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Article

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INTRODUCTION

The most striking campaign finance development since the Supreme Court's decision in *Citizens United v. Federal Election Commission*¹ in January 2010 has not been an upsurge in corporate and union spending, as might have been expected from a decision striking down the decades-old laws barring such expenditures. Instead, federal election campaigns have been marked by the emergence of an entirely new campaign vehicle, which uses—but is not primarily dependent on—corporate or union funds, and which threatens to upend the federal campaign regulatory regime in place since 1974.

The 2010 election cycle witnessed the birth of the “Super PAC”—a political action committee legally entitled to raise donations in unlimited amounts. Non-existent and probably illegal before the spring of 2010, Super PACs spent an estimated \$65 million on independent expenditures in 2010, and were significant players in more than a dozen Senate and House races.² By early 2012, Super PACs were already major partici-

[†] Joseph P. Chamberlain Professor of Legislation, Columbia Law School. Copyright © 2012 by Richard Briffault.

1. 130 S. Ct. 876 (2010).

2. The Center for Responsive Politics estimated total Super PAC independent expenditures in the 2010 election cycle at \$65.3 million. See Ctr. for Responsive Politics, *2010 Outside Spending, by Super PACs*, OPENSECRETS.ORG (Feb. 29, 2012), [hereinafter *2010 Outside Spending*] <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=S> (adding the “Independent Expenditures” column equals approximately \$65.33 million). The Congressional Research Service found that Super PACs spent \$90.4 million in 2010, with about seventy percent of that, or approximately \$63 million, devoted to independent spending and the rest spent on administrative costs. See R. SAM GARRETT, CONG. RESEARCH SERV., R42042, “SUPER PACS” IN FEDERAL ELECTIONS: OVERVIEW AND ISSUES FOR CONGRESS 13 (2011). Super PAC spending exceeded ten percent of total candidate spending in sixteen Senate and House elections. *Id.* at 19–20.

pants in the 2011–2012 election cycle, significantly outspending the candidates in the early Republican presidential nominating contests.³ Some Super PACs spent millions of dollars on Senate general election contests that were more than ten months away.⁴ Although some Super PAC funds come from corporations and unions, the vast majority have been provided by wealthy individuals who, well before *Citizens United*, were permitted to spend unlimited sums independently, but were subject to a federal statutory limit of \$5000 on the amounts they could give to the federal PACs that expressly support or oppose federal candidates.⁵ *Citizens United* did not address the statutory limits on individual donations to PACs. The Court's overruling of *Austin v. Michigan Chamber of Commerce*⁶ and the pertinent part of *McConnell v. FEC*⁷ focused on the constitutional status of corporate campaign participation and the protection of independent spending, not on the rules governing contributions to political committees.⁸ The authorization of Super PACs followed directly from lower court decisions, including two that predated *Citizens United*, and advisory opinions of the Federal Election Commission (FEC). But *Citizens United*—particularly the Supreme Court's flat assertion that independent expenditures, whatever their actual effect on the political process, raise no danger of corruption or the appearance of corruption⁹ within the meaning of *Buckley v. Valeo*¹⁰—provided crucial doctrinal support for the legal actions that launched

3. See, e.g., Dan Eggen, *Super PACs Outspend Campaigns 2 to 1 in S.C.*, WASH. POST, Jan. 16, 2012, at A6.

4. See, e.g., Tom Hamburger & Melanie Mason, *'Super PACs' Show Power*, L.A. TIMES, Jan. 1, 2012, at A1 (“In Ohio, \$3 million in ads . . . have already been aired against the state's incumbent Democratic senator, Sherrod Brown—a year before the election.”); Manu Raju, *Scott Brown, Elizabeth Warren Call for Super PAC Cease-Fire*, POLITICO (Jan. 16, 2012, 1:42 PM), <http://www.politico.com/news/stories/0112/71484.html> (reporting that, as of early January 2012, Super PACs had spent at least \$3.5 million on the November 2012 Massachusetts United States Senate race).

5. See Fredreka Schouten et al., *Individuals, Not Corporations, Drive Super PAC Financing*, USA TODAY, Feb. 9, 2012, at A7 (“Nearly two-thirds of the \$95 million that flowed into super PACs driving presidential and congressional politics came from wealthy individuals”); 2 U.S.C. § 441a(1)(C) (limit on individual donations to a regular, non-Super PAC is \$5000 per calendar year).

6. 494 U.S. 652 (1990) (per curiam).

7. 540 U.S. 93 (2003).

8. *Citizens United v. FEC*, 130 S. Ct. 876, 899–913 (2010).

9. *Id.* at 908–11.

10. 424 U.S. 1 (1976).

Super PACs and enabled them to flourish. The rise of Super PACs indicates that the real impact of *Citizens United* may be the re-validation of the unlimited use of private wealth in elections, not just spending by corporations and unions.

This Article considers the emergence of Super PACs and their implications for the future of American campaign finance law. Part I explains what a Super PAC is and how it differs from other campaign finance vehicles. Part II analyzes the law of Super PACs, including the doctrinal tension out of which they emerged and the court and agency decisions authorizing their existence and operations. Part III examines the place of Super PACs in the campaign finance system, particularly their role in the 2010 congressional elections and their potential impact on the 2012 races based on fundraising and spending as of early 2012. In their brief life span, Super PACs have already begun to evolve from general ideological or partisan committees to vehicles for advancing or opposing the fortunes of specific candidates. This threatens to obliterate the significance of the limits on contributions to candidates that have been a centerpiece to federal campaign finance regulation since the post-Watergate reforms enacted in 1974. Part IV concludes by considering the implications of Super PACs for the future of American campaign finance law.

I. WHAT IS A SUPER PAC AND HOW DOES IT DIFFER FROM OTHER CAMPAIGN FINANCE ACTORS?

A Super PAC is a political committee, registered with the FEC, and subject to the federal organizational, registration, reporting, and disclosure requirements that apply to other political committees.¹¹ A Super PAC makes independent expenditures expressly supporting or opposing candidates for federal office, but does not make any contributions to federal candidates.¹² Indeed, it is often formally referred to as an “independ-

11. See 2 U.S.C. §§ 432–34 (2006 & Supp. IV 2006) (codifying “political committees”).

12. See GARRETT, *supra* note 2, at 3 (defining a Super PAC). As a result of a federal district court order, the FEC has also authorized so-called “hybrid PACs” that can both accept unlimited donations to finance independent expenditures and accept contributions, subject to the restrictions that ordinarily apply to contributions to PACs, to be used to make contributions to candidates. A hybrid PAC must keep the funds for its contributions and independent spending separate, but it can operate as a Super PAC with respect to its independent spending and as an ordinary PAC with respect to its contributions. See TAN & nn 157-164, *infra*.

ent expenditure committee” or an “independent expenditure-only PAC.”¹³ An ordinary, non-Super PAC can both make contributions to candidates and engage in independent spending that expressly advocates the election or defeat of a clearly identified candidate for federal office, whereas a Super PAC can only make independent expenditures and is barred from making direct candidate contributions.¹⁴ The very silver lining to the dark cloud of inability to contribute is that the rules limiting contributions to ordinary PACs do not apply to Super PACs.¹⁵ Federal law limits an individual’s contribution to a PAC to \$5000 per year;¹⁶ corporations and unions cannot donate treasury funds to a PAC, although a corporation or union can create its own PAC and use treasury funds to pay for the PAC’s administrative costs and to solicit individual contributions to the PAC from people affiliated with the corporation or union.¹⁷ But there are no restrictions on the size of donations to Super PACs and no prohibition on the contribution of corporate or union treasury funds.¹⁸ Both PACs and Super PACs can engage in unlimited amounts of independent spending. But only Super PACs can fund that unlimited spending by collecting unlimited amounts in contributions from individuals, corporations, and unions. This gives the Super PAC the capacity to raise and spend far more money than the standard PAC.

Super PACs are related to, but distinguishable from, two

13. Technically, the term “political action committee” or “PAC” does not exist under federal law. The law recognizes and regulates a “political committee,” which is defined as any committee, club, association, or other group of persons that receives contributions in excess of \$1000 or makes expenditures in excess of \$1000 in a calendar year to influence elections for federal office. 2 U.S.C. § 431(4)(A). Political committees also include the “separate, segregated fund[s]” created by corporations and unions—which are barred from using their treasury funds to contribute to candidates under 2 U.S.C. § 441b(a)—to make contributions in federal elections. *Id.* §§ 431(4)(B), 441b. Because the first committee created by a labor union in the 1940s to get around the restriction on direct union support for federal candidates was called the Political Action Committee, political committees have long been known as PACs. Anthony Corrado, *Money and Politics: A History of Campaign Finance Law*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 7, 18 (Anthony Corrado et al. eds., 2005).

14. GARRETT, *supra* note 2, at 3. As explained in note 12, *supra*, there are also hybrid PACs that can both make contributions to candidates, with funds subject to federal contribution restrictions, and undertake independent spending with funds not subject to contribution restrictions.

15. *Id.*

16. 2 U.S.C. § 441a(a)(1)(C).

17. *Id.* § 441b.

18. GARRETT, *supra* note 2, at 3–6.

other independent spending vehicles that have loomed large in recent elections—section 527 committees and section 501(c) organizations. Both “527” and “501(c)” refer to provisions of the Internal Revenue Code. Section 527 is the provision of the Code that exempts from federal income taxation contributions given to organizations operating primarily to influence elections to the extent that the contributions are used for electoral purposes.¹⁹ Although technically all political committees are 527 organizations for tax purposes, the term is generally used to describe so-called “outside” committees—that is, committees other than candidate, party, or political action committees—that participate in elections.²⁰ Although for tax purposes these outside 527s are electoral organizations, they are not “political committees” within the meaning of the Federal Election Campaign Act (FECA).²¹ Therefore, they need not register with the FEC and abide by other FECA requirements and restrictions as long as they avoid engaging in campaign communications that involve “express advocacy,”²² that is, expressly calling for the election or defeat of clearly identified federal candidates.²³ 527s are required by the Internal Revenue Code to publicly disclose donors who give more than \$200—the same threshold FECA applies to political committees²⁴—but the 527 disclosure is enforced by the IRS, not the FEC.²⁵ Like Super PACs, 527s are not subject to FECA’s dollar limits and source restrictions on contributions to FEC political committees, and there are no limits on how much they can spend.²⁶

Unlike 527s, section 501(c) organizations—particularly those covered by 501(c)(4), (c)(5), and (c)(6) of the tax code—are not primarily electoral. Instead they are civic leagues and social welfare organizations ((c)(4)s), labor unions ((c)(5)s), and trade associations and chambers of commerce ((c)(6)s).²⁷ These entities may engage in political activity to advance their public

19. See generally Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949 (2005) (providing a basic overview of 527s).

20. See *id.* at 954 (“[T]he 527s are not parties, and they do not have the same relationship to candidates that the parties enjoy.”).

21. *Id.* at 951–52.

22. See *id.* at 955–60.

23. *Id.*

24. 2 U.S.C. § 434(b)(3)(F) (2006).

