

# ESSAY

## The Year of the Super PAC

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### ABSTRACT

*2012 was the year of the Super PAC. In the first presidential election cycle since their development, Super PACs raised almost one billion dollars and enabled the very wealthy to channel money into campaigning like never before during the post-Watergate era. However, still so early in the Super PAC's evolution, 2012 offered only a taste of what comes next. Super PACs of the future will not serve merely as voice amplifiers for candidates and parties, as they typically seemed in 2012. Super PACs, and related 501(c) entities, enable very wealthy individuals to avoid the usual coordination costs of mass politics and bypass the major parties, a capacity that they will learn to exploit for their independent ends.*

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## INTRODUCTION

The 2012 election cycle will be remembered as the year of the Super PAC. Super PACs are a category of political action committee ("PAC") that, under the extended logic of *Citizens United v. FEC*,<sup>1</sup> are exempt from contribution limits basically to the degree that they refrain from making contributions to candidates and parties and thereby limit their federal election activity to independent expenditures.<sup>2</sup> They are eligible to receive and spend unlimited sums from individuals, corporations, and unions on independent campaigning in support of and in opposition to candidates for federal office.<sup>3</sup> The 2012 election was the first presidential election cycle following *Citizens United* and the ensuing development of the Super PAC. Free from longstanding campaign finance restrictions, Super PACs, along with similarly oriented 501(c) organizations, spent more than one billion dollars on campaigning during the 2012 election cycle, with two-thirds of that money coming from just 209 individual donors and groups, each of whom gave a half million dollars or more.<sup>4</sup>

This Essay briefly assesses the impact of Super PACs so far and where they are headed from here. Although it is still early in the Super PAC's evolution, the 2012 election nonetheless suggests a few conclusions. Super PACs did not significantly shift the partisan balance of power in 2012, as both parties effectively mobilized Super PACs for the general election, but Super PACs effectuated a regressive shift of political power to the very wealthy. Super PACs enabled individual billionaires to channel their money into politics more quickly and prolifically than at any other time in the post-Watergate era. If *Citizens United* is understood to have raised concerns about the disproportionate influence of concentrated wealth rather than a specific fear of corporations, then the prolific spending by Super PACs, as well as 501(c) groups, funded overwhelmingly by a small group of billionaires, realized those concerns in 2012.

The ability of Super PACs to channel unlimited contributions for electioneering largely served and supported the major parties in the 2012 election cycle, but Super PACs should not be viewed as mere extensions of candidates and parties as they sometimes seemed in

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1 *Citizens United v. FEC*, 558 U.S. 310 (2010).

2 See generally Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644 (2012).

3 See *id.* at 1644–45.

4 See Eliza Newlin Carney, *Rules of the Game: Lessons Learned from First Post-Citizens United Presidential Race*, ROLL CALL (Oct. 31, 2012, 12:09 PM), [www.rollcall.com/news/rules\\_of\\_the\\_game\\_lessons\\_learned\\_from\\_first\\_post\\_citizens\\_united-218589-1.html](http://www.rollcall.com/news/rules_of_the_game_lessons_learned_from_first_post_citizens_united-218589-1.html).

2012. As this Essay explains, Super PACs in 2012 typically served either as the alter ego of particular candidates or as a shadow party organization in support of one major party's slate of candidates. Although Super PACs were not permitted to coordinate formally with candidates and parties, they were organized and run by insiders who managed to coordinate their strategy informally through various means. Nonetheless, this flow of money to Super PACs expressed a formal shift of power and activity from candidates and parties to outside groups that is likely to increase.

Super PACs and similar 501(c) organizations offer a powerful beachhead for wealthy individuals to influence elections very quickly and directly without the mediation of the major parties—a capacity that these individuals are likely to exploit more thoroughly as Super PACs mature. Indeed, several of the most generous benefactors of Super PACs seemed motivated by ideological commitments rather than a conventional desire to curry party favor. The Super PACs of the future will not simply be voice amplifiers for candidates and parties, nor will they be exclusively vehicles for ideological activists to pressure candidates and influence politics from outside the parties; they are almost certain to be both.

## I. *CITIZENS UNITED* AND THE SUPER PAC

*Citizens United* transformed campaign finance law. It triggered a series of events that led to the deregulation of virtually all independent expenditures. Only a few months after the decision, a new form of campaign finance organization, known as a Super PAC, developed in its doctrinal wake. Along with other outside groups, Super PACs collected unlimited contributions from almost any source for independent expenditures, with little or no disclosure in time for the 2010 midterm elections. What was stunning about this development was not just the breathtaking scope of change to campaign finance law and practice following *Citizens United*, but also how quickly that change took place.

### A. *The Road from Citizens United to the Super PAC*

*Citizens United*'s impact was unimaginable when the Court first noted probable jurisdiction in the case during the fall of 2008.<sup>5</sup> The nonprofit corporation Citizens United sought to broadcast its movie, a screed against Hillary Clinton titled *Hillary: The Movie*, on cable

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<sup>5</sup> See *Citizens United v. FEC*, 555 U.S. 1028, 1028 (2008) (noting “probable jurisdiction”).

video-on-demand.<sup>6</sup> The case at that point addressed mainly whether the video-on-demand showing by Citizens United would constitute a “broadcast, cable, or satellite communication” in violation of the prohibition on corporate-funded electioneering communications<sup>7</sup> in section 203 of the Bipartisan Campaign Reform Act (“BCRA”).<sup>8</sup> During oral argument, however, several Justices appeared alarmed by the government’s concession that corporate-funded books could conceivably be prohibited by BCRA.<sup>9</sup> The Court ordered reargument and supplemental briefing on the broader question of whether federal prohibitions on corporate electioneering were unconstitutional.<sup>10</sup> After a second oral argument on this question, the Court overruled decades of precedent on restrictions of corporate electioneering, striking down section 203 of BCRA.<sup>11</sup>

The Court’s decision in *Citizens United* provoked public outcry, but the irony was that the public misinterpreted its far-reaching significance.<sup>12</sup> The public outcry focused on the Court’s striking down of longstanding restrictions on corporate electioneering that had been federal law for at least half a century.<sup>13</sup> However, under recent Roberts Court decisions in campaign finance law, corporations already were permitted to engage in slightly less explicit campaign advocacy in the form of so-called “sham issue advocacy.” As Nate Persily observed, “before *Citizens United*, a corporation or union could sponsor ads with its treasury funds that said ‘Tell Congressman Smith to stop destroying America.’ After *Citizens United*, they can add at the end ‘and, by the way, don’t vote for him.’”<sup>14</sup> People could tell the difference between the more and less explicit versions of the same advertisement, studies showed, but they absorbed the same lesson about how they should vote either way.<sup>15</sup> As a result, the decision’s effect on

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6 See *Citizens United v. FEC*, 530 F. Supp. 2d 274, 275 (D.D.C. 2008).

7 2 U.S.C. § 441b(b)(2) (2006); *Citizens United*, 530 F. Supp. 2d at 277 & n.6.

8 Bipartisan Campaign Reform Act (“BCRA”) of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C.); *Citizens United*, 530 F. Supp. 2d at 276–77 & n.6.

9 See Bradley A. Smith, *The Myth of Campaign Finance Reform*, NAT’L AFF., Winter 2010, at 75, 75–76 (describing this exchange during oral argument).

10 See *id.* at 76; *Citizens United v. FEC*, 129 S. Ct. 2893, 2893 (2009).

11 See *Citizens United v. FEC*, 558 U.S. 310, 365–66 (2010).

12 See Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 14 (2012) (summarizing public reaction to *Citizens United*).

13 *Id.*

14 Nathaniel Persily, *The Floodgates Were Already Open*, SLATE (Jan. 25, 2010, 2:30 PM), <http://www.slate.com/id/2242558>.

15 See CRAIG B. HOLMAN & LUKE P. McLoughlin, BRENNAN CTR. FOR JUSTICE, *BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS* 16 (2001), available at [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_10664.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_10664.pdf).

corporate electioneering was less practically important than the public assumed.

The larger significance of *Citizens United* is its narrowing of the lone government interest in campaign finance regulation. In reaching its holding on corporate electioneering, the Court offered broad reasoning that extended to all independent expenditures, not just those financed by corporations. The Court stated flatly in reaching its decision about corporate expenditures that *any* independent expenditure “do[es] not give rise to corruption or the appearance of corruption.”<sup>16</sup> The Court explained that “[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.”<sup>17</sup> Only such coordination, or an outright contribution, produces the type of exchange between candidate and donor that gives rise to a risk of quid pro quo corruption.<sup>18</sup> And the Court explained further that only the risk of quid pro quo corruption, or the appearance thereof, permits the government to regulate campaign finance activity under the First Amendment.<sup>19</sup> As a result, although *Citizens United* focused on the regulability of corporate expenditures in particular, the decision sent a very clear signal that the Court did not believe that independent expenditures from any source, corporate or noncorporate, give rise to a sufficient corruption risk to justify their regulation by the government.

This signal about the constitutional permissibility of regulating independent expenditures as a general matter led to the legal development of Super PACs. The decision in *Citizens United* was issued on January 21, 2010,<sup>20</sup> and only days later, the D.C. Circuit heard arguments in *SpeechNow.org v. FEC* (“*SpeechNow*”).<sup>21</sup> In its decision in *SpeechNow* just a couple of months later, the D.C. Circuit mentioned or cited *Citizens United* twenty-eight times in less than ten pages while striking down contribution limits as applied to a political committee that engaged exclusively in independent expenditures.<sup>22</sup> The D.C. Circuit recounted the greater scope of constitutionally permissible regulation of campaign finance prior to *Citizens United* before noting

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

<sup>17</sup> *Id.* at 360.

<sup>18</sup> *See id.* at 358–59.

<sup>19</sup> *See id.*

<sup>20</sup> *Id.* at 310.

<sup>21</sup> *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

<sup>22</sup> *See id. passim.*

simply that the “*Citizens United* Court retracted this view of the government’s interest.”<sup>23</sup>

If there was no government interest in the restriction of independent expenditures as a matter of law, then there was similarly no government interest in limiting contributions to a committee that makes only such independent expenditures.<sup>24</sup> The D.C. Circuit reversed the district court’s dismissal of *SpeechNow*’s constitutional claims, which reflected a pre-*Citizens United* understanding of campaign finance law, and concluded that “[g]iven this analysis from *Citizens United*, we must conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group such as *SpeechNow*.”<sup>25</sup> The D.C. Circuit explained simply: “Because of the Supreme Court’s recent decision in *Citizens United v. Federal Election Commission*, the analysis is straightforward.”<sup>26</sup>

*SpeechNow* spawned the Super PAC. By the summer of 2010, the Federal Election Commission (“FEC”) had codified the decision in advisory opinions that cleared the way for independent expenditure-only political committees that were exempt from federal contribution limits—quickly dubbed “Super PACs.”<sup>27</sup> These Super PACs were organized and operational well in time for the November 2010 elections.<sup>28</sup> In less than a year of operation, more than seventy Super PACs raised and spent more than \$80 million during the fall midterm elections.<sup>29</sup> American Crossroads, a political organization created by Karl Rove, raised approximately \$32 million in a matter of a few months.<sup>30</sup>

The reasoning of *SpeechNow* extended beyond Super PACs to certain 501(c) organizations as well.<sup>31</sup> In particular, 501(c)(4) social welfare organizations that refrain from contributions to candidates also could accept unlimited contributions, just like Super PACs, and

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<sup>23</sup> *Id.* at 694.

<sup>24</sup> *See id.* at 692–95.

<sup>25</sup> *Id.* at 695.

<sup>26</sup> *Id.* at 692–93.

<sup>27</sup> *See, e.g.*, FEC Advisory Op. No. 2010-08 (2010).

<sup>28</sup> *See* T.W. Farnam, *72 Super PACs Spent \$83.7 Million on Election*, WASH. POST, Dec. 4, 2010, at A3.

<sup>29</sup> *See id.*

<sup>30</sup> *See* Dan Eggen & T.W. Farnam, *‘Super PACs’ Alter Campaign*, WASH. POST, Sept. 28, 2010, at A1.

<sup>31</sup> *See* Richard Briffault, *Nonprofits and Disclosure in the Wake of Citizens United*, 10 ELECTION L.J. 337, 348 (2011) (observing that this reasoning “seems generally applicable to all politically active organizations”).

similarly surged in political usefulness alongside Super PACs.<sup>32</sup> Indeed, many Super PACs, such as American Crossroads, claim a 501(c)(4) cousin that presents similar fundraising capacity with a slightly different profile.<sup>33</sup> These 501(c)(4) organizations, unlike Super PACs, claim that they do not have a “major purpose” of influencing federal elections and therefore refuse to register as political committees with the FEC.<sup>34</sup> As a result, these 501(c)(4) groups generally limit their disclosure of contributors under federal campaign finance law even when they make substantial expenditures in federal campaigns.<sup>35</sup> Any consideration of *Citizens United* and *SpeechNow*’s effects on outside group spending thus must include not only the more highly publicized Super PACs, but also spending by these specific 501(c)(4) groups.

### B. A Counternarrative

A counternarrative about *Citizens United* has since emerged that contends the decision did not play an important role in the development of Super PACs. The counternarrative posits that Super PACs were an inevitable extension of the basic logic of *Buckley v. Valeo*,<sup>36</sup> not an innovation of *Citizens United*.<sup>37</sup> As a result, Super PACs would have emerged similarly through the natural progression of campaign finance law even if *Citizens United* had not been decided as it had (perhaps limited to a narrow ruling about video-on-demand advertising under BCRA).<sup>38</sup> Super PACs, in other words, were an inevitable evolution of campaign finance law given the bedrock premises of *Buckley*.

The development of Super PACs, however, was less inevitable than the counternarrative assumes. As an initial matter, it was not at

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<sup>32</sup> See Cory G. Kalanick, Note, *Blowing Up the Pipes: The Use of (c)(4) to Dismantle Campaign Finance Reform*, 95 MINN. L. REV. 2254, 2263–66 (2011).

<sup>33</sup> See Richard Briffault, *Two Challenges for Campaign Finance Disclosure After Citizens United and Doe v. Reed*, 19 WM. & MARY BILL RTS. J. 983, 1007–08 (2011).

<sup>34</sup> See *id.* (explaining the application of the major purpose test to politically active 501(c) organizations).

<sup>35</sup> See *id.*

<sup>36</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>37</sup> See, e.g., Floyd Abrams, *Citizens United and Its Critics*, 120 YALE L.J. ONLINE 77 (2010), <http://yalelawjournal.org/images/pdfs/902.pdf>.

<sup>38</sup> See *id.* at 80–82; George F. Will, ‘Kingmakers’ Without a King, WASH. POST, Mar. 1, 2012, at A19; Wendy Kaminer, *The Truth About Citizens United and Outside Campaign Cash*, ATLANTIC (May 21, 2012, 4:13 PM), <http://www.theatlantic.com/politics/archive/2012/05/the-truth-about-citizens-united-and-outside-campaign-cash/257439/>; Richard Pildes, *How Consequential Is Citizens United?*, ELECTION L. BLOG (Nov. 9, 2011, 6:24 AM), <http://electionlawblog.org/?p=25207>.

all obvious that *Buckley* necessarily dictated the constitutional permissibility of Super PACs as a simple matter of doctrinal logic. Contribution limits were applied largely without controversy to such independent expenditure-only committees during a quarter century of campaign finance law and practice since *Buckley* itself.<sup>39</sup> Although the Court had not squarely decided the question, it also was not a matter of great uncertainty until recently.<sup>40</sup> If anything during this period, the Court had expanded the grounds for government regulation under the constitutional interest in the prevention of corruption.<sup>41</sup> The Rehnquist Court had consistently extended the corruption interest beyond *Buckley* to uphold a wide range of campaign finance regulations, including the prohibitions on corporate electioneering later struck down in *Citizens United*.<sup>42</sup>

By 2010, this preregulation tide had dramatically reversed under the Roberts Court.<sup>43</sup> Of course, what changed in *Citizens United* was not the culmination of an inescapable chain of campaign finance logic, but rather a turnover in Court personnel.<sup>44</sup> The replacement of Chief Justice Rehnquist and Justice O'Connor with Chief Justice Roberts and Justice Alito shifted the Court toward a narrower interpretation of the government's interest in the prevention of corruption and thus a far less deferential position on campaign finance regulation.<sup>45</sup>

This shift is evident in the ascendance of Justice Kennedy's approach to campaign finance law. In *McConnell v. FEC*,<sup>46</sup> Justice Kennedy strongly dissented from a five-Justice majority of the Rehnquist Court that upheld the BCRA restrictions on corporate and union soft money.<sup>47</sup> Justice Kennedy protested the Court's willingness to "establish [a] standard defining corruption [that] is broader than conduct

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<sup>39</sup> See, e.g., *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) (explaining that even an independent expenditure-only entity, such as the Massachusetts Citizens for Life corporation, is subject to regulation as a political committee if its major purpose is influencing elections); Conciliation Agreement, Swift Boat Veterans and POWs for Truth, MURs 5511 & 5525, at 1 (FEC Dec. 11, 2006); Conciliation Agreement, Freedom, Inc., MUR 5492, at 14 (FEC Oct. 31, 2006).

<sup>40</sup> See, e.g., Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 68 (2004) (discussing Rehnquist Court deference to the government in campaign finance cases).

<sup>41</sup> See *id.*

<sup>42</sup> See, e.g., *id.*

<sup>43</sup> See Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243, 248–54 (2010) (describing this shift and its consequences across the range of campaign finance law).

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*

<sup>46</sup> *McConnell v. FEC*, 540 U.S. 93 (2003).

<sup>47</sup> *Id.* at 286 (Kennedy, J., dissenting).



that presents a quid pro quo danger” under *Buckley*.<sup>48</sup> He argued that “the corruption interest only justifies regulating candidates’ and officeholders’ receipt of what we can call the ‘quids’ in the quid pro quo formulation.”<sup>49</sup> As a consequence, Justice Kennedy reasoned that the corruption interest permits the government to restrict only such direct exchanges in the form of contributions, but not money spent independently on campaign speech.<sup>50</sup> This dissenting view later triumphed as the majority position on the Roberts Court.<sup>51</sup> In *Citizens United*, Justice Kennedy wrote for the Court, again concluding that corporate money spent on independent campaign speech—this time in the form of independent expenditures—“do[es] not give rise to corruption or the appearance of corruption” and therefore could not be constitutionally prohibited.<sup>52</sup>

The ascendancy of this view, on which Super PACs were premised, was not an inevitability by operation of legal logic. The logical fidelity of Justice Kennedy’s position to *Buckley* did not change between *McConnell* and *Citizens United*; the Court’s political composition did.<sup>53</sup> Previous Courts refused invitations to adopt such sweeping conclusions about the impermissibility of regulating independent expenditures, the basic foundational logic of *Buckley* notwithstanding. Previous Courts, while never addressing the question squarely,<sup>54</sup> also displayed a greater willingness to permit the regulation of independent expenditures and suggested little inclination to distinguish independent expenditure—only committees from others. For example, in *California Medical Association v. FEC*,<sup>55</sup> the Court rejected an overbreadth challenge to the federal contribution limit on political committees without distinguishing between committees that make contributions and those that make only independent expenditures.<sup>56</sup> For this reason, the FEC enforced the contribution limit against politi-

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48 *Id.* at 293.

49 *Id.* at 292.

50 *See id.* at 294.

51 *See Kang, supra* note 43, at 248–54.

52 *Citizens United v. FEC*, 558 U.S. 310, 357 (2010).

53 None of this is meant to challenge *Citizens United*’s legitimacy as improperly political—only as an observation that the Court’s shift on campaign finance has been an obvious extension of its changing personnel, just as one would expect regardless of ideological direction.

54 *See N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 292 (4th Cir. 2008) (noting that “the [Supreme] Court ha[d] never held that it is constitutional to apply contribution limits to political committees that make solely independent expenditures”).

55 *Cal. Med. Ass’n v. FEC*, 453 U.S. 182 (1981).

56 *Id.* at 197.

cal committees without drawing such distinctions for decades without significant challenge.

*Citizens United* was important in the development of Super PACs as the unequivocal signal of the Roberts Court's particular trajectory in campaign finance law and its break from the Rehnquist Court. Not only were *SpeechNow* and the rise of Super PACs not logically inevitable in the abstract, before *Citizens United* there was at least some uncertainty about how the Roberts Court might see the corruption potential of independent expenditures. Only a year before *Citizens United*, Justice Kennedy himself wrote for the Court in *Caperton v. A.T. Massey Coal Co.*<sup>57</sup> that roughly \$3 million of independent expenditures in support of a state supreme court justice's election raised a sufficient prospect of actual bias to require recusal of the justice in a case involving the campaign supporter.<sup>58</sup> It was possible, then, that the Roberts Court could view independent expenditures as raising a constitutional concern about the subsequent biasing of an elected official who benefitted from them, at least under certain circumstances.<sup>59</sup>

The recent decision in *Caperton* notwithstanding, *Citizens United* made absolutely clear how the Roberts Court would view any related campaign finance issues such as those presented in *SpeechNow*. *Citizens United* therefore made *SpeechNow* an easy case with only one possible outcome. As the D.C. Circuit put it: "Whatever the merits of [arguments supporting contribution limits for independent expenditure-only committees] before *Citizens United*, they plainly have no merit after *Citizens United*."<sup>60</sup> Perhaps the D.C. Circuit might have struck down those contribution limits as applied in *SpeechNow* even in the absence of *Citizens United*, but the full development of Super PACs would have been far slower and less dramatic.

Indeed, the world of campaign finance was not transformed in the least when another federal circuit, even before *Citizens United* and *SpeechNow*, ruled that state contribution limits as applied to independent expenditure committees were unconstitutional. In *North Carolina Right to Life, Inc. v. Leake*,<sup>61</sup> the Fourth Circuit based its ruling on the premise that "independent expenditures are made without candidate consultation, rendering it unlikely that such expenditures would

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<sup>57</sup> *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

<sup>58</sup> *Id.* at 882–87.

<sup>59</sup> See James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, 66 N.Y.U. ANN. SURV. AM. L. 727, 761 (2011).

<sup>60</sup> *SpeechNow.org v. FEC*, 599 F.3d 686, 694 (D.C. Cir. 2010).

<sup>61</sup> *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008).

be made in exchange for ‘improper commitments from the candidate.’”<sup>62</sup> Not only was this decision quite limited in terms of the actual impact on campaign finance practice, the Fourth Circuit decision was more qualified than the D.C. Circuit’s decision in *SpeechNow*. The Fourth Circuit felt obligated to leave open the opportunity for the government to apply contribution limits to independent expenditure committees if it can “produce convincing evidence of corruption before upholding contribution limits as applied to such organizations.”<sup>63</sup> In other words, the Fourth Circuit’s decision was based on a factual finding as applied to the statute and surrounding circumstances, rather than a blanket ruling that such an application of contribution limits was unconstitutional as a matter of law. After *Citizens United*, none of this measurement was necessary or appropriate given how clearly the Roberts Court defined the narrow scope of regulation for independent expenditures.

*Citizens United* so utterly removed room for argument about Super PACs that the FEC, seemingly stalemated on all other major questions of campaign finance law, promptly issued administrative guidance on Super PACs within months of the *SpeechNow* decision.<sup>64</sup> The pace at which this process occurred allowed Super PACs to organize and operate in full force in time for the 2010 midterm elections. It is important to note how the staggeringly rapid development of Super PACs in 2010 locked in the practices that carried over permanently to the 2012 cycle. A slower, more gradual road to Super PACs might have been dotted with interim decisions from the FEC and various courts, likely in different directions, which would have complicated the development of Super PACs and created much greater cause for caution among campaign finance lawyers. The quicker pace of events was made possible only by the clarity of the Court’s position in *Citizens United*, which leapfrogged any real possibility of a less sweeping reestablishment of equilibrium of campaign finance law.

Instead of a gradual evolution of the campaign finance system over the course of several years, with a new system of regulation and carve-outs developing over time, *Citizens United* sparked a nearly immediate transformation of the system that deregulated independent expenditures over a course of a few months. Not only did the law shift abruptly in a deregulatory direction, but the culture of campaign finance law and practice was transformed in the process. As Mark

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<sup>62</sup> *Id.* at 292 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)).

<sup>63</sup> *Id.* at 293.

<sup>64</sup> See FEC Advisory Op. No. 2010-09 (2010).

Schmitt put it, “*Citizens United* seems to have led to a huge shift in cultural norms and assumptions on the part of donors and money brokers. . . . There’s a sense now that you might as well try anything.”<sup>65</sup>

*Citizens United* so clearly signaled the Court’s willingness to oversee a total deregulation of independent expenditures that not only did the FEC quickly accede, but campaign finance players aggressively took advantage of what they reasonably understood as a clear resolution of otherwise murky questions of campaign finance law in a deregulatory direction.<sup>66</sup> Fred Wertheimer protested along these lines that “[t]he campaigns know the FEC isn’t going to enforce the law, and so they’ve decided to do whatever they want.”<sup>67</sup> Campaign finance law is a domain where the precedent of established practice on both sides carries substantial weight, particularly when the background law is so complex, nuanced, and contested. Once a full field of Super PACs operated through a full election cycle in 2010, with very little tailored restriction, it was then nearly impossible for the FEC to pull apart these established practices, put a stop to them, and impose firm restrictions on a full range of active practices. The Super PAC horse had long ago left the barn.

An assessment of *Citizens United*’s importance in the development of Super PACs therefore should account not only for any causal connection between that decision and *SpeechNow*, but also the speed of legal change that flowed from such a loud and clear declaration of an overarching position on campaign finance law from the United States Supreme Court. In other words, even if the D.C. Circuit had reached the same decision in *SpeechNow* in the absence of *Citizens United*, it is still difficult to imagine quite the same sudden transformation of campaign finance law in 2010 following from that decision. *Citizens United* was an important element in the Super PAC narrative, both in the fact of the Super PAC’s contingent development under the Roberts Court and, just as importantly, the stunning pace with which the sequence of events took place following the decision.

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<sup>65</sup> Mark Schmitt, *Note to the Last Citizens United Denier: It Really Did Change Money in Politics*, NEXT NEW DEAL (July 19, 2012), <http://www.nextnewdeal.net/note-last-citizens-united-denier-it-really-did-change-money-politics>.

<sup>66</sup> See Mike McIntire & Michael Luo, *Fine Line Between ‘Super PACs’ and Campaigns*, N.Y. TIMES, Feb. 26, 2012, at A1.

<sup>67</sup> *Id.*

## II. TOMORROW'S SUPER PAC

The 2012 elections permanently established Super PACs as a central feature of national politics and campaign finance. Super PACs spent more than \$600 million in the 2012 federal election cycle, more than twice what political parties spent, and accounted for almost half of total federal campaign spending in 2012.<sup>68</sup> Activists from both major parties helped organize and operate Super PACs in 2012 and are positioned to operate through them for the foreseeable future.<sup>69</sup> Although Super PACs did not provide a decisive partisan edge in 2012, they nonetheless embody a dramatic increase in the prominence and influence of the very wealthy in national politics that expresses exactly the public concern over *Citizens United* in only slightly different (noncorporate) form.

Super PACs operated mainly in loyal support of candidate and party campaigning at the national level in 2012, but the Super PACs of the future will likely evolve to include stronger ideological agents that work outside of and at odds with the major parties. Super PACs were funded by wealthy donors whose generosity was motivated, at least among an important subset in 2012, by intense ideological commitments as much as any desire for party favor. Given that Super PACs must remain formally independent of candidates and parties, it is inevitable that these donors, with the 2012 experience now under their belt, will exercise greater independence over how their many millions are spent and even pressure candidates of both parties along ideological, rather than strictly partisan, lines. The Super PACs of the future will therefore not only supplement candidate and party efforts, as they mainly did in 2012, but more ideologically independent Super PACs are likely to challenge candidates and parties more aggressively from outside the party structure as well.

### A. *The Super PAC in 2012*

Although Super PACs are a relatively new campaign finance entity, they are, in an important sense, simply an updated replacement for the nonconnected 527 organization in past elections. Richard Briffault described 2004 as the “year of the 527 organization” in the world of campaign finance,<sup>70</sup> much in the same spirit that 2012 was the year

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<sup>68</sup> *Outside Spending*, OPENSECRETS.ORG, [http://www.opensecrets.org/outsidespending/fes\\_summ.php](http://www.opensecrets.org/outsidespending/fes_summ.php) (last visited Aug. 20, 2013).

<sup>69</sup> See McIntire & Luo, *supra* note 66.

<sup>70</sup> Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 949 (2005).

of the Super PAC.<sup>71</sup> Before *Citizens United* and *SpeechNow*, nonconnected 527 organizations were the most prominent form of outside group spending on campaigning and raised many of the same normative questions as Super PACs today.<sup>72</sup>

The difference is that Super PACs are a supercharged version of the former 527.<sup>73</sup> The latter-day 527 organization could receive unlimited soft money from individuals without violating federal campaign finance law if it refrained from contributions, expenditures, and coordination, thus restricting its election activities mainly to issue advocacy.<sup>74</sup> If the 527 organization engaged in express advocacy, contribution limits would apply, and the organization and its contributors ran the risk of violating federal law. The Super PAC, as the post-*SpeechNow* replacement for the 527 organization, is completely free of these legal restrictions.<sup>75</sup> It likewise can receive unlimited contributions, not only from individuals but from corporations and unions as well, but unlike the previous generation of 527 organizations, it may engage freely in express advocacy.<sup>76</sup>

What is more, the modern Super PAC benefits from the post-*Citizens United* culture shift among the donor class regarding campaign spending. *Citizens United* was controversial less for its technical ruling on substantive law than for the obvious signal it sent about the propriety of government limitation on the application of wealth to political influence.<sup>77</sup> As such, it not only outraged the political left, it also encouraged the political right to engage in aggressive campaign spending in the face of what had seemed until then to be fairly

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<sup>71</sup> See, e.g., Peter Fenn, Op-Ed., *Corporations Gone Wild in the Year of the Super PAC*, U.S. NEWS (July 26, 2012), <http://www.usnews.com/opinion/blogs/Peter-Fenn/2012/07/26/corporations-gone-wild-in-the-year-of-the-super-pac>.

<sup>72</sup> See Briffault, *supra* note 70, at 962.

<sup>73</sup> See Husna Haq, *Election 101: Five Basics About 'Super PACs' and 2012 Campaign Money*, CHRISTIAN SCI. MONITOR (Oct. 7, 2011), <http://www.csmonitor.com/USA/Elections/2011/1007/Election-101-Five-basics-about-super-PACs-and-2012-campaign-money/What-is-a-super-PAC-and-how-is-it-different-from-an-ordinary-PAC> (describing Super PACs as "PACs on steroids").

<sup>74</sup> See Briffault, *supra* note 70, at 962.

<sup>75</sup> See Michael E. Toner, Karen E. Trainer & Julie Missimore, *What Is a Super PAC?*, WILEY REIN LLP ELECTION L. NEWS (Sept. 2011), <http://www.wileyrein.com/publications.cfm?sp=articles&newsletter=8&id=7458> (explaining that Super PACs "effectively replac[e] so-called 527 organizations, because Super PACs allow for the acceptance of unlimited individual and corporate contributions while permitting express advocacy in communications").

<sup>76</sup> *Id.*

<sup>77</sup> See Matt Bai, *How did Political Money Get This Loud?*, N.Y. TIMES MAG., July 22, 2012, at 14 (describing the lifting of a "cloud of uncertainty" around campaign spending and the resulting psychological shift).

straightforward legal liability.<sup>78</sup> This cultural shift meant enthusiastic contributions to Super PACs, but also a surge of nonpublic donations to certain 501(c)(4) organizations that were likewise exempted from contribution limits but tested the outer bounds of regulatory compliance by refusing basic disclosure of contributors.<sup>79</sup>

Between Super PAC and 501(c)(4) electioneering, the new world of campaign finance after *Citizens United* has shifted action from candidates and parties to outside groups. Independent expenditures by outside groups and individuals other than parties and candidates exploded in 2010 after *Citizens United* and *SpeechNow* to more than \$200 million, roughly a third more than in 2008.<sup>80</sup> Total spending on electioneering by outside groups was roughly the same in 2010 as in 2008, despite the fact that 2008 was a presidential election year.<sup>81</sup> Compared to the previous midterm election, outside spending jumped from roughly \$70 million in 2006 to more than \$300 million in 2010.<sup>82</sup> The 2012 election featured another dramatic rise in outside spending. With two years to prepare for the 2012 election, Super PACs and other outside groups increased their total spending from just over \$300 million in 2010 to more than \$1 billion in 2012.<sup>83</sup> Republican-leaning American Crossroads and its associated 501(c)(4) American Crossroads GPS spent \$175 million in independent expenditures, while Restore Our Future spent almost \$150 million by itself, and Democratic-leaning Super PAC Priorities USA Action spent \$65 million.<sup>84</sup>

Despite this explosion of outside money, it does not appear that there has been, at least so far, any net partisan advantage from Super PAC and 501(c)(4) spending. Immediate postelection analysis suggested that the outside spending largely cancelled out between the major parties in 2012.<sup>85</sup> Although the Republican side owned a Super PAC advantage in 2010, the Democratic side ramped up its outside

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<sup>78</sup> *Id.*

<sup>79</sup> *See id.*

<sup>80</sup> *See Total Outside Spending by Election Cycle, Excluding Party Committees*, OPEN-SECRETS.ORG, [http://www.opensecrets.org/outsidespending/cycle\\_tots.php](http://www.opensecrets.org/outsidespending/cycle_tots.php) (last visited Aug. 20, 2013).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *See id.*

<sup>84</sup> *See 2012 Outside Spending, by Group*, OPEN-SECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=A> (last visited Aug. 20, 2013).

<sup>85</sup> *See* Nicholas Confessore, 'Super PACs' Are Finally Drawing Democrats in, N.Y. TIMES, Sept. 27, 2012, at A1; Dan Eggen & T.W. Farnam, Money Down the Drain: Spending a Lot, with Little Effect, WASH. POST, Nov. 8, 2012, at A1; Super PAC Money Fails to Buy Victories, S.F.

spending to counter Republican efforts in 2012 and minimized any decisive partisan advantage, particularly at the national level.<sup>86</sup> None of this suggests that Super PAC money is unimportant—only that neither side should have a decisive advantage when both sides organize effectively, as is usually the case at the national level. Indeed, going forward, candidates and parties might well assume the necessity of a Super PAC component in every national race just to compete, let alone gain an edge, in the ongoing arms race of campaign finance.<sup>87</sup>

Instead, the normative concern about Super PACs is less about partisan imbalance than about simple distributional politics between the very rich and everyone else. Campaign finance reform is motivated primarily by just such a distributional worry about economic inequality translating into political inequality.<sup>88</sup> The removal of campaign finance reform and the introduction of Super PACs exacerbate these worries for those concerned about the influence of money in democratic politics. The legal capacity of Super PACs to receive uncapped contributions enhanced the capacity of very wealthy individuals to exercise influence in electoral politics and even finance presidential campaigns almost by themselves. Along these lines, Super PACs supporting Newt Gingrich and Rick Santorum, funded overwhelmingly by billionaires Sheldon Adelson and Foster Friess, respectively, spent seven- and eight-figure sums during the Republican presidential primaries and singlehandedly elongated the primary campaign by months.<sup>89</sup> Those Super PACs kept Gingrich and Santorum in the race well beyond where their financial support otherwise would have permitted, but were eventually outspent by other Super PACs

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CHRON. (Nov. 8, 2012, 11:04 PM), <http://www.sfgate.com/default/article/Super-PAC-money-fails-to-buy-victories-4022196.php>.

<sup>86</sup> See Confessore, *supra* note 85; Danny Yadron, Patrick O'Connor & Alexandra Berzon, *Super PACs' Impact Appears Limited*, WALL STREET J., Nov. 8, 2012, at A4. Continuing this Democratic ramp up into 2013, Democratic Super PACs actually outraised Republican ones by two to one halfway through the year. See Fredreka Schouten & Christopher Schnaars, *Democratic Super PACs Out-raise GOP: In Stark Reversal of 2012, Tally is \$32 Million vs. \$14 Million*, USA TODAY, Aug. 2, 2013, at A4.

<sup>87</sup> See Yadron et al., *supra* note 86 (explaining expert and donor opinion that “the future is secure for super PACs”).

<sup>88</sup> See David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370 (1994) (“The true targets of campaign reform, therefore, are inequality and certain potential problems of interest group politics that are endemic to representative government.”).

<sup>89</sup> Dan Eggen & T.W. Farnam, *The Men Behind the GOP's Millions*, WASH. POST, Feb. 21, 2012, at A1.



supporting Mitt Romney and funded by millions in contributions from billionaire Harold C. Simmons.<sup>90</sup>

Indeed, a surprisingly small group of very wealthy individuals accounted for a very large proportion of all funding for the major Super PACs. Just over one hundred people donated roughly forty percent of all money contributed to Super PACs.<sup>91</sup> Adelson and his family together donated more than \$90 million to Super PACs during the 2012 election cycle.<sup>92</sup> The Adelsons gave more than \$20 million to the pro-Gingrich Super PAC Winning Our Future during the presidential primary, and after Gingrich dropped out, gave another \$30 million to Super PACs supporting Romney in the general election against President Obama.<sup>93</sup> Harold C. Simmons and his company Contran Corporation together contributed more than \$25 million to Republican-related Super PACs during the 2012 election cycle.<sup>94</sup> According to the Center for Public Integrity, Simmons and the Adelsons were two of the top six Super PAC donors who collectively accounted for more than \$180 million in contributions to Super PACs for the 2012 election cycle.<sup>95</sup>

Of course, billionaires always had the right under *Buckley* to spend unlimited amounts in their *own* independent expenditures in support of favored candidates.<sup>96</sup> However, they typically did not—at least, not as generously as they did in funding outside spending in 2012.<sup>97</sup> Before *Citizens United*, a combination of cultural proscriptions and the transaction costs of undertaking one's own advocacy, as opposed to funding a separate organization oriented to the task, deterred the very wealthy from leveraging their private resources into campaigning to the degree that Super PACs and 501(c)(4) groups make easy today.<sup>98</sup> This further exaggeration of wealth's dispropor-

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<sup>90</sup> *Id.*; see also Joe Garofoli, *Failed Gingrich Bid Shows Clout of Super PACs*, S.F. CHRON., May 3, 2012, at A1.

<sup>91</sup> Thomas Fitzgerald, *Winning While Losing*, PHILA. INQUIRER, Dec. 9, 2012, at 8.

<sup>92</sup> Fredreka Schouten, *Casino CEO Put Millions into Effort to Oust Dems*, USA TODAY, Dec. 7, 2012, at 7A.

<sup>93</sup> See *id.*; Matea Gold, *Miriam Adelson Gets \$5 Million Back from Pro-Gingrich 'Super PAC'*, L.A. TIMES (June 21, 2012), <http://articles.latimes.com/2012/jun/21/news/la-pn-miriam-adelson-gets-5-million-back-from-progingrich-super-pac-20120621>.

<sup>94</sup> Ryan Murphy, *One More Look at Super PACs in Texas*, TEX. TRIB. (Nov. 21, 2012), <https://www.texastribune.org/library/data/one-more-look-super-pacs/>.

<sup>95</sup> See *Super Donors*, CENTER FOR PUB. INTEGRITY, <http://www.publicintegrity.org/politics/consider-source/super-donors> (last visited Aug. 20, 2013).

<sup>96</sup> See *Buckley v. Valeo*, 424 U.S. 1, 59 n.67 (1976).

<sup>97</sup> See Briffault, *supra* note 2, at 1644–45.

<sup>98</sup> See *id.* at 1674.

tionate influence in electoral politics is the basic outcome that concerned many critics of *Citizens United*, only that it occurred through Super PACs and 501(c)(4) organizations rather than direct corporate expenditures.<sup>99</sup>

### B. *The Future of the Super PAC and Political Decentralization*

The fact that Super PAC spending did not appear to yield a partisan edge between Republicans and Democrats at the national level in 2012 does not signal that Super PACs are likely to be less prominent or important in the future. The 2012 elections were the first full-blown trial of Super PACs, and allies of the major parties seemed to cancel out their outside spending efforts.<sup>100</sup> However, Super PACs provide such opportunity for channeling money into advocacy that they will be a permanent feature of campaigns not only at the national level, but will also eventually reach the state and local level, where the opportunities have not yet been fully explored. Super PAC innovation is still at an early stage.

Super PACs in 2012 could be divided very crudely into two categories.<sup>101</sup> The first category has been described by Richard Briffault as the “candidate-specific Super PAC,” which is “organized to back a specific candidate or [is] formed at the behest of party leaders.”<sup>102</sup> Candidate-specific Super PACs, or “alter ego” Super PACs, figured most prominently during the Republican primaries where they provided additional opportunities for wealthy donors to continue supporting a particular candidate even after contributing the maximum permissible amounts directly to that candidate.<sup>103</sup> Unencumbered by contribution limits, these alter ego Super PACs served as unlimited outlets for wealthy donors to pour additional millions dedicated specifically to express advocacy for their candidate, contributing well beyond what was legally permissible before the advent of Super PACs.

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<sup>99</sup> See Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y REV. 217, 223–24 (2010) (identifying a concern about the political leverage of extreme wealth as the cause of outrage against *Citizens United*, rather than a specific concern about corporations).

<sup>100</sup> See Confessore, *supra* note 85; Neil King, Jr., *Super PAC Influence Falls Short of Aims*, WALL ST. J., Sept. 24, 2012, at A1; Yadron, et al., *supra* note 87.

<sup>101</sup> See Dave Nyczepir, *Where Super PACs Will Really Thrive*, CAMPAIGNS & ELECTIONS (Nov. 14, 2012), <http://www.campaignsandelections.com/campaign-insider/342757/where-super-pacs-will-really-thrive.html> (referring to Robert Lenhard's prediction that Super PACs will divide into these two categories).

<sup>102</sup> See Briffault, *supra* note 2, at 1675–77.

<sup>103</sup> See *id.* at 1675–78.

In the 2012 election, these alter ego Super PACs, as Briffault details, were set up by close allies of particular candidates as an informal Super PAC wing to the candidate's formal campaign apparatus.<sup>104</sup> These Super PACs integrated their messaging and media strategy to the extent that they fell just short of formal coordination but could still serve effectively as "force-multipliers for candidates, helping them get their message out to voters."<sup>105</sup> Indeed, such alter ego Super PACs were so effective at collecting and spending money in focused advocacy for their candidates at the national level, both in the Republican presidential primaries and the general election, that an alter ego Super PAC will be a campaign prerequisite for any competitive presidential candidate going forward.<sup>106</sup> Just as important is that such alter ego Super PACs were similarly effective in 2012 for Senate candidates.<sup>107</sup> In the future, Super PACs will likely spread quickly beyond the national level to congressional, state, and local races as well,<sup>108</sup> and even beyond election campaigning to legislative lobbying.<sup>109</sup>

A second broad category of Super PAC is a type of shadow party organization.<sup>110</sup> These Super PACs essentially took the place of similarly minded 527 organizations such as Democratic-leaning America

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<sup>104</sup> See *id.* at 1675–77.

<sup>105</sup> See Haq, *supra* note 73 (quoting Michael Beckel); see also Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 94–97 (2013), <http://www.columbia-law-review.org/wp-content/uploads/2013/05/Briffault-113-Colum.-L.-Rev.-88-2013.pdf>.

<sup>106</sup> See Andy Kroll, *In the Future, Everyone Will Have a Super-PAC*, MOTHER JONES (Jan. 28, 2013, 4:01 AM), <http://www.motherjones.com/politics/2013/01/super-pac-explosion-congress-president-elections> (summarizing expert opinion that Super PACs will be a necessity in future elections); Melanie Mason, *Jon Huntsman Latest Hopeful to Be Backed by 'Super PAC'*, L.A. TIMES (Aug. 30, 2011), <http://articles.latimes.com/2011/aug/30/news/la-pn-huntsman-super-pac-20110830> (quoting a Republican operative as predicting "everybody will have [a super PAC]—there will be a sidecar for every motorcycle").

<sup>107</sup> See Briffault, *supra* note 2, at 1677 (describing the beginning of this practice); Sean Lenggell, *Impact of Super PACs Felt in GOP Senate Primary Races*, WASH. TIMES, May 17, 2012, at A3.

<sup>108</sup> See, e.g., Steven T. Taylor, *Political and Election Law Grows as Rules and Court Decisions Complicate the Landscape*, OF COUNSEL, Dec. 2012, at 1 (describing the new practice area of Super PACs at the state level); Nyczepir, *supra* note 101; Maeve Reston, *'Super PAC' in Mayor's Race Draws Money From Powerful GOP Donor*, L.A. TIMES, Jan. 11, 2013, at AA4.

<sup>109</sup> See Fredreka Schouten, *Groups Deploy Super PACs as Lobbying Force; 'This Is a Disastrous Development,' Says Critic of Big Spenders*, USA TODAY, Dec. 4, 2012, at A5; Editorial, *When 'Super PACs' Become Lobbyists*, N.Y. TIMES, Nov. 27, 2012, at A30; Dave Levinthal, *Super PACs Get New Use—As Lobbying Arms on Hill*, POLITICO (Sept. 25, 2012, 5:59 PM), <http://www.politico.com/news/stories/0912/81674.html>.

<sup>110</sup> See, e.g., Matea Gold, *Outside Groups Changing the Political Game for Good*, L.A. TIMES, Oct. 21, 2012, at A1 (describing the Super PAC as shadow political party); Sheelah Kolhatkar, *How Karl Rove's Super PAC Plays the Senate*, BLOOMBERG BUSINESSWEEK (Sept. 4, 2012), <http://www.businessweek.com/articles/2012-09-04/exclusive-how-karl-roves-super-pac>

Coming Together and Republican-leaning Progress for America before the Super PAC era.<sup>111</sup> Those 527s served as shadow party organizations in the sense that they were run by party insiders and broadly served their respective party's campaign agenda and candidates to the extent permissible under the law at the time. They collected donations outside of contribution limits from their party's wealthy donors and engaged in election activity short of express advocacy, including voter registration, get-out-the-vote efforts, and issue advocacy in support of their party.<sup>112</sup> These 527 organizations have been superseded by the shadow party Super PAC that can likewise collect unlimited contributions but can engage in independent expenditures as well.<sup>113</sup>

The shadow party Super PAC was the dominant form of Super PAC in 2010 and re-emerged during the 2012 general election after the primaries closed. Although the Republican primaries brought the alter ego Super PACs to center stage, the 2012 general election returned the focus to Super PACs such as Republican-leaning American Crossroads that are closely associated with one of the major parties and support a broad swath of only that party's slate of candidates.<sup>114</sup> Like the shadow party 527s, these Super PACs were largely organized and run by former party insiders and drew financial support from party-dedicated donors interested in supporting their major party beyond the constraints of contribution limits on party committees and candidates.<sup>115</sup> While these Super PACs fought to a draw in the 2012 general election, they too are now a permanent fixture in national campaigning as the parties compete to stay ahead of one another.

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plays-the-senate (describing American Crossroads' efforts to support Republican Senate candidates as a shadow party organization).

<sup>111</sup> See David Greising, *Republican-Leaning 527 Groups Quickly Gained Ground on Rivals*, CHI. TRIB., Nov. 4, 2004, at 6 (discussing 527 election-related activity).

<sup>112</sup> See Stephen R. Weissman & Ruth Hassan, *BCRA and the 527 Groups*, in *THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 79*, 84–90 (Michael J. Malbin ed., 2006).

<sup>113</sup> See Bai, *supra* note 77 (explaining this transition from shadow party 527s to Super PACs).

<sup>114</sup> See, e.g., REPUBLICAN NAT'L COMM., *GROWTH & OPPORTUNITY PROJECT 44* (2013), available at [http://growthopp.gop.com/RNC\\_Growth\\_Opportunity\\_Book\\_2013.pdf](http://growthopp.gop.com/RNC_Growth_Opportunity_Book_2013.pdf) (acknowledging such third-party groups as "critical components of the Republican Party").

<sup>115</sup> See, e.g., Bill Allison, *Inside Spending: Super PACs, Dark Money Groups Dominated by Political Insiders*, SUNLIGHT FOUND. REPORTING GROUP (Jan. 23, 2013, 9:38 AM), <http://reporting.sunlightfoundation.com/2013/inside-spending-super-pacs-dark-money-groups-dominated-political> (reporting on staffing and funding of Super PACs by party insiders); Laura Edwins, *Election 2012: Top Seven Super PACs*, CHRISTIAN SCI. MONITOR (Oct. 4, 2012, 8:06 PM), <http://www.csmonitor.com/USA/DC-Decoder/2012/1004/Election-2012-top-seven-super-PACs/Restore-our-Future> (reporting the leadership and sponsors for several of the leading Super PACs).

Of course, Super PACs must refrain from formal coordination with candidates and parties to retain their special freedom from contribution limits.<sup>116</sup> Even the most loyal alter ego Super PAC, for instance, is limited by the fact that it is barred from expenditures made “in cooperation, consultation, or concert with, or at the request or suggestion of” its favored candidate or the candidate’s staff or party in decisions regarding election advertising.<sup>117</sup> Beyond such express agreement or formal collaboration between candidate campaign and Super PAC, however, the coordination rules are sufficiently unsettled such that Super PACs still managed to be very effective in coordinating their activities with candidate campaigns even in the absence of material involvement by the candidate campaign.

Not only were certain Super PACs in 2012 staffed by former staffers of favored candidates and funded by candidates’ major donors, key personnel from Super PACs and favored candidate campaigns also engaged in continuous contact that arguably fell short of material involvement in advertisement decisions.<sup>118</sup> As Trevor Potter noted, “The chief fundraisers travel with the candidates and appear onstage with the candidates but presumably don’t talk about the one thing the FEC regulation prohibits, which is the actual content of the ad and where it should be run.”<sup>119</sup> Another clever Super PAC tactic in 2012, perhaps even closer to the permissible line, was to hire the same advertising consultant as the candidate campaign, but without any direct contact between the Super PAC and candidate campaign.<sup>120</sup> The looseness of the coordination rules allowed Super PACs to boost candidates as an intended extension of the formal campaign, but free from contribution limits. What is more, as temporary entities formally distanced from the candidate, Super PACs were able to attack the candidate’s opponent without any worries about public blowback and the Super PACs’ long-term reputation.<sup>121</sup> Super PACs thus could serve as

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116 One of the most important restrictions on Super PACs was the uncertainty surrounding their ability to feature federal candidates in their advertising without engaging in formal coordination. See T.W. Farnam, *A GOP ‘Super PAC’ Breaks New Ground in Campaign Ads*, WASH. POST, Oct. 13, 2011, at A19; Kroll, *supra* note 106.

117 2 U.S.C. § 441a(a)(7)(B) (2006).

118 See, e.g., Eliza Newlin Carney, *Close Super PAC Ties Draw Ire*, ROLL CALL (Dec. 15, 2011, 12:00 AM), [http://www.rollcall.com/issues/57\\_75/Close-Super-PAC-Ties-Draw-Ire-211067-1.html](http://www.rollcall.com/issues/57_75/Close-Super-PAC-Ties-Draw-Ire-211067-1.html); Eliza Newlin Carney, *The Super PAC Paradox*, ROLL CALL (Mar. 12, 2012, 12:00 AM), [http://www.rollcall.com/issues/57\\_107/Super-PAC-Paradox-213021-1.html](http://www.rollcall.com/issues/57_107/Super-PAC-Paradox-213021-1.html).

119 Carney, *The Super PAC Paradox*, *supra* note 118.

120 See McIntire & Luo, *supra* note 66.

121 See Kang, *supra* note 12, at 47–48 (explaining the absence of reputational concerns); Kroll, *supra* note 106, (explaining that Super PACs do the “dirty work” in campaigning).

the attack arm of negative advertising for candidates without the countervailing deterrent of reputational accountability that holds back candidates and parties.<sup>122</sup>

Yet, even as Super PACs offer a powerful tool to candidates and parties, the surge in outside spending by Super PACs also produces a decentralization of power and money away from the formal control of candidates and party committees.<sup>123</sup> An important aspect of campaign finance activity and electioneering that once might have been undertaken by candidates and party committees now can be assumed more easily and efficiently by Super PACs, given their greater freedom from contribution limits and source restrictions. Just so, 501(c)(4) organizations also have assumed certain candidate and party functions where their minimal public disclosure of contributors, compared even to Super PACs, provides practical advantages in fundraising to support those functions.<sup>124</sup> The nominal restrictions on formal coordination, as weak as they are, guarantee at least a minimum of independence from the direction of candidates and parties such that, in this formal sense, candidates and parties have ceded some of their responsibilities, and thus influence, to Super PACs and 501(c)(4) groups.<sup>125</sup>

What is more, Super PACs and 501(c)(4) groups may threaten the centralized control of the major parties even further in future elections than they did in 2012. Major party influence has ebbed and flowed in response and then adaptation to legal and technological changes over time. Speaking generally, the new predominance of television advertising in campaigning in the 1960s introduced an era of candidate-centered politics where the traditional party organizations lost central importance and campaign finance to pay for that advertising became critical.<sup>126</sup> The major parties, however, adapted to these and other changes by developing powerful campaign finance networks that provided the necessary financial support to candidates and again

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<sup>122</sup> See Brian C. Mooney, *Super PACs Fueling GOP Attack Ads*, BOS. GLOBE, Feb. 2, 2012, at A1; Elizabeth Wilner, *How Super-Group Advertising Kept Romney in the Race*, AD AGE (Oct. 25, 2012), <http://adage.com/article/campaign-trail/super-pac-advertising-romney-race/237980/> (reporting that Super PACs in the presidential race were more negative than the campaigns and three of the four most active Super PACs in the race aired *only* negative ads as of late October 2012).

<sup>123</sup> See Kang, *supra* note 12, at 43–52 (predicting and discussing this shift); Gold, *supra* note 110 (reporting this development in 2012).

<sup>124</sup> Kang, *supra* note 12, at 34–35.

<sup>125</sup> *Id.* at 43–52.

<sup>126</sup> See generally JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 241–76 (1995).

restored parties to center stage.<sup>127</sup> At the presidential level for instance, the major parties used the tools of campaign finance to adapt to the passage of the party boss-dominated nomination process and the introduction of direct primary elections.<sup>128</sup> Both parties coordinated critical sets of party insiders and donors to focus endorsements and financial support on a favored primary candidate who almost always triumphed in the primary election process as a result.<sup>129</sup>

The legal changes in campaign finance following *Citizens United* may once again disrupt the dominance of the major parties. Parties regained influence because campaign finance regulation limited the size of individual contributions and thus required the solicitation and collection of thousands of donors every election cycle.<sup>130</sup> This exercise was particularly well-suited to the institutional strengths of the major parties in coordinating large groups of politically minded activists on a continuing basis.<sup>131</sup> However, the post-*Citizens United* disruption to the longstanding regulatory regime of campaign finance undermines the value of those strengths in today's candidate politics. Super PACs and 501(c)(4) groups can stockpile vast amounts of campaign money without organizational help or direction from a major party. Unencumbered by contribution limits, those groups bypass the coordination costs that large-scale campaign fundraising required in the past. They can raise similar amounts of money simply by collecting a few incredibly large donations from a small group of very wealthy individuals, thus obviating the need for the type of mass coordination conducted by the parties.

The 2012 cycle offered only a glimpse of the disruptive potential of the Super PAC. The Republican presidential primary featured heavy Super PAC spending that kept Jon Huntsman, Newt Gingrich, and Rick Santorum in the race far longer than they otherwise would have survived.<sup>132</sup> In the past, trailing candidates such as Huntsman,

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127 See MARTY COHEN ET AL., *THE PARTY DECIDES: PRESIDENTIAL NOMINATIONS BEFORE AND AFTER REFORM* 3–7 (2008); SETH E. MASKET, *NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE LEGISLATURES* 43–53 (2012). See generally Gregory Koger, Seth Masket & Hans Noel, *Cooperative Party Factions in American Politics*, 38 AM. POL. RES. 33 (2010); Gregory Koger, Seth Masket & Hans Noel, *Partisan Webs: Information Exchange and Party Networks*, 39 BRIT. J. POL. SCI. 633 (2009).

128 COHEN, *supra* note 127, at 3, 5–6.

129 *Id.* at 187–234.

130 *Id.* at 5–7.

131 *Id.*

132 See Nicholas Confessore & Jim Rutenberg, *PACs' Aid Allows Romney's Rivals to Extend Race*, N.Y. TIMES, Jan. 13, 2012, at A14; Mooney, *supra* note 122; Molly Redden, *Pac Man*, NEW REPUBLIC, Mar. 1, 2012, at 5; Naureen Khan & Alex Roarty, *Super PAC Lifelines Keep*

Gingrich, and Santorum needed a large group of coordinated donors to keep them in the primary hunt and would have promptly dropped out of the race as the Republican party network starved them of funds to continue. But in 2012, a Super PAC financed by even a single person willing to spend the necessary millions could by itself keep a losing candidate in the primary race long past any conceivable chance of winning the nomination. The result was an elongated, expensive Republican primary process that did not help eventual nominee Mitt Romney's chances of winning the general election.<sup>133</sup> It was far from the tidy, efficient primary process that parties typically desire.<sup>134</sup>

Nonetheless, Super PACs and other outside groups have not yet exerted a highly decentralizing substantive impact on party politics.<sup>135</sup> After extending the Republican primary process during the spring, the financial backers of Gingrich's and Santorum's Super PACs rallied behind Romney and swung money to Republican-leaning Super PACs in the general election campaign against President Obama.<sup>136</sup> The Democratic Party in particular benefitted from having a relatively small number of outside groups with defined responsibilities that therefore did not interfere with it or one another.<sup>137</sup> In 2012, Super PACs largely served as support organizations during the general election, exclusively in support of one major party's candidates or the other's.

This pattern is poised to change in elections to come. Within weeks following the 2012 election, a number of Super PACs promised to raise and spend money to promote specific ideological causes and

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*Weakened Candidates in the Game*, NAT'L J. (Feb. 28, 2012, 9:40 PM), <http://www.nationaljournal.com/2012-presidential-campaign/super-pac-lifelines-keep-weakened-candidates-in-the-game-20120228>.

<sup>133</sup> See Sara Murray & Patrick O'Connor, *How Race Slipped Away from Romney*, WALL ST. J., Nov. 8, 2012, at A1; Jim Arkedis, *The GOP Primary Is Badly Wounding Mitt Romney*, ATLANTIC (Feb. 13, 2012, 11:30 AM), <http://www.theatlantic.com/politics/archive/2012/02/the-gop-primary-is-badly-wounding-mitt-romney/252929/>; Liz Fedor, *Super PAC Spending Weakens the Entire GOP Presidential Field*, MINN. POST (Mar. 8, 2012), <http://www.minnpost.com/business/2012/03/super-pac-spending-weakens-entire-gop-presidential-field>; Kenneth P. Vogel & Abby Phillip, *Mitt Romney's Burn Rate a Boon for Obama*, POLITICO (Feb. 21, 2012, 4:46 AM), <http://www.politico.com/news/stories/0212/73100.html>.

<sup>134</sup> See Ryan Lizza, *Life of the Party: Can the GOP Save Itself?*, NEW YORKER, Mar. 12, 2012, at 24; Mooney, *supra* note 122.

<sup>135</sup> See TAYLOR LINCOLN, PUB. CITIZEN, SUPER CONNECTED 10, 18 (2013), available at <http://www.citizen.org/documents/super-connected-march-2013-update-candidate-super-pacs-not-independent-report.pdf> (finding that three-quarters of all Super PAC spending was by a Super PAC dedicated to a single candidate or in service of a national party).

<sup>136</sup> See, e.g., Gold, *supra* note 93 (documenting the Adelson family shifting support from pro-Gingrich Super PACs to pro-Romney Super PACs).

<sup>137</sup> See Kenneth P. Vogel & Tarini Parti, *Democratic Super PACs Get Jump on 2014, 2016*, POLITICO (Nov. 26, 2012, 4:24 AM), <http://www.politico.com/news/stories/1112/84205.html>.



support and oppose candidates from both parties along those lines.<sup>138</sup> Even Karl Rove suggested that American Crossroads might start picking sides in Republican primaries to support favored candidates, even if it puts the Super PAC at odds with other conservative groups.<sup>139</sup> In other words, Super PACs of the future are very likely to cause greater intraparty conflict than they did in 2012, and with potentially big wallets and separate agendas, further decentralize political power away from the formal parties.<sup>140</sup>

This is particularly true given that an important subset of billionaire donors who generously funded Super PACs in 2012 appeared to be motivated significantly by personal ideological commitments, rather than a classic desire to curry favor with the major parties.<sup>141</sup> Many major Super PAC donors already were loyal donors to their favored party's committees and candidates subject to contribution limits before Super PACs.<sup>142</sup> Their direct giving, however, was filtered through the parties and candidates who, by electoral necessity, tilt toward the median voter.<sup>143</sup> Candidates and parties are held accountable for their views by an electoral majority and therefore dilute the extreme positions of even the most committed donors among the many interests and supporters necessary to cobble together a majority coalition.<sup>144</sup> Now, as these wealthy donors increasingly shift their financial support to Super PACs, where their wealth provides the great-

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138 See Andy Kroll, *How Super-PACs Could Fuel the War over the GOP's Future*, MOTHER JONES (Nov. 21, 2012, 4:13 AM), <http://www.motherjones.com/politics/2012/11/super-pac-republican-party-immigration-gay-marriage>; Kroll, *supra* note 106; see also James Bennet, *The New Price of American Politics*, ATLANTIC, Oct. 2012, at 66, 68 (quoting Jim Bopp predicting that Super PAC spending will grow to three times that of candidate spending in four years).

139 See Karen Tumulty, *Rove Still Resolute in the Face of Defeat*, WASH. POST, Nov. 11, 2012, at A1.

140 See Thomas B. Edsall, *Billionaires Going Rogue*, N.Y. TIMES CAMPAIGN STOPS (Oct. 28, 2012, 10:53 PM), <http://campaignstops.blogs.nytimes.com/2012/10/28/billionaires-going-rogue/> (arguing that Super PACs are displacing the parties).

141 See, e.g., Timothy Noah, *Crankocracy in America*, NEW REPUBLIC, Apr. 19, 2012, at 2; Redden, *supra* note 132; Mike Allen, *Sheldon Adelson: Inside the Mind of the Mega-Donor*, POLITICO (Sept. 23, 2012, 9:12 PM), <http://www.politico.com/news/stories/0912/81588.html>; Soros: *The Super PAC Man*, WALL ST. J., Sept. 28, 2012, at A16; see also Richard Cohen, *Cash's Powerful Megaphone*, WASH. POST, Jan. 17, 2012, at A13.

142 See Briffault, *supra* note 2, at 1678 (describing maxed out Super PAC donors); see also Paul Harris, *Super PAC Donors Often Max Out on Individual Donations, Study Finds*, GUARDIAN (Feb. 21, 2012 4:15 PM), <http://www.theguardian.com/world/2012/feb/21/super-pac-donors-individual-donations>; Rachel Leven, *Super-PAC Donors Also Maxing Out with Campaigns, Study Finds*, HILL (Feb. 21, 2012, 2:01 PM), <http://thehill.com/blogs/ballot-box/fundraising/211777-super-pac-donors-also-maxing-out-with-campaigns-study-finds>.

143 See COHEN, *supra* note 127, at 6.

144 See *id.*

est leverage, they also bypass intermediation by parties and candidates and gain greater control of how their money is spent—a capacity that they were only beginning to exploit in 2012. Particularly after Super PACs directed by party insiders yielded disappointing results in 2012,<sup>145</sup> wealthy donors motivated as much by ideological intensity as anything else may rely less on insider guidance for their Super PACs and carve their own path in years to come.<sup>146</sup>

### CONCLUSION

Super PACs are powerful conduits for money in politics that promise to impose both centripetal and centrifugal forces on party politics at the same time for years to come. They are versatile tools that were used by allies of candidates and parties in 2012 to amplify their campaigning, but they also can be used by party outsiders against candidates and parties as well. In 2012, Super PACs largely worked in tandem with candidates as alter egos, and with parties as shadow party entities, but their legal capacity to channel enormous amounts of money outside contribution limits makes them attractive and useful as instant bases of power for anyone interested in applying financial resources to politics. In future elections, this capacity is likely to be applied by those interested in pressuring candidates and parties in ideological directions more so than in 2012.

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<sup>145</sup> See Tumulty, *supra* note 139; Andy Kroll, *Will Republican Megadonors Say Sayonara to Super-PACs?*, MOTHER JONES (Nov. 9, 2012, 4:03 AM), <http://www.motherjones.com/politics/2012/11/sheldon-adelson-republican-donor-exodus-2012>.

<sup>146</sup> See generally Samuel Issacharoff & Jeremy Peterman, *Special Interests After Citizens United: Access, Replacement, and Interest Group Response to Legal Change*, 9 ANN. REV. L. & SOC. SCI. (forthcoming 2013) (distinguishing legal strategies for outside groups with different political motivations based on whether they are access or replacement oriented).