiality is measured by . . . materiality.”⁸⁵ But, what is “materiality”? Here, words appear to have failed the agency, for it offered a series of dictionary definitions, loosely connected and somewhat vague in the telling. Thus, the Commission noted that a candidate’s “material” involvement in an ad, or the scope of “materiality” required for there to have occurred a “substantial discussion,” turned on the “importance, degree of necessity, influence or the effect of involvement by the candidate.”⁸⁶ This did not mean, the Commission was quick to add, that coordination depended on a showing that “but for” the candidate’s discussion or involvement, the ad would not have occurred.⁸⁷ “Influence” would be enough, and of course, be adjudicated on a case by case basis.⁸⁸

The rules also followed Congress’ lead in setting aside, decisively, any requirement of agreement or formal collaboration. The rule on this point was far-reaching: coordination could occur even if there was no “mutual understanding” or “meeting of the mind” on “any aspect” of the

80. Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003).

81. *Id.*

82. 11 C.F.R. § 109.21(d)(3).

83. *Id.* § 109.21(d)(2).

84. Coordinated and Independent Expenditures, 68 Fed. Reg. at 433.

85. *Id.* at 435.

86. *Id.* at 433.

87. *Id.* at 433-34.

88. *Id.* at 433.

communication.⁸⁹

Taken together, these standards allowed for a close government inquiry into various forms of “assent,” even if not explicit, to propositions about advertising, but made clear that a “mutual understanding” or “meeting of the minds” was not required for enforcement action to proceed. The government would examine “substantiality” and “materiality,” defining one in terms of the other, and it would have to consider all the “facts” closely in doing so. Political communications and understandings in all their complexity would be subject to close inspection and the application of free-floating definitions. Here two worlds collide: the vital, sometimes chaotic, even surreptitious world of politics, and the demands of the legal “order.”

C. Problematic Relationships

Specific relationships could trigger the application of the coordination under the new rules.⁹⁰ The rules, as directed by Congress, required attention to the activities of “agents” for candidates or parties, the use of “common vendors,” and/or the information possessed and passed on by a candidate’s “former” employees or independent contractors.⁹¹ These businesses or individuals could leave a coordination finding in their wake if they conveyed to the spender, on the basis of their prior association with the candidate, information material to an expenditure, or if they even “used” such material information.⁹²

The candidate might know that this information had been conveyed or used, and the FEC, recognizing this point, made special provision for it.⁹³ In this case, coordination would result in the making of a prohibited contribution to the candidate who was formerly the employer, but it would not result in the candidate “receiving it.”⁹⁴ Liability would run only one way: the contribution would be complete for these purposes, but would somehow not reach its intended recipient, who would not be deemed to have received it, even if he or she benefited from it.⁹⁵

This concern with relationships did not appease supporters of the original legislation, including the congressional sponsors.⁹⁶ They were

89. 11 C.F.R. § 109.21(e) (2005).

90. *Id.* § 109.21(d).

91. *Id.*

92. *Id.* § 109.21(d)(5)(i)-(ii).

93. *Id.*

94. *Id.* § 109.21(b)(2).

95. *Id.*

96. Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49081-83 (July 29, 2002) (defining “agent”).

troubled that the Commission had defined the term “agent” to include only those acting with “actual authority, express or implied.”⁹⁷ Agency, they argued, could be established also on the basis of “apparent authority,” that is, a reasonable belief that someone was acting for the candidate, under her instructions, even if this was not so.⁹⁸ As noted below, a challenge to this aspect of the rules prompted a federal district court judge to return the rule to the agency for further consideration.⁹⁹ The agency responded with a revised version of the rule, stating that it would provide for liability on the basis of “apparent” authority.¹⁰⁰

No relationship could be more problematic than one for which the candidate could be responsible but did not actually know about or authorize. The new rules, entering actively into the domain of political alliances, operated not only to limit relationships, but now also, at least for legal purposes, to create them.

IV. THE AFTERMATH AND A CONCLUSION

The FEC, upon issuing its rules, was sued by the congressional sponsors for failing to effect congressional intent with sufficient rules.¹⁰¹ The United States District Court hearing the case upheld various complaints, including the rule’s delineation of only a “120 day” period prior to an election, when a broadcast or other paid public “reference” to a candidate could be treated as coordination; the agency’s decision to exclude Internet communications; and, as noted, the FEC’s definition of the term “agent.”¹⁰² The rulemaking had evidently not ended, nor had dissatisfaction about the reach or comprehensiveness of the rules.¹⁰³

In this way, the coordination rules are intended to provide order to

97. 11 C.F.R. § 300.2(b).

98. *See* Prohibited and Excessive Contributions, 67 Fed. Reg. at 49081-83; *see also* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 423-25 (Jan. 3, 2003) (defining “agent”).

99. *See* Shays v. FEC, 337 F. Supp. 2d 28, 71-72 (D.D.C. 2004).

100. *See* Definition of “Agent” for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 70 Fed. Reg. 5382 (Feb. 2, 2005).

101. *See* Shays, 337 F. Supp. 2d at 35.

102. *Id.* at 64-65, 70-72.

103. The FEC appealed five of the fifteen rules overturned by the court. One of those appealed was the “120 day” coordination rule. *See* Brief of Federal Election Commission, Shays v. FEC, 337 F. Supp. 2d 28 (D.C. Cir. 2005) (No. 04-5352). The FEC did not appeal the court’s judgment that the Internet could not be removed wholesale from the scope of “public communications” subject to the coordination restrictions. As of this writing, the Agency, amid some considerable concern in the blogosphere, has proposed new rules to regulate Internet politics. *See* Notice of Proposed Rulemaking on Internet Communications, 70 Fed. Reg. 16967 (Apr. 4, 2005).

politics—to guard against circumventions, against conversations that spill over into “substantial discussions” and “material involvements,” and against relationships that might be exploited for the covert communication of sensitive political information. Those in the disorderly and complex business of politics must watch what they say and whom they hire: they must prepare themselves for “fact-based” inquiries into whether, having actually agreed to a proposal for some spending of benefit, they might have indicated “assent.” In this world, agreement, a meeting of the minds, or mutual understanding, is immaterial. What matters is the thoroughgoing imposition of order on political life.

This preoccupation with order and control, like the order passionately pursued by Jane Jacobs’s planners, follows from a similar source. It is a distrust of politics, even a disdain for it; and a belief that if not controlled and even subdued, it will foster only corruption. The myriad understandings, bargains, associations, and forms of communication fundamental to political life represent in this view the means of effecting corruption—not something “intricate” and “many-faceted,” nor the expression of “organized complexity.”