25. I.R.C. §§ 527(j)(2)(B), 6104(a)(1)(A) (2006).

26. Briffault, *supra* note 19, at 950–51.

27. I.R.C. § 501(c)(4)–(6).

policy goals and may even enter the electoral arena, as long as that is not their primary purpose and political spending is not their primary expense.²⁸ They can spend without limit on election-related activity, including electioneering communications, so long as electoral spending is less than half of their total spending within a year.²⁹ They are also exempt from any FECA restrictions on the donations they receive.³⁰ 501(c)'s are required to disclose information to the IRS about donors who give \$5000 or more in a single year, but this information is not made public.³¹ FEC disclosure applies to 501(c) contributors only if the contributor specifically earmarks her contribution for federal electioneering communications or express advocacy.³²

Thus, all three types of organizations—Super PACs, 527s, and 501(c)s—may engage in election-related spending without dollar limits and accept contributions to pay for that spending from individuals, corporations, and unions without dollar limits. Super PACs are subject to FECA disclosure of their donors, and 527s are subject to IRS disclosure of their donors, while 501(c)s are not required to publicly disclose their donors at all.³³ 527 committees have to eschew express advocacy in order to avoid being regulated as FEC political committees, and 501(c)s must limit their electoral spending to less than half their total spending in an annual period.³⁴ Super PACs, however, can devote all their spending to electioneering and engage in

28. See Miriam Galston, *When Statutory Regimes Collide: Will Citizens United and Wisconsin Right to Life Make Federal Tax Regulation of Campaign Activity Unconstitutional?*, 13 U. PA. J. CONST. L. 867, 876 n.29 (describing the “primarily” standard of organizational purpose under § 501(c)) (2011).

29. *Id.*

30. The Supreme Court has held that FECA applies only to “organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). By definition, 501(c) groups cannot have a political primary or main purpose. Galston, *supra* note 28, at 876 n.29.

31. See I.R.C. §§ 6033, 6104.

32. See 11 C.F.R. § 104.20(c)(9) (disclosure of contributors who fund electioneering communication), 11 C.F.R. § 109.10(e)(1)(vi) (disclosure of contributors who fund independent expenditures). On March 30, 2012, the United States District Court for the District of Columbia granted summary judgment to the plaintiffs in a suit brought to challenge the requirement that a corporation or union that engages in electioneering communications subject to federal reporting requirements need disclose only those donors above a threshold level who earmarked their donations for the purpose of furthering electioneering communications. *Van Hollen v. FEC*, ___ F.Supp.2d ___, 2012 WL 1066717, D.D.C., Mar. 30, 2012, (No. CIV A 11-0766 (ABJ)).

33. See 2 U.S.C. §§ 432–34 (2006); I.R.C. §§ 527(j)(2)(B), 6033, 6104.

34. See *supra* notes 22–23, 30–32 and accompanying text.

express advocacy.³⁵ The trade-off for their greater freedom to spend is that they are subject to FECA's more stringent disclosure requirements.³⁶

Despite these formal legal differences, these organizations are often closely connected. One interest group can sponsor a 527, a 501(c), a Super PAC, and an ordinary PAC. The largest Super PAC in 2010, American Crossroads, was linked to a prominent 501(c)(4), American Crossroads Grassroots Political Strategies.³⁷ Although each entity must abide by a particular set of rules, enjoys distinct opportunities, and is subject to different restraints, these groups can operate as political networks rather than as isolated organizations.³⁸ Donors who prefer anonymity can take advantage of a 501(c)(4)'s exemption from public disclosure, although as we shall see donors have also found ways to give to Super PACs and avoid disclosure. On the other hand, donors who are less concerned about disclosure and who do not want the committee they are funding to have to watch its words or worry about maintaining its 501(c) tax status can now give unlimited financial support to a Super PAC. According to former FEC Chairman Michael Toner, Super PACs have "effectively replac[ed]" 527 organizations because of their ability to engage in express advocacy.³⁹

II. THE LAW OF SUPER PACS

A. BACKGROUND: THE DOCTRINAL DIFFICULTY

Super PACs emerged out of the tension at the heart of the central holding in the Supreme Court's foundational campaign finance decision, *Buckley v. Valeo*.⁴⁰ In *Buckley*, the Court held

35. See *supra* notes 11–13 and accompanying text.

36. See *supra* note 11 and accompanying text.

37. See Peter Overby, *Powerful GOP-Linked SuperPAC Has Clear Agenda*, NPR.ORG (Feb. 9, 2012), <http://www.npr.org/2012/02/09/146613016/powerful-gop-linked-superpac-has-clear-agenda> ("The superPAC American Crossroads works with a partner, a nonprofit 'issues' group called Crossroads GPS, which [American Crossroads CEO Stephen] Law also runs.")

38. See Jessica Yellin, *Crossroads' \$51 Million Haul*, CNN (Jan. 31, 2012), <http://politicalticker.blogs.cnn.com/2012/01/31/crossroads-51-million-haul/> ("Together American Crossroads and Crossroads GPS raised \$51 million in 2011 . . . American Crossroads the super PAC raised \$18.4 million and Crossroads GPS raised \$32.6 million.")

39. Michael E. Toner et al., *What Is a Super PAC?*, ELECTION L. NEWS (Wiley Rein LLP, Wash. D.C.), Sept. 2011, at 7, available at <http://www.wileyrein.com/publications.cfm?sp=articles&newsletter=8&id=7458>.

40. 424 U.S. 1 (1976) (per curiam).

that the First Amendment permits limits on campaign finance activities in order to prevent corruption or the appearance of corruption.⁴¹ Contributions to candidates can be limited because a large contribution raises the danger “of a political quid pro quo” and “public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions” undermines confidence in our system of government.⁴² So, too, contributions to organizations that make contributions to candidates, and expenditures that such organizations coordinate with the candidates they support, can be limited to prevent circumvention of the limit on direct contributions to candidates.⁴³ On the other hand, *Buckley* determined that candidate expenditures and independent expenditures—that is, expenditures on campaign activities by individuals and groups not affiliated with a candidate but supporting or opposing a candidate—may not be limited.⁴⁴ *Buckley* held that limiting independent expenditures “heavily burdens core First Amendment expression,” which could not be justified by the anti-corruption interest that sustains contribution limits.⁴⁵ In so ruling, the Court’s reasoning was at least partially empirical. The Court assumed that:

[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.⁴⁶

Buckley flatly rejected the idea that any “governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections” could support a limit on independent spending.⁴⁷ With equality not a permissible justification for limiting independent spending and the anti-corruption concern that justified limits on contributions not available to support limits on independent spending, *Buckley* held that independent spending could not be subject to limits.

41. *Id.* at 26–30.

42. *Id.* at 26–27.

43. *Id.* at 46 n.53.

44. *Id.* at 44–45, 51–54.

45. *Id.* at 47–48.

46. *Id.* at 47.

47. *Id.* at 48–49 (rejecting the equalization argument on First Amendment grounds).

But what about contributions to organizations that engage in independent spending? Can those contributions be limited? *Buckley* upheld FECA's limit on individual donations to candidates,⁴⁸ its limit on donations by political committees to candidates,⁴⁹ and its aggregate limit on all contributions an individual can make to candidates and political committees in a calendar year.⁵⁰ But it did not specifically address FECA's \$5000-per-year cap on individual donations to political committees.

Arguably, the Court implicitly addressed and resolved the question when it upheld FECA's aggregate limit on all individual donations to federal election committees, which was \$25,000 per year when *Buckley* was decided⁵¹ and is now \$117,000 per biennial election cycle.⁵² The Court found that the aggregate limit was necessary to prevent evasion of the monetary cap on individual donations to candidates "by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked political contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party."⁵³ But the Court's analysis appears to assume that donations to political committees could be limited because such committees function as conduits passing along the donations to candidates or because of the close association between a candidate and his political party.⁵⁴ *Buckley* left open whether a limit could be imposed on donations to committees that are not parties or conduits but make only independent expenditures.

That question was affected, but not clearly resolved, by several other Supreme Court decisions in the years before *Citizens United*. Five years after *Buckley*, in *California Medical Ass'n v. FEC (CalMed)*, the Court upheld the application of FECA's limit on contributions to a political committee in a case

48. *Id.* at 23–35.

49. *Id.* at 35–36.

50. *Id.* at 38.

51. *See id.* at 38 (discussing the \$25,000 limit on total contributions in a calendar year).

52. *See Contributions*, FEC (Feb. 2011), <http://www.fec.gov/pages/brochures/contrib.shtml> (listing the current federal campaign contribution limits).

53. *Buckley*, 424 U.S. at 38.

54. *See id.* (explaining that the cap on total contributions stops contributors from avoiding the cap on contributions to candidates by giving to political committees which can then use that money to support the contributor's chosen candidates).

involving donations by a trade association to its own PAC.⁵⁵ Although there would seem to be little danger that an organization could corrupt its own PAC, the Court's plurality opinion by Justice Marshall emphasized that the limit on donations to political committees prevented circumvention of the limit on direct contributions to candidates.⁵⁶ The key fifth vote came from Justice Blackmun who, in a concurring opinion, agreed that the limit could be upheld "as a means of preventing evasion of the limitations on contributions to a candidate."⁵⁷ Justice Blackmun, however, went on to suggest that "a different result would follow" if the donation cap "were applied to contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates," because "a committee that makes only independent expenditures poses no . . . threat" of corruption or the appearance of corruption.⁵⁸

Technically dictum, Justice Blackmun's *CalMed* concurrence was bolstered by a second decision later that year, *Citizens Against Rent Control v. City of Berkeley (CARC)*, in which the Court invalidated a municipal ordinance capping contributions to committees formed to support or oppose ballot propositions.⁵⁹ The Court had previously found that ballot-proposition elections pose no danger of corruption as they do not involve the election of a candidate, so that spending in support of or opposition to ballot questions could not be limited.⁶⁰ As a result, the Court in *CARC* concluded there was no anti-corruption justification for the "significant restraint on the freedom of expression of groups and those individuals who wish to express their views through committees."⁶¹

Justice Blackmun's concurring dictum in *CalMed* and the Court's *CARC* decision together indicate there is no constitutional basis for limiting contributions to an organization if neither the contribution itself nor the activity it is funding poses a danger of corruption. But when does a contribution or expenditure pose a sufficient danger of corruption that it may be regu-

55. 453 U.S. 182, 184–86, 201 (1981).

56. *Id.* at 197–99.

57. *Id.* at 203 (Blackmun, J., concurring).

58. *Id.*

59. 454 U.S. 290, 291, 300 (1981).

60. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790 (1978) (noting that the risk of corruption present in candidate elections does not exist in issue elections).

61. *CARC*, 454 U.S. at 299.

lated? Although *Buckley* likened corruption to the danger that “large contributions are given to secure a political *quid pro quo*,” the Court stressed the risk of corruption even in arrangements that do not amount to a bribe.⁶² Rather, the possibility of corruption extends beyond “blatant and specific attempts of those with money to influence governmental action.”⁶³ In a later case, the Court emphasized that the corruption concern “extend[s] to the broader threat from politicians too compliant with the wishes of large contributors.”⁶⁴

The Court’s conception of the nature of the “corruption” that could justify restriction was dramatically expanded in 2003 in *McConnell v. FEC*, which upheld the soft money restrictions Congress imposed in the Bipartisan Campaign Reform Act of 2002 (“BCRA”).⁶⁵ Soft money consisted of donations by wealthy individuals that were dramatically greater than the dollar limitations applicable to individual donations to candidates and contributions by corporations and unions, notwithstanding the longstanding ban on corporate and union donations to federal candidates.⁶⁶ The conceptual basis for soft money’s evasion of federal contribution restrictions was that the donations did not go to specific candidates, or to parties for direct support of specific candidates, but instead were given to pay for party activities that aided candidates only indirectly, such as voter registration and get-out-the-vote drives, generic party advertising, or campaign ads that did not expressly advocate the election or defeat of clearly identified federal candidates.⁶⁷ In the absence of a direct relationship between the donor and a specific candidate, soft money defenders claimed there was no danger of corruption.⁶⁸ *McConnell*, however, found substantial evidence that federal officeholders and party leaders avidly sought soft money even if given to party accounts they did not control, and that wealthy individuals, corporations, and unions provided soft money “for the express purpose

62. *Buckley v. Valeo*, 424 U.S. 1, 26–29 (1975) (per curiam).

63. *Id.* at 28.

64. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000).

65. 540 U.S. 93 (2003).

66. *See id.* at 122–26 (describing soft money).

67. *See id.* at 123 (discussing the FEC’s ruling that parties could use soft money to fund “mixed-purpose activities” that support multiple candidates on a party’s ticket).

68. *See, e.g., id.* at 149–50 (discussing the arguments of soft-money defenders).

of securing influence over federal officials.”⁶⁹ Under these circumstances, there was no need for an express donor-candidate relationship or for proof of a tie between a donation and a specific legislative or other governmental goal of the donor to establish “corruption.” Rather, the Court took a much broader approach, concluding that Congress could reasonably determine that money given to party committees to enable donors to obtain preferential access to officials and thereby influence government decision-making could constitute corruption sufficient to justify restriction.⁷⁰

Although *McConnell* did not address independent spending, the Court’s more capacious definition of corruption in terms of the opportunity for influence resulting from the preferential access gained by campaign money suggested that *Buckley*’s quasi-empirical rejection of an anti-corruption justification for limiting independent spending might be subject to reconsideration on a showing that independent spending was also a source of preferential access and influence. Other cases had also left open the possibility that independent spending could be shown to have corrupting effects. In *First National Bank of Boston v. Bellotti*, even as it struck down a state ban on corporate spending in ballot proposition elections, the Court acknowledged that “Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.”⁷¹ Similarly, when it struck down limits on independent expenditures in support of or opposition to presidential candidates who had accepted public funding, the Court acknowledged that it is “hypothetically possible . . . that candidates may take notice of and reward those responsible for PAC [independent] expenditures by giving official favors to the latter in exchange for the supporting messages.”⁷² In *Austin v. Michigan Chamber of Commerce*, the Court upheld on anti-corruption grounds a state law prohibiting corporate independent expenditures,⁷³ albeit in an opinion that emphasized the special “state-conferred” advantages provided by the corporate form.⁷⁴ So, too, the Court in *McConnell* approved BCRA’s ex-

69. *Id.* at 147.

70. *Id.* at 142–54.

71. 435 U.S. 765, 788 n.26, 795 (1978).

72. *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 498 (1985).

73. 494 U.S. 652, 698–99 (1990).

74. *Id.* at 660.

tension of the comparable federal ban to corporate and union electioneering communications that did not involve express electoral advocacy.⁷⁵ In *Caperton v. A.T. Massey Coal Co., Inc.* the Court found that an independent expenditure could be just as corrupting as a contribution of comparable size when it held that a judge elected after an election campaign in which he had been the beneficiary of millions of dollars of independent spending was required by the Constitution to recuse himself from a case involving the independent spender.⁷⁶ Given the size of the independent expenditure in question, “there is a serious risk of bias—based on objective and reasonable perceptions.”⁷⁷ Stunningly, *Caperton* completely blurred the contribution/expenditure distinction first developed in *Buckley* and carefully sustained by the Court for over thirty-three years when it repeatedly referred to the very large independent expenditures at issue in the case as “contributions.”⁷⁸ To be sure, *Caperton* was a due process case that did not turn on the First Amendment or involve any limits on independent spending. Nevertheless, *Caperton* at least tacitly recognized there are circumstances in which independent expenditures have the same potential to corruptly influence the actions of elected officials as contributions.

Thus, on the eve of *Citizens United* there were two strands in Supreme Court doctrine that pointed in different directions if restrictions on contributions to political committees that make only independent expenditures were ever challenged. On the one hand, *CARC* and Justice Blackmun’s dictum in his *CalMed* concurrence implied that contributions to independent expenditure-only committees may not be limited because independent expenditures pose no danger of corruption. On the other hand, *McConnell* and *Caperton* broadened the Court’s working definition of corruption, and *McConnell* found that contributions not tied to any candidate’s campaign could be limited on a showing that such contributions enabled their donors to obtain preferential access to elected officials. Although *McConnell* did not address independent expenditures, its concern with the influence obtained by soft money donations could provide support for restrictions on donations to independent groups if and when it could be demonstrated that such dona-

75. *McConnell v. FEC*, 540 U.S. 93, 203–09 (2003).

76. 556 U.S. 868, 129 S. Ct. 2252, 2265–67 (2009).

77. *Id.* at 2263.

78. *Id.* at 2263–65.

tions are also a means of obtaining preferential access to elected officials.

B. LOWER COURT STIRRINGS

The question of whether contributions to independent groups could be limited became more salient in the 2000s after Congress adopted, and the Court sustained, BCRA's soft money restrictions. Due to BCRA's much tighter regulation of soft money contributions to political parties, some donors—particularly very wealthy individuals—began to make very large contributions to 527 committees.⁷⁹ This led to new proposals, arguably bolstered by *McConnell*'s validation of the restrictions on party soft money, to more closely regulate the 527s.

1. *North Carolina Right to Life, Inc. v. Leake*

In 2003, in *North Carolina Right to Life, Inc. v. Leake*, the United States Court of Appeals for the Fourth Circuit struck down a North Carolina law capping individual contributions to independent expenditure committees.⁸⁰ The court determined the state had “failed to proffer sufficiently convincing evidence which demonstrates that there is a danger of corruption due to the presence of unchecked contributions” to independent expenditure-only committees.⁸¹ The court cited and quoted Justice Blackmun's *CalMed* concurrence, but did not treat it as absolutely barring restrictions on donations to independent expenditure-only committees.⁸² Rather, it concluded that limiting such donations required more evidence of a corrupting effect than was needed to justify limits on donations to candidate committees, and it found the state had failed to carry that heavier burden of proof.⁸³ That decision was vacated and remanded by the Supreme Court for reconsideration in light of *McConnell*,⁸⁴ but in 2008 the Fourth Circuit reaffirmed its original position.⁸⁵ The court emphasized that *McConnell* had up-

79. See, e.g., Briffault, *supra* note 19, at 964–65.

80. 344 F.3d 418, 433–34 (4th Cir. 2003).

81. *Id.* at 434.

82. *Id.* (citing *Cal. Med. Ass'n v. FEC*, 435 U.S. 182, 203 (1981) (Blackmun, J., concurring)).

83. *Id.*

84. *Leake v. N.C. Right to Life, Inc.*, 541 U.S. 1007, 124 S. Ct. 2065, 2065 (2004).

85. *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 308 (4th Cir. 2008).

held limits only on contributions to political parties, which, as *McConnell* itself had noted, are closely tied to candidates, “have special access to and relationships with” elected officials, and “have influence and power in the Legislature that vastly exceeds that of any interest group.”⁸⁶ With independent committees “further removed from the candidate” than political parties, the Fourth Circuit restated its prior position that “it is ‘implausible’ that contributions to independent expenditure political committees are corrupting.”⁸⁷ *Leake* did not completely rule out the possibility that contributions to independent expenditure committees could be limited, finding that such a limit could be upheld if North Carolina could “produce convincing evidence of corruption” resulting from independent committee activities.⁸⁸ But substantial independent committee spending alone—even spending targeted at specific candidates or that influenced candidates’ positions—did not constitute the “sufficiently convincing evidence” of corruption” that the court deemed necessary to support limits on contributions to independent expenditure committees.⁸⁹

2. *EMILY’s List v. Federal Election Commission*

The decision of the United States Court of Appeals for the District of Columbia Circuit in *EMILY’s List v. FEC* grew directly out of the efforts of the FEC to deal with the surging role of non-profit 527 committees in the aftermath of BCRA’s imposition of limits on political party soft money.⁹⁰ Like many 527’s, EMILY’s List engaged in both election-related activities in support of or opposition to federal candidates and broader get-out-the-vote and voter registration activities not tied to a particular candidate. It also paid for communications referring to a particular party, but not particular candidates, and advertisements or communications that referred to candidates but did not expressly advocate their election or defeat. To make sure that only hard money—that is, contributions that complied with FECA’s dollar limits and source prohibitions—was used to pay for the efforts of 527’s that support federal candidates, the FEC adopted rules requiring that at least some of a 527’s non-candidate-specific activities, which could also benefit fed-

86. *Id.* at 293 (quoting *McConnell v. FEC*, 540 U.S. 95, 188 (2003)).

87. *Id.*

88. *Id.*

89. *Id.*

90. 581 F.3d 1, 4–5 (D.C. Cir. 2009).

eral candidates, be funded in part by hard money.⁹¹ Thus, the FEC's rules required that half of the costs of generic get-out-the-vote and voter registration activities, half of the cost of communications that refer to a party only, half of the committee's administrative expenses, and at least some portion of the cost of advertisements that refer to federal candidates be paid for with hard money.⁹²

EMILY's List struck down these requirements as unconstitutional.⁹³ In the course of its analysis, Judge Kavanaugh's opinion initially considered an issue not before the court—whether donations to independent expenditure-only committees could be limited.⁹⁴ Relying heavily on Justice Blackmun's *CalMed* concurrence and on *CARC*, he determined that as independent expenditures are not corrupting, the contributions funding them could not be corrupting.⁹⁵ In the court's view, *McConnell* did not affect this analysis, as *McConnell's* validation of limits on contributions not going to particular candidates applied only to contributions to political parties.⁹⁶ Those limits were justified by “the close ties between candidates and parties and the extensive record evidence [before the *McConnell* court] of what it deemed a threat of actual or apparent corruption—specifically, the access to federal officials and candidates that large soft-money contributors to *political parties* received in exchange for their contributions.”⁹⁷ In the absence of “record evidence that non-profit entities have sold access to federal candidates and officeholders in exchange for large contributions,” contributions to non-profit independent spending committees, unlike contributions to parties, could not be limited.⁹⁸

EMILY's List's discussion of independent expenditure-only committees was technically dicta; *EMILY's List* both made contributions to candidates and engaged in independent spending.⁹⁹ As a result, *EMILY's List* and committees like it could be required to make their contributions to federal candidates only

91. *Id.* at 16–17.

92. *See id.* at 15–18.

93. *Id.* at 3.

94. *Id.* at 8–11.

95. *Id.* at 11.

96. *Id.* at 13.

97. *Id.* (emphasis in original).

98. *Id.* at 14.

99. *Id.* at 12.

from contributions that observed federal dollar limits and source restrictions, and could be required to “pay an appropriately tailored share of administrative expenses associated with their contributions” from their hard-money accounts.¹⁰⁰ But the court relied on its finding that contributions to independent expenditure-only committees could not be limited in holding that EMILY’s List and similar committees could not be required to use dollar- or source-limited hard money contributions to pay for expenditures that were not contributions to candidates or associated administrative expenses.¹⁰¹

Leake and *EMILY’s List*, thus, rejected the argument that *McConnell’s* reasoning—particularly its focus on the political influence a large donation can win a donor even when the donation does not go directly to a candidate—supported regulation of contributions to independent committees that were not used to pay for contributions to candidates.¹⁰² *McConnell* was cabined as a political parties case, not treated as a more general principle supporting limits on any donations that could win the donor political favors.¹⁰³ To be sure, both *Leake* and *EMILY’s List* left open the possibility that limits on donations to independent committees could be sustained on a showing that independent committees “sold access to federal candidates and officeholders in exchange for large contributions.”¹⁰⁴ But both courts expressed considerable doubts that such evidence could ever be found.¹⁰⁵ *Citizens United* soon shut the door to the possibility that independent spending could ever be deemed corrupting, thereby setting the stage for the authorization of Super PACs a few months after that.

C. *CITIZENS UNITED V. FEC*

Barely six months after *Caperton* blurred contributions with independent expenditures and treated the latter as having

100. *Id.*

101. *Id.* at 14.

102. *Id.* at 13–14; *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 293 (4th Cir. 2003).

103. See *EMILY’s List*, 581 F.3d at 13–14; *N.C. Right to Life, Inc.*, 525 F.3d at 293.

104. *EMILY’s List*, 581 F.3d at 14; see also *N.C. Right to Life, Inc.*, 525 F.3d at 293 (“Given the remove [sic] of independent expenditure committees from candidates themselves, we must require North Carolina to produce convincing evidence of corruption before upholding contribution limits as applied to such organizations.”).

105. *EMILY’s List*, 581 F.3d at 14; *N.C. Right to Life, Inc.*, 525 F.3d at 293.

effects on beneficiaries comparable to the former, *Citizens United* determined that independent expenditures raised no danger of the corruption that would justify limitation.¹⁰⁶ *Citizens United* sharply distinguished the concerns about undue influence, special access, and the favoritism resulting from large donations which had loomed so large in *McConnell* from the corruption that *Buckley* required to justify campaign finance restrictions. Writing for the Court, Justice Kennedy declared, “[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.”¹⁰⁷ Similarly, “[i]ngratiation and access, in any event, are not corruption.”¹⁰⁸ So, too, the “appearance of influence or access . . . will not cause the electorate to lose faith in our democracy” and thus cannot provide a basis for regulation in the name of preventing the “appearance . . . of corruption.”¹⁰⁹ Most strikingly, the Court appeared to acknowledge that independent spending might actually sometimes be corrupting in fact when it observed that elected officials might “succumb to improper influences from independent expenditures.”¹¹⁰ Indeed, Justice Kennedy observed, “if they surrender their best judgment, and if they put expediency before principle, then surely there is cause for concern.”¹¹¹ But even that concern could not support limits on independent expenditures, regardless of the empirical evidence of their effects on the elected officials who benefit from them.¹¹² To that end, *Caperton* was dismissed as a case about a litigant’s due process right to a fair trial before an unbiased judge; it did not provide support for any limits on campaign spending.¹¹³

Noting its prior case law had left “open the possibility” that independent expenditures “could be shown to cause corruption,” *Citizens United* spoke firmly and categorically: “[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”¹¹⁴

106. *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 911.

111. *Id.*

112. *Id.* at 910–11.

113. *Id.* at 910.

114. *Id.* at 909.

Citizens United was a case about the rights of corporations to make independent expenditures. It said nothing at all about the rights of wealthy individuals to make contributions to independent committees. Indeed, the Court made much of the contribution/expenditure distinction in invalidating limits on corporate spending.¹¹⁵ Prior cases that had upheld limits on corporate contributions, and even on a corporation's solicitation of contributions to its PAC,¹¹⁶ were dismissed as of "little relevance here"¹¹⁷ as those "involved contribution limits" while *Citizens United* was an independent spending case.¹¹⁸ But within a few months, *Citizens United* was invoked to strike down the limits on donations to independent expenditure committees, resulting in the emergence of Super PACs.

D. *SPEECHNOW.ORG*

Less than one week after *Citizens United*, the United States Court of Appeals for the District of Columbia Circuit sitting en banc heard oral argument in the challenge brought by SpeechNow.org, an unincorporated nonprofit association that sought to engage in express advocacy independent spending in support of federal candidates.¹¹⁹ SpeechNow stated it would acquire funds only from individuals and not from corporations.¹²⁰ SpeechNow claimed it would be unconstitutional to require it to register as a FECA political committee and to abide by federal reporting and disclosure requirements and contribution restrictions; as the organization would not make any contributions to candidates its activities assertedly raised no danger of corruption.¹²¹ Two months later the court held unanimously that although the registration, reporting, and disclosure requirements could be applied to SpeechNow, it would be unconstitutional to apply either FECA's \$5000 per calendar year cap on contributions to political committees or the statute's biennial aggregate limit on all contributions to committees involved in federal elections.¹²²

The court determined that, given *Citizens United*, "the

115. *Id.*

116. *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197 (1982).

117. *Citizens United*, 130 S. Ct. at 909.

118. *Id.*

119. *SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010).

120. *Id.*

121. *Id.* at 690.

122. *Id.*

analysis is straight-forward [T]he government has *no* anti-corruption interest in limiting independent expenditures.”¹²³ The FEC argued that, as in *McConnell*, large contributions to groups that aid candidates will make the benefited candidates grateful, which can lead to “preferential access for donors and undue influence over officeholders.”¹²⁴ But the court concluded that “whatever the merits of those arguments before *Citizens United*, they plainly have no merit after *Citizens United*.”¹²⁵ As *Citizens United* held “as a matter of law” that independent expenditures do not corrupt or create the appearance of corruption, “contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption The Court has effectively held that there is no corrupting ‘quid’ for which a candidate might in exchange offer a corrupt ‘quo.’”¹²⁶ As a result, “the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations.”¹²⁷

SpeechNow’s reading of *Citizens United* and its invalidation of limits on contributions to independent expenditure-only committees has since been followed by two other courts of appeals. The Ninth Circuit, in two decisions handed down in 2010 and 2011, addressed provisions of ordinances adopted by the cities of Long Beach and San Diego that limited contributions to committees that independently supported or opposed candidates. The *Long Beach* opinion, handed down just a few weeks after *SpeechNow*, was partially empirical.¹²⁸ Like *Leake* and *EMILY’s List*, which were cited extensively,¹²⁹ the *Long Beach* court found that the independent committees in question—PACs run by the Long Beach Chamber of Commerce—were “several significant steps removed from ‘the case in which a donor gives money directly to a candidate,’”¹³⁰ and had no “close

123. *Id.* at 693 (emphasis in original).

124. *Id.* at 694.

125. *Id.*

126. *Id.* at 694–95.

127. *Id.* at 696.

128. *Long Beach Area Chamber of Commerce v. Long Beach*, 603 F.3d 684 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 392 (2010). Technically, the Long Beach ordinance prohibited independent spending concerning a candidate by any entity that accepted “contribution[s] in excess of \$350 to \$650, depending upon the office for which the candidate is running,” *id.* at 687, but the court treated the restriction as a contribution limit. *Id.* at 696–99.

129. *See id.* at 687, 692–93, 696–97, 699.

130. *Id.* at 696 (quoting *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 291 (2008)).

connection and alignment,’ ‘close affiliation,’ [or] ‘nexus’ with candidates.”¹³¹ As their “relationship with candidates is, at best, attenuated,”¹³² and as the city had acknowledged that it was unable to “identify a single instance of corruption, quid pro quo or otherwise, involving contributions to [independent expenditure committees] for use as independent expenditures,”¹³³ the court held that the contribution limits could not be applied to donations to the Long Beach Chamber of Commerce PACs.¹³⁴

The *San Diego* decision, handed down a little more than a year later,¹³⁵ was more categorical, relying extensively on *Citizens United’s* protection of independent expenditures and its narrowing of *McConnell’s* definition of corruption.¹³⁶ Rather than emphasize the lack of any evidence of corruption, the court focused on the lack of any direct tie between the San Diego PACs that had challenged the city’s ordinance and municipal candidates as well as the lack of “historical interconnection with candidates that distinguishes political parties.”¹³⁷

At the close of 2011, in *Wisconsin Right to Life State Political Action Committee v. Barland*, the Seventh Circuit followed the District of Columbia and Ninth Circuits in finding that contributions to independent expenditure-only committees may not constitutionally be limited.¹³⁸ The case involved a challenge by the Wisconsin Right to Life State Political Action Committee to Wisconsin’s relatively high \$10,000 per calendar year limit on individual donations to state and local candidates, political parties, and political committees.¹³⁹ The Seventh Circuit treated the case as governed entirely by the principles establishing that “[t]he threat of quid pro quo corruption does not arise when independent groups spend money on political speech,” so that it followed purely “as a matter of law and logic, that Wisconsin’s \$10,000 aggregate annual contribution limit is unconstitutional as applied to organizations, like the Right to Life PAC, that engage only in independent expenditures.”¹⁴⁰ Although the state contended that large donations to independent expenditure

131. *Id.* (quoting *McConnell v. FEC*, 540 U.S. 93, 155 (2003)).

132. *Id.* at 697.

133. *Id.*

134. *Id.* at 699.

135. *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011).

136. *Id.* at 1118–21.

137. *Id.* at 1121.

138. 664 F.3d 139, 155 (7th Cir. 2011).

139. *Id.* at 143.

140. *Id.* at 153–54.

committees can give rise to corruption in indirect ways “through ‘the proverbial ‘wink or nod’ between donor and candidate regarding the donor’s ‘uncoordinated’ beyond-limits contribution,”¹⁴¹ the Seventh Circuit rejected the argument, finding that after *Citizens United* “[a]s a categorical matter,” independent expenditures ‘do not give rise to corruption.’”¹⁴²

SpeechNow and the other court of appeals decisions began the process of dismantling limits on contributions to independent expenditure-only committees. The formal authorization of Super PACs at the federal level occurred as a result of FEC decisions in the summer of 2010.

E. THE FEDERAL ELECTION COMMISSION AUTHORIZES FEDERAL SUPER PACS

Federal Super PACs were officially born when the FEC handed down a pair of advisory opinions on July 22, 2010. In *Club for Growth, Inc.*, the FEC determined that the Club, an ideologically conservative non-profit 501(c)(4) corporation, could create a federally-registered independent expenditure-only committee, pay for its administrative and solicitation costs, and seek unlimited contributions to the committee from the general public.¹⁴³ This represented two departures from the federal laws covering political committees. First, a political committee established and administered by a corporation—technically, a “separate, segregated fund”¹⁴⁴—is limited to soliciting contributions only from people affiliated with the corporation, such as stockholders, executive and administrative personnel, employees, and family members of these groups.¹⁴⁵ Second, as already noted, FECA limits the amount that can be contributed to a corporate PAC. However, citing *Citizens United*, *EMILY’s List*, and *SpeechNow*, the FEC concluded that as the Club for Growth’s proposed committee “intends to make only independent expenditures, there is no basis to impose contribution limits on the Committee” or on its solicitations.¹⁴⁶

The Advisory Opinion noted that the Club for Growth already had a PAC that made contributions to candidates and that the president of the Club, who was treasurer of the exist-

141. *Id.* at 155 (internal quotation marks omitted).

142. *Id.*

143. FEC Advisory Op. 2010-09, at 3–5 (2010).

144. 2 U.S.C. § 441b(b)(4)(A)(i) (2006).

145. *Id.*

146. FEC Advisory Op. 2010-09, at 4.

ing PAC, would also serve as treasurer of the new committee.¹⁴⁷ However, given the Club's representation that the new committee would not engage in coordinated activity with the candidates it supports, it would still be exempt from FECA's contribution limits.¹⁴⁸

On the same day, the FEC also advised Commonsense Ten, an independent committee newly created to spend independently in support of Democratic candidates, that it, too, was not subject to FECA's contribution restrictions on political committees.¹⁴⁹ Going beyond *Club for Growth*, Commonsense Ten indicated it would solicit and accept unlimited contributions from corporations, unions, and other political committees, as well as individuals.¹⁵⁰ Like the Club for Growth committee, it would register with the FEC and file regularly scheduled disclosure reports.¹⁵¹ The FEC agreed that the committee could accept unlimited donations from corporations, unions, and political committees as well as individuals.¹⁵² The Super PAC capable of both unlimited fundraising for independent expenditures and unlimited independent spending was fully launched.

In 2011, the FEC dealt with a handful of other Super PAC issues that reflected the rapid development of the new campaign finance vehicle. The FEC's actions and inactions continued to reshape the legal landscape in ways that encouraged the further development of the Super PAC phenomenon. In an advisory opinion issued in June in response to a request from Majority PAC (the successor to Commonsense Ten) and House Majority PAC (two committees formed to engage in independent spending in support of democratic congressional candidates), the FEC determined that federal officeholders and candidates, and national party officials could "attend, speak at, or be featured . . . fundraisers" at Super PAC events at which donations in unlimited amounts were solicited from individuals, corporations, and unions.¹⁵³ The only restriction the FEC applied to fundraising by federal candidates and party officials is that they could not actually ask for more than \$5000.¹⁵⁴ As part of

147. *Id.*

148. *Id.*

149. FEC Advisory Op. 2010-11, at 2-3 (2010).

150. *Id.* at 2.

151. *Id.*

152. *Id.*

153. FEC Advisory Op. 2011-12, at 4 (2011).

154. *Id.*

BCRA's soft-money restrictions, Congress had barred federal candidates, federal officials, and national party officials from raising any funds that did not comply with federal dollar limits and source restrictions.¹⁵⁵ These provisions had been specifically upheld in *McConnell* and were not specifically challenged in *Citizens United* or *SpeechNow*.¹⁵⁶ As a result, dollar limits and source restrictions continue to apply to the amounts a federal candidate, a federal official, or a party official can ask for and which entities they can solicit.¹⁵⁷ But there are no restrictions on the ability of a candidate to appear at a fundraiser for and urge donations to a Super PAC intending to use those funds to support that candidate or attack her opponent.¹⁵⁸

Subsequently, as a result of a federal district court decision, the FEC agreed that a formally separate committee was not necessary for a PAC to enjoy Super PAC status. In *Carey v. FEC*, the federal district court for the District of Columbia held that the National Defense Political Action Committee, a political committee not connected to any other organization, could make contributions, engage in independent spending, and accept unlimited contributions for its independent expenditures.¹⁵⁹ The Committee could do so provided it maintained separate "hard-money" and "soft-money" bank accounts, with a proper allocation of administrative costs between them.¹⁶⁰ The court issued a preliminary injunction barring the FEC from enforcing FECA's contribution limits with respect to such a "hybrid PACs" independent expenditures.¹⁶¹ The FEC subsequently stated it would no longer enforce any statutory or regulatory provisions barring corporate, union, or unlimited individual contributions to the "non-contribution account," that is, the independent expenditure accounts of such committees.¹⁶² *Carey* is

155. See 2 U.S.C. §§ 441i(a)(1), 441i(e)(1)(A) (2006).

156. See FEC Advisory Op. 2011-12, at 4.

157. See *id.*

158. See *id.* at 5.

159. *Carey v. FEC*, 791 F. Supp. 2d 121, 131-32 (D.D.C. 2011). The FEC had previously failed to act on a request from the National Defense PAC for an advisory opinion approving its plan to set up separate bank accounts to pay for contributions and for independent expenditures, and to accept unlimited contributions for the latter. Three commissioners had been prepared to approve the plan while two were opposed. With four affirmative votes needed to approve an advisory opinion, the FEC was deadlocked. *Id.* at 127.

160. *Id.* at 131-32.

161. *Id.* at 136.

162. News Release, FEC, FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5,

flatly inconsistent with *CalMed*, including Justice Blackmun's concurring opinion, as the National Defense PAC, like the *CalMed* PAC, intended to make both contributions to federal candidates and express advocacy independent expenditures concerning them. The district court, however, did not refer to *CalMed*, let alone attempt to distinguish it. Instead, it concluded that the result was required by *EMILY's List*, *SpeechNow*, and *Citizens United*.¹⁶³ Of course, given that *Club for Growth* had previously upheld the ability of one organization to maintain both a PAC and a Super PAC with the same person as treasurer for both entities,¹⁶⁴ the practical consequence of permitting one entity with two bank accounts to do the same thing may not be significant. Still, the court's easy assumption that the arrangement now must be constitutional is striking and is further evidence of the impact of *Citizens United*.

At the close of 2011, the FEC grappled with two advisory opinion requests that, even more than the fundraising solicitation issue raised in *Majority Ten* and *House Majority Ten*, demonstrate how closely tied Super PACs have become to specific candidates. On December 1, the FEC deadlocked over a question raised by American Crossroads—which was, by far, the Super PAC that raised and spent the most money in 2010¹⁶⁵—regarding whether it could produce and distribute broadcast ads that would feature incumbent members of Congress up for reelection, speaking on camera (or in voice over) and discussing a legislative or policy issue in a manner “thematically similar to the incumbent Members' own re-election

2011), available at <http://www.fec.gov/press/Press2011/20111006postcarey.shtml>.

As noted in text, the National Defense PAC was not sponsored by a parent organization. In campaign finance parlance, it was a non-connected PAC as distinguished from a “separate, segregated fund” created and supported by a parent corporation or union. See note 13, *supra*. On March 1, 2012, the FEC deadlocked over the question of whether a separate segregated fund could also operate as a hybrid PAC. See Matter of Stop This Insanity, Inc. Employee leadership Fund, AO 2012-01 (draft advisory opinion to permit separate segregated fund to operate as a hybrid PAC failed on a vote of 3-3; draft advisory opinion to bar separate segregated fund from operating as a hybrid PAC failed by a 3-3 vote), <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3407>.

By mid-February 2012, there were approximately two dozen hybrid PACs. See Dave Levinthal, *Hybrid PACs pick up the pace*, Politico, Feb. 14, 2012, <http://www.politico.com/news/stories/0212/72849.html>.

163. See *Carey*, 791 F. Supp. 2d at 128–36.

164. See FEC Advisory Op. 2010-09, at 4 (2010).

165. Ctr. for Responsive Politics, *Super PACs*, OPENSECRETS.ORG (Mar. 5, 2012) [hereinafter *Super PACs*] <http://www.opensecrets.org/pacs/superpacs.php?cycle=2010>.

campaign materials . . .,” “us[ing] phrases or slogans that the Member has previously used,” and with the goal of “improv[ing] the public’s perception of the featured Member of Congress in advance of the 2012 campaign season.”¹⁶⁶ Some of these ads might also feature criticism of the candidate’s electoral opponents.¹⁶⁷ American Crossroads candidly stated all the advertisements would be “fully coordinated” with the candidates so aided “insofar as each Member would be consulted on the advertisement script and would then appear in the advertisement” but also asserted the ads would not contain any “express advocacy or the functional equivalent of express advocacy.”¹⁶⁸ Three commissioners concluded that American Crossroads’ frank acknowledgement that its advertising program would be “fully coordinated [with the candidates]” whose reelection the organization sought to promote meant the ads were effectively contributions within the meaning of FECA¹⁶⁹ so that they could not be paid for by an independent expenditure-only committee.¹⁷⁰ But three other commissioners found that the proposed ads were not “coordinated expenditures” within the meaning of FEC regulations.¹⁷¹ In their view, the ads, even if coordinated-in-fact with candidates, did not cease to be independent expenditures within the meaning of FEC regulations.¹⁷² The regulation defining “coordinated expenditure” required consideration of the content of the ads as well as the relationship between the sponsor and the candidate aided by the ad.¹⁷³ It exempted from a finding of coordination ads that avoided express advocacy or the functional equivalent of express advocacy concerning candidates, even if decisions concerning whether and where to air the ad and determining its content were actually coordinated between the candidate and the ostensibly independent committee.¹⁷⁴ Moreover, these commissioners reasoned that “there are many reasons why candidates can and

166. FEC Advisory Op. 2011-23, at 1 (2011) (request for advisory opinion by American Crossroads).

167. *Id.*

168. *Id.*

169. See 2 U.S.C. §§ 431(8)(A)(1), 441a(a)((7)(B) (2006), *invalidated by* SpeechNow.org v. FEC, 559 F.3d 686, 688 (D.C. Cir. 2010).

170. FEC Advisory Op. 2011-23, at 2 (2011) (vote); FEC Advisory Op. 2011-23, at 3, 7–8 (2011) (agenda document No. 11-68-A).

171. See 11 C.F.R. § 109.21 (2011).

172. See *id.*

173. See *id.* § 109.21(a), (c).

174. See *id.*

should work with outside groups on important issues or legislation.”¹⁷⁵ Although the deadlock meant the Commission could not green light American Crossroads’ proposal, the three votes in favor of the Super PAC’s position strongly suggests that the FEC is highly unlikely to bring an enforcement action against American Crossroads if it undertakes the projected ad campaign.

Finally, also at the end of the year, the FEC did impose one check on a planned Super PAC. Utah Republican Senator Michael Shumway Lee sought permission to create an independent spending account within his leadership PAC, the Constitutional Conservatives Fund PAC.¹⁷⁶ He also sought permission to solicit unlimited contributions to an account to be used to pay for ads expressly calling for the election or defeat of clearly identified federal candidates—other than Senator Lee himself.¹⁷⁷ A leadership PAC is a committee “directly or indirectly established, financed, maintained or controlled” by a federal official or candidate for federal office but is not the candidate’s authorized campaign committee.¹⁷⁸ Federal candidates and officeholders use leadership PACs to assist other candidates, such as fellow party members, in their campaigns or to pay for non-election-related political expenses of the PAC’s sponsor.¹⁷⁹ Senator Lee contended that his leadership PAC, like any other PAC, could engage in unlimited independent spending on behalf of federal candidates without raising the danger of corruption, so that he too should be able to accept unlimited contributions into the independent spending account of his leadership PAC.¹⁸⁰ Whatever the logic of his argument in light of *Citizens United*, *EMILY’s List*, and *SpeechNow*, however, the Commission concluded that this issue, much like the solicitation of contributions by federal candidates and officials considered in *Majority PAC* and *House Majority PAC*, was resolved by the BCRA provision¹⁸¹ sustained in *McConnell* and not challenged by any later court decision; barring federal candidates and officials from soliciting, receiving, directing, transferring, or spending

175. FEC Advisory Op. 2011-23 (agenda document No. 11-68-A) (statement of Vice Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen).

176. FEC Advisory Op. 2011-21, at 1 (2011) (Request by Constitutional Conservatives Fund PAC).

177. *Id.*

178. 2 U.S.C. § 434(i)(8)(B) (2006).

179. *See, e.g.*, FEC Advisory Op. 2011-21, at 1–2.

180. *See id.*

181. 2 U.S.C. § 441i(e)(1).

election funds that do not comply with federal contribution limits and source prohibitions.¹⁸²

The *Constitutional Conservatives Fund* decision was only a relatively minor check on the expansive legal development of Super PACs. At the start of the spring of 2010, Super PACs did not exist. By the close of the fall of 2011, through a combination of court decisions and FEC advisory opinions and non-decisions, these new campaign finance instruments could raise and spend unlimited funds provided by individuals, corporations, and unions; use the very candidates they supported to fund-raise for them; make contributions to candidates (albeit only with hard money funds) as well as aid them with independent expenditures; and, given the deadlocked response to the American Crossroads advisory opinion request, probably collaborate with candidates in preparing campaign ads that use footage of the candidates and sound the candidates' own themes provided they avoid express advocacy or the functional equivalent of express advocacy in those ads. Moreover, as the progression of cases indicates, Super PACs have very quickly evolved from truly independent committees devoted to ideological causes, like the right to life organizations in *Leake*, the chambers of commerce in *Long Beach*, and the ideological conservatives in *Club for Growth*, to the more plainly partisan committees in *Commonsense Ten*, and organizations working very closely with specific candidates as in *Majority Ten* and *House Majority Ten* and *American Crossroads*. As the discussion in the next Part indicates, by late 2011 and early 2012 many Super PACs were created to aid specific candidates and were effectively part of the campaigns of the candidates they aided. As such, their rise appears to signal the end of the modern effort to limit the size and source of contributions to candidates.

III. SUPER PACS ON THE CAMPAIGN TRAIL

A. 2010

Super PACs were not officially recognized by the FEC until late July 2010, but they got off to a very fast start. By the end of the 2010 congressional elections less than four months later, eighty-four groups had registered with the FEC as Super

182. Letter from Cynthia L. Bauerly, Chair, FEC, to DB Capitol Strategies, PLLC (Dec. 1, 2011) (on file with FEC), available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3349>.

PACs.¹⁸³ These groups reported raising nearly \$85 million and spending just over \$65 million on independent expenditures expressly supporting or opposing federal candidates.¹⁸⁴ Although less than a quarter of the more than \$290 million spent by all outside groups on independent expenditures and electioneering communications in the 2009–10 election cycle,¹⁸⁵ this amount was still a substantial development, especially given the short period of time in which Super PACs could operate. In effect, the Super PACs were raising an average of roughly \$5 million a week during the period they were active. Super PACs reported making expenditures of at least \$250,000 in 111 different House and Senate races, and spending at least a half million dollars in each of twenty-five contests.¹⁸⁶ Super PAC independent spending was equal to 20% or more of total candidate spending in four elections.¹⁸⁷ In the hotly contested Colorado Senate race, Super PACs spent more than \$10 million—more than 40%—of the total amount spent by the competing Republican and Democratic candidates.¹⁸⁸

Although those potential donors who prize anonymity may prefer to give to 501(c) organizations not subject to public disclosure, Super PACs also enjoy certain fund-raising advantages. Not only are they free to expressly advocate for and against candidates, but they need not veil their fund-raising appeals in the language of issue advocacy. As David Keating, the executive director of Club for Growth, explained to the *Washington Post*, fund-raising appeals for issue advocacy groups “were awkward and forced the organizations to be vague about their intentions.”¹⁸⁹ In his words, “[w]hat’s really liberating about this particular type of organization is that you can actually talk to people honestly about what you want to do. . . . Raising money is also a lot easier and more on the up-and-up for everyone involved.”¹⁹⁰

Of the more than eighty Super PACs active in 2010, ten ac-

183. *Super PACs*, *supra* note 165.

184. *Id.*

185. See Ctr. for Responsive Politics, *Outside Spending*, OPENSECRETS.ORG, *Outside Spending*, <http://www.opensecrets.org/outsidespending/> (last visited Jan. 25, 2012).

186. GARRETT, *supra* note 2, at 17.

187. *Id.* at 18.

188. *Id.*

189. Dan Eggen & T.W. Farnam, ‘*Super PACs*’ *Alter Campaign*, WASH. POST, Sept. 28, 2010, at A6.

190. *Id.*

counted for almost seventy-five percent of total Super PAC campaign spending, with American Crossroads towering over the entire field.¹⁹¹ Founded in part by President George W. Bush's chief political adviser Karl Rove,¹⁹² American Crossroads raised more than \$26 million and spent more than \$21 million on independent expenditures, or about a third of total Super PAC campaign spending in 2010.¹⁹³ American Crossroads spent nearly \$6 million in the Colorado Senate race, \$2.7 million in the Missouri Senate race (out of \$3.3 million spent by all Super PACs in that contest), and more than \$2 million in the Florida Senate election.¹⁹⁴ All of American Crossroads' spending was either for the Republican candidate or, as with the \$5.1 million in negative ads aimed at Colorado's Democratic Senator Michael Bennet, against Democrats.¹⁹⁵ In general, Super PAC spending tended to be negative.¹⁹⁶ Whereas independent spending by traditional PACs in 2010 consisted of \$48 million in positive ads and \$20 million in negative ads, three-quarters of Super PAC independent expenditures were for negative ads.¹⁹⁷

Perhaps most striking given the role *Citizens United* played in mid-wifing the birth of Super PACs, corporate contributions amounted to only a modest share of Super PAC funds—approximately 23%.¹⁹⁸ Although news accounts noted the \$1 million donation American Crossroads received from Dixie Rice Agricultural Corp.,¹⁹⁹ other stories reported on the

191. See GARRETT, *supra* note 2, at 12–13.

192. See Dave Cook, *Karl Rove 'Super PAC' Won't Favor Any 2012 Candidate During Primaries*, CHRISTIAN SCI. MONITOR (June 24, 2011), www.csmonitor.com/USA/politics/mintor_breakfast/2011/0624/Karl-Rove-super-PAC-won-t-favor-any-2012-candidate-during-primaries.

193. *2010 Outside Spending*, *supra* note 2.

194. See GARRETT, *supra* note 2, at 18; Ctr. for Responsive Politics, *American Crossroads Independent Expenditures*, OPENSECRETS.ORG (Jan. 27, 2011), <http://www.opensecrets.org/pacs/independ.php?strID=C00487363&cycle=2010>.

195. See FEC, 2010 FALL ELECTION CYCLE SUMMARY DATA TABLE 3: SUMMARY OF INDEPENDENT EXPENDITURES (2010), www.fec.gov/press/bkgnd/cf.summary.info/2010pac_fullsum/3indepexp2010.pdf.

196. *Id.*

197. *Id.*

198. See Diana Dwyre, *After Citizens United and SpeechNow.org Considering the Consequences of New Campaign Finance Rules 13–14* (Sept. 1–4, 2011) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1901547.

199. Jonathan D. Salant & Kristin Jensen, *'Super PACs' Multiply to Sway Election*, BLOOMBERG BUS. WK. (Sept. 9, 2010, 9:53 AM), http://businessweek.com/busdaily/dnflash/content/Sep2010.db2010099_789434.htm.

multi-hundred-thousand and multi-million dollar gifts to Super PACs from very wealthy individuals, including \$7 million to American Crossroads from Texas magnate Bob J. Perry, who had been a prime financial backer of the anti-Kerry group Swift Boat Veterans for Truth in 2004.²⁰⁰ In general, more of the money given to Super PACs seems to have come from “private-equity partners and hedge fund managers,”²⁰¹ and corporate executives and owners than from the corporate treasury funds unleashed by *Citizens United*. *Citizens United* may have drawn public attention and concern because of its validation of corporate campaign spending; but in the short run at least its principal consequence appears to have been to make it easier for very wealthy individuals who had already been free to spend independently to pool their funds and give them to organizations run by expert political operatives for use in election campaigns.

B. 2011 AND THE START OF 2012

Early indications are that 2010 was just a warm-up election for Super PACs, and that their real impact will be in 2012. Even before the end of 2011, 258 groups had registered as Super PACs with the FEC—or three times the number active in 2010—and they had reported receiving \$32 million and spending \$11 million.²⁰² By early April 2012, the number of Super PACs had risen to 421, and they reported raising more than \$155 million and spending nearly \$ 90 million.²⁰³

More striking even than the explosive growth in the number of Super PACs has been their change in focus. In 2010, the Super PACs that spent the most money—including American Crossroads, America’s Families First Action Fund, Club for Growth Action, NEA Action, Women Vote!, and Commonsense Ten—were broadly ideological, partisan, or connected to traditional interest groups like unions, trade associations, or envi-

200. Jim Kuhnhenh, *Texas Millionaire Gives \$7 Million to GOP Group*, SEATTLE TIMES, Oct. 20, 2010, available at http://seattletimes.nwsources.com/html/politics/2013214018_apuscampaignmoney.html.

201. T.W. Farnam, *72 Super PACs Spent \$83.7 Million on Election*, WASH. POST, Dec. 4, 2010, at A3.

202. *Super PACs*, *supra* note 165.

203. Ctr for Responsive Politics, *2012 Outside Spending*, by *Super PACs* (April 11, 2012) [hereinafter *Super PACs April 2012*] <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&type=S>.

ronmentalists.²⁰⁴ Some, most prominently American Crossroads, were tightly linked to a particular party, but none were focused on a specific candidate or sponsored by a particular party leader.²⁰⁵ That changed in 2011 and 2012. With the exception of American Crossroads, the leading Super PACs in the opening year of the 2011–12 election cycle were all organized to back a specific candidate or were formed at the behest of party leaders.²⁰⁶

The leading Super PAC, in terms of receipts and expenditures, was Restore Our Future; which was organized by Governor Mitt Romney's 2008 campaign treasurer and political director, and which was joined in the summer of 2011 by the Romney campaign's chief fund-raiser.²⁰⁷ Restore Our Future reported receipts of more than \$ 43 million as of early April 2012, and expenditures of more than \$ 40 million.²⁰⁸ According to news accounts, it had spent \$5 million even before the New Hampshire primary.²⁰⁹ The Super PAC Make Us Great Again was founded by Governor Rick Perry's former chief of staff shortly before the governor declared his candidacy for the Republican presidential nomination,²¹⁰ and was one of nine Super PACs supporting Perry.²¹¹ It had spent \$3.8 million by the start of 2012.²¹² An executive of the Huntsman Corporation—the family business that is the source of Utah Governor John Huntsman's personal wealth—filed the papers forming Our Destiny PAC.²¹³ Our Destiny received much of its funding from Governor Huntsman's father, “a billionaire chemical executive,” and financed a major advertising campaign to support Hunts-

204. See *Super PACs*, *supra* note 165.

205. See *id.*

206. See *id.*

207. Michael Scherer, *How Super PACs Could Eclipse Official Campaigns in 2012*, TIME (Sept. 19, 2011), <http://swampland.time.com/2011/09/19/how-super-pacs-could-eclipse-official-campaigns-in-2012/>; *Romney Fundraiser Jumps From Campaign to Super PAC*, IWATCHNEWS (Aug. 24, 2011), <http://www.iwatchnews.org/2011/08/24/5941/romney-fundraiser-jumps-campaign-super-pac>.

208. See *Super PACs* April 2012, *supra* note 203.

209. T.W. Farnam, *Super PACs Let Big Donors Give Even More to Their Candidates*, WASH. POST, Jan. 9, 2012, at A1.

210. See Nicholas Confessore, *Lines Blur Between Candidates and PACs with Unlimited Cash*, N.Y. TIMES, Aug. 28, 2011, at 1.

211. *Super PACs*, *supra* note 165.

212. See Farnam, *supra* note 209.

213. See Alexander Burns, *Huntsman Corporation Insider Launches PAC*, POLITICO (Aug. 29, 2011, 3:09 PM), <http://www.politico.com/news/stories/0811/62256.html>.

man's New Hampshire primary effort.²¹⁴ Our Destiny had spent more than \$2.8 million by the day Governor Huntsman ended his campaign.²¹⁵ Winning Our Future, the Super PAC created to back former Speaker of the House Newt Gingrich,²¹⁶ raised nearly \$19 million and spent nearly \$17 million.²¹⁷ The pro-Rick Santorum Red White and Blue Fund had spent nearly \$7.5 million by the time he ended his campaign.²¹⁸ President Obama was the sole intended beneficiary of the Priorities USA PAC, which was founded by two former White House aides.²¹⁹ Other Super PACs were formed to back Ron Paul, Newt Gingrich, Herman Cain, and Michele Bachman.²²¹ As one Republican operative presciently forecasted early in the campaign season, in addition to a candidate's authorized campaign committee "everybody will have a [Super PAC]—there will be a sidecar for every motorcycle."²²²

Nor were presidential candidates the only election participants to be benefited, or challenged, by highly targeted Super PACs. The congressional leaderships of both parties organized and solicited funds for Super PACs aimed at electing or reelecting members of Congress.²²³ In the House, for example, a former top aide to Majority Leader Eric Cantor (R.-Va.) started the YG (for "Young Guns") Action Fund with the goal of raising and spending \$30 million to help the Republicans retain control

214. See Jim Rutenberg & Nicholas Confessore, *Major Ad Blitz for Huntsman in New Hampshire*, by *Group Backed by His Father*, N.Y. TIMES, Nov. 15, 2011, at A18; Jim Rutenberg, *Huntsman Campaign, Low on Cash, Gets Aid From Group Tied to Father*, N.Y. TIMES, Dec. 4, 2011, at A24.

²¹⁵ See Super PACs April 2012, *supra* 203.

216. See Jeff Zeleny, *Former Gingrich Aide Joins Pro-Newt 'Super PAC'*, N.Y. TIMES—THE CAUCUS (Dec. 20, 2011, 10:34 AM), <http://thecaucus.blogs.nytimes.com/2011/12/20/former-gingrich-aide-joins-super-pac/?scp=1&sq=super%20pac&st=cse>.

²¹⁷ See Super PACs April 2012, *supra* 203.

²¹⁸ *Id.*

219. See Matea Gold & Christi Parsons, *Former Obama Aides May Start Political Group*, L.A. TIMES, Apr. 1, 2011, at A9.

221. See Super PACs, *supra* note 165.

222. Melanie Mason, *Jon Huntsman Latest Hopeful to Be Backed by 'Super PAC'*, L.A. TIMES—POLITICS NOW (Aug. 30, 2011, 12:26 PM), <http://www.latimes.com/news/politics/la-pn-huntsman-super-pac-20110830,0,594503.story>.

223. See Laura Litvan, *Super-PACs Ramp Up Spending on Races Where Control of Congress Is at Stake*, BLOOMBERG, Mar. 8, 2012, <http://www.bloomberg.com/news/2012-03-08/super-pacs-ramp-up-spending-with-congressional-control-at-stake.html>; Robin Bravender & Anna Palmer, *Lawmakers Unsure Super PAC Cash Will Trickle Down*, POLITICO (Oct. 14, 2011, 12:38 AM), <http://www.politico.com/news/stories/1011/65937.html>.

of the House this fall.²²⁴ Other members of Congress and ideological groups have also been active in creating or using Super PACs for Congressional races.²²⁵ Candidate-specific Super PACs have also been created to back Senator Orrin Hatch (R.-Utah) and Rep. Howard Berman (D.-Cal.) and to oppose Senators Scott Brown (R.-Mass.), Sherrod Brown (D.-Ohio), and Thomas Carper (D.-Del.).²²⁶ By early January, Super PACs were already looming so large in the Massachusetts Senate race that Senator Brown and his prospective Democratic opponent Elizabeth Warren were discussing ways of limiting their role.²²⁷ One seasoned Capitol Hill observer predicted that “[i]t’s only a matter of time before super PACs become, like . . . leadership PACs de rigueur for Members of the House and Senate.”²²⁸

With no limits on the donations it can accept, a Super PAC focused on a specific candidate is the perfect vehicle for donors who want to support the candidate, but who have “maxed out,” that is, have hit the statutory ceiling on how much they can contribute to the candidate’s authorized campaign committee. One study found that of the 205 individuals who donated to the pro-Romney Restore Our Future Super PAC in 2011, 172, or 84% of the total, had also contributed the maximum amount allowed by law to Romney’s campaign.²³⁰ Five of these “maxed

224. See Hamburger & Mason, *supra* note 4, at A14.

225. See Jonathan Allen and Anna Palmer, *Super PAC challenge: Congress*, POLITICO, Mar. 11, 2012, <http://www.politico.com/news/stories/0312/73866.html>; Eliza Newlin Carney, *Super PACs Target Congressional Races*, ROLL CALL, Mar. 50, 2012, http://www.rollcall.com/issues/57_103/Super-PACS-Target-Congressional-Races-212830-1.html.

226. See Eliza Newlin Carney, *Super PACs Multiply, Head to Hill*, ROLL CALL, Oct. 18, 2011, at 3, 14; Dan Eggen, *Congressional Incumbents Start Attracting Big-Money ‘Super PACs,’* WASH. POST, Dec. 1, 2011, at A23.

227. See Raju, *supra* note 4.

228. Carney, *supra* note 226, at 14. Super PACs are now also becoming active in state elections, including state judicial races. See, e.g., Brady Dennis, *Super PACs, donors turn sights on judicial branch*, Wash. Post, Mar. 29, 2012, http://www.washingtonpost.com/business/economy/super-pacs-donors-turn-sights-on-judicial-branch/2012/03/29/gIQAalsniS_story.html; Matt Sledge, *Super PAC Sugar Daddies Spread Campaign Contributions Around at State Level Too*, Huffington Post, Mar. 13, 2012, http://www.huffingtonpost.com/2012/03/13/super-pac-donors-campaign-contributions-states_n_1324229.html.

230. Ctr. for Responsive Politics, *Double-Duty Donors, Part II: Large Numbers of Wealthy Donors Hit Legal Limit on Giving to Candidates, Turn to Presidential SuperPACs in Continuing Trend*, OPENSECRETS.ORG (Feb. 21,

out” donors each gave \$1 million to Restore Our Future.²³¹ Similarly, more than one-quarter of the donors to the pro-Obama Super PAC, Priorities USA Action, had also maxed out on their donations to the President’s campaign committee, as had three-quarters of the donors to the pro-Rick Perry Make US Great Again, more than half the donors to Rick Santorum’s Red White and Blue Fund, and one third of the donors to Newt Gingrich’s Winning the Future.²³²

Most of these donations were extremely large. As of the end of February 2012, two-thirds of all donations to Super PACs consisted of contributions of \$500,000 or more.²³⁴ The top ten Super PAC donors had all given in excess of \$2 million apiece, with casino magnate Sheldon Adelson, his wife and daughter leading the pack with \$16.5 million in contributions to the pro-Gingrich Winning the Future; financier Harold Simmons not far with \$15.4 million in donations from himself, his wife and their company to pro-Romney, pro-Gingrich, and pro-Santorum Super PACs; and Texas homebuilder Bob Perry having given \$6.7 million to the pro-Romney Restore Our Future, a pro-Rick Perry PAC, and American Crossroads.²³⁵

The many candidate-specific Super PACs that emerged in 2011-12 played a central financing role in the opening rounds of the Republican presidential contest. Some Super PACs apparently “spent more ad money than the candidates they support.”²³⁹ According to news accounts, by mid-December 2011 Restore Our Future spent \$2.6 million in Iowa, much of it on negative ads aimed at New Gingrich.²⁴⁰ The pro-Perry Super PAC, Make Us Great Again, spent nearly \$2.5 million in the fall of 2011, while the pro-Huntsman Super PAC, Our Destiny, spent nearly \$1.9 million,²⁴¹ primarily on ads in New Hamp-

2012, 11:00 AM), <http://www.opensecrets.org/news/2012/02/double-duty-donors-part-ii-large-nu.html>.

²³¹ See *id.*

²³² See *id.*

²³⁴ See Paul Blumenthal, *Super PAC Mega-Donors Still Contributing Most of the Money*, HUFFINGTON POST, Mar. 23, 2012, http://www.huffingtonpost.com/2012/03/23/super-pac-donors-500000-plus-february-filings_n_1376053.html.

²³⁵ See *id.*

²³⁹ Eliza Newlin Carney, *Close Super PAC Ties Draw Ire*, ROLL CALL, Dec. 15, 2011, at 3.

²⁴⁰ See Michael D. Shear & Jeremy W. Peters, *Rivals Mount Tough Attacks on Gingrich in Volatile Race*, N.Y. TIMES, Dec. 20, 2011, at A1.

²⁴¹ See Robin Bravender & Dave Levinthal, *Super PACs: The Bad Cops of*

shire²⁴² “even as the Huntsman campaign . . . remained off the air.”²⁴³ Overall, Super PACs, dominated by those backing Mitt Romney, Rick Perry, and Jon Huntsman spent more than \$15 million by early January 2012,²⁴⁴ with roughly two-thirds of Romney’s spending in Iowa²⁴⁵ and South Carolina²⁴⁶ coming from his Super PAC. In the run up to Super Tuesday, Mitt Romney’s campaign focused all its broadcast ad spending on Ohio, but his Super PAC spent \$7 million on “broadcast television, cable, and radio . . . blanketing the airwaves from Idaho to Georgia.”²⁴⁷ Similarly, Newt Gingrich ran no ads of his own, but the Super PAC supporting him spent \$3.7 million in seven states.²⁴⁸ According to one survey, Super PACs accounted for 91% of the campaign ads broadcast in connection with the Alabama and Mississippi Republican presidential primaries.²⁴⁹

During the most intense phase of the Republican nominating contest, news accounts repeatedly found that Super PAC spending was comparably to, if not greater than, spending by the candidates’ own campaign committees.²⁵⁰ By early April,

2012, POLITICO (Dec. 21, 2011, 4:32 AM), <http://www.politico.com/news/stories/1211/70731.html>.

242. See Steve Peoples, *Super PAC Funds Boost Huntsman Run in N.H.*, WASH. TIMES, Nov. 15, 2011, at A6.

243. Carney, *supra* note 239.

244. See Eggen, *supra* note 3.

245. See *id.*

246. Hamburger & Mason, *supra* note 4, at A14.

247. See Jeremy W. Peters, ‘*Super PACs, Not Campaigns, Do Bulk of Ad Spending*, N.Y. TIMES, Mar. 2, 2012, http://www.nytimes.com/2012/03/03/us/politics/super-pacs-not-campaigns-do-bulk-of-ad-spend-ing.html?_r=1&scp=16&sq=jeremy%20peters%20super%20pacs&st=cse.

248. See *id.*

249. See Greg Giroux, *Super-PAC Ads Dominate Republican Race in Alabama, Mississippi*, BLOOMBERG, Mar. 13, 2012, <http://www.bloomberg.com/news/2012-03-12/super-pacs-dominate-republican-ads-aired-in-alabama-mississippi-primaries.html>.

250. See, e.g., Jack Gillum, *Super PAC Overtaking Campaign Fundraising*, HUFFINGTON POST, FEB. 21, 2012, http://www.huffingtonpost.com/2012/02/21/super-pacs-republican-gop-campaign-2012_n_1290442.html; Nicholas Confessore, *G.O.P. Campaigns Grow More Dependent on ‘Super PAC’ Aid*, N.Y. TIMES, Feb. 20, 2012, <http://www.nytimes.com/2012/02/21/us/politics/super-pac-role-grows-for-republican-campaigns.html?pagewanted=all>; Dan Eggen, *Super PACs dominating Republican presidential race*, WASHINGTON POST, Feb. 20, 2012,

Restore Our Future had spent more than \$40 million, or roughly two-thirds of what the Romney campaign had spent as of the end of February. Winning the Future had spent \$16.7 million, or nearly the \$19.2 million the Gingrich campaign as of the end of February, and the pro-Santorum Red, White and Blue Fund had spent \$7.5 million, compared to the \$13 million spent by the Santorum campaign proper, as of the end of February.²⁵¹ As in 2010, Super PAC ads tend to be predominantly negative, as illustrated by the anti-Gingrich ads aired in Iowa by Restore Our Future and by the pro-Santorum Super PAC, Red, White & Blue Fund.²⁵²

To be sure, in order to receive unlimited contributions, Super PACs must operate technically independently of the candidates they support.²⁵³ Indeed, in a television interview in December 2011, Governor Romney, who was the intended beneficiary of more Super PAC spending than any other candidate, bemoaned the anti-coordination rule.²⁵⁴ Calling Super PACs “a disaster,” he stressed in response to a complaint about Restore Our Future’s negative anti-Gingrich ads, “I’m not allowed to communicate with a Super PAC in any way, shape or form. If we coordinate in any way whatsoever, we go to the big house.”²⁵⁵

However, a candidate and the candidate-specific Super PAC supporting the candidate can establish a successful working relationship without formal coordination. The candidate can fund-raise for the Super PAC²⁵⁶ and the Super PAC can run footage of the candidate in its ads. Indeed, one candidate, Rick Perry, used footage from his Super PAC’s ad for his own

http://www.washingtonpost.com/politics/super-pacs-dominating-republican-presidential-race/2012/02/20/gIQANOaGQR_story.html.

²⁵¹ The numbers in text are derived from comparing two charts on OpenSecrets.org – the 2012 Presidential Campaign Fundraising Summary, which provides data concerning funds raised and spent by the campaign committees of the presidential candidates as of February 29, 2012, <http://www.opensecrets.org/pres12/index.php> – with Presidential Independent Expenditures, which provides spending data as of the date examined, <http://www.opensecrets.org/pres12/indexp.php>.

252. See Bravender & Levinthal, *supra* note 241.

253. *Id.*

254. See Michael D. Shear, *Romney Says ‘Super PACs’ Have Been a Disaster*, N.Y. TIMES—THE CAUCUS (Dec. 20, 2011, 2:47 PM), <http://thecaucus.blogs.nytimes.com/2011/12/20/romney-says-super-pacs-have-been-a-disaster/>.

255. *Id.*

²⁵⁶ See, e.g., Kenneth P. Vogel, *Rick, Newt come out for super PACs*, POLITICO, Feb. 15, 2012, <http://www.politico.com/news/stories/0212/72948.html>.

campaign ads.²⁵⁷ Candidates and committees can post their plans on Internet websites, thereby effectively sharing strategies with each other.²⁵⁸ Indeed, candidates and Super PACs may turn to the same consultants for advice on direct mail strategies, voter research, polling, and media services.²⁵⁹ Surrogates for the presidential candidate can meet with the staff of and donors to the Super PAC.²⁶⁰ Foster Friess, the top financial backer of the pro-Santorum Red, White, and Blue shared the stage with Santorum when he gave his victory speech after winning an election contest in Missouri primary.²⁶¹ More generally, as Super PACs are typically run by former top aides to the candidates, formal coordination of message or strategies between candidates and their Super PACs is unnecessary. The two committees are likely to share common understandings of campaign themes and campaign tactics. As Tom Cole (R.-Okla.), the former chair of the National Republican Campaign Committee—the official campaign committee of House Republicans—explained, “[w]hen your old consultants and your best buddies are setting them up, you can pretty much suspect that there’s been a lot of discussion beforehand.”²⁶³ Or, as one former FEC commissioner put it, “people who think alike don’t need to conspire.”²⁶⁴

²⁵⁷ See Ben Smith, *Perry Ad Features SuperPAC Footage*, POLITICO (Nov. 26, 2011, 7:45 PM), http://www.politico.com/blogs/bensmith/1111/Perry_ad_features_SuprPAC_footage.html.

²⁵⁸ See Bravender & Levinthal, *supra* note 241.

²⁵⁹ See, e.g., Kim Barker and Al Shaw, *Campaign Spending Shows Political Ties, Self-Dealing*, PROPUBLICA, Mar. 28, 2012, <http://www.propublica.org/article/campaign-spending-shows-political-ties-self-dealing>; Mike McIntire and Michael Luo, *Fine Line Between ‘Super PACs’ and Campaigns*, N.Y. TIMES, Feb. 25, 2012, <http://www.nytimes.com/2012/02/26/us/politics/loose-border-of-super-pac-and-romney-campaign.html?pagewanted=all>.

²⁶⁰ Michael Luo and Nicholas Confessore, *Top Obama Adviser to Appear at ‘Super PAC’ Event*, N.Y. TIMES, MAR. 3, 2012, <http://query.nytimes.com/gst/fullpage.html?res=9D03E3D61739F930A35750C0A9649D8B63&ref=michaelluo>;

²⁶¹ See Eliza Newlin Carney, *The Super PAC Paradox*, ROLL CALL, Mar. 12, 2012, http://www.rollcall.com/issues/57_107/Super-PAC-Paradox-213021-1.html.

²⁶³ Anna Palmer & Jim Vandehei, *A New Way to Buy Real Influence*, POLITICO (Oct. 24, 2011, 10:11 PM), <http://www.politico.com/news/stories/1011/66673.html>.

²⁶⁴ See Shane D’Aprile, *Shop Talk: A New Era in Campaign Finance*, CAMPAIGNS AND ELECTIONS, Mar. 20, 2012,

IV. SUPER PACS AND THE FUTURE OF CAMPAIGN FINANCE LAW

As this Article is going to press in early 2012, it is too early to determine for certain what impact Super PACs will have on campaign finance in the 2012 election, let alone in the elections to follow. However, the preliminary data indicates that Super PACs are likely to be transformative, effectively ending the post-Watergate era of campaign finance laws.

As enacted by Congress in the Federal Election Campaign Act Amendments of 1974 and substantially modified by the Supreme Court in *Buckley v. Valeo*, the post-Watergate campaign finance regime had three basic features: (1) limits on contributions to federal candidates, to the political parties, and to political committees focused in federal elections; (2) reporting and disclosure of contributions to and by, and expenditures by, these regulated entities; and (3) partial public funding.²⁶⁵ The contribution limits sought to curtail the influence of very wealthy donors, and also continued the pre-existing prohibitions on corporate and union contributions.²⁶⁶ The expenditure limits on independent spending would have curtailed circumvention of the contribution limits to candidates,²⁶⁷ while the spending limits on candidates would have reduced the incentive for them to focus on fundraising.²⁶⁸ The disclosure requirements were aimed at fully informing the voters concerning the individuals and interests that were funding campaigns.²⁶⁹ Public funding was intended to alleviate the fund-raising burden for presidential candidates while also reducing their dependence on large private contributions.²⁷⁰

Due to the Supreme Court's invalidation of the expenditure limits Congress adopted for candidates and independent committees, FECA's contribution limits were subject to strain from the outset. Candidates scrambled to collect the limited donations allowed to fund the unlimited spending the Supreme Court permitted. The combination of unlimited spending and limited contributions benefited multi-millionaire candidates

<http://www.campaignsandelections.com/magazine/us-edition/314162/shop-talk-a-new-era-in-campaign-finance.shtml> (Robert Lenhard, quoting Gore Vidal).

265. See *Buckley v. Valeo*, 424 U.S. 1, 7 (1976) (per curiam).

266. See *id.* at 23–29, 35–36.

267. See *id.* at 44.

268. See *id.* at 107.

269. See *id.* at 65–67.

270. See *id.* at 94–96.

and provided an opportunity for fund-raising intermediaries, such as PACs and bundlers, to aid candidates. Independent committees also offered an important alternative for donors subject to contribution limits to provide additional financial support for their preferred candidates and to attempt to influence electoral outcomes. The system, strained as it was, largely held. In the 1990s through the early 2000s, the system almost broke as soft-money contributions to the political parties evaded statutory dollar limits and source prohibitions, and both party-funded and outside group issue ads provided new opportunities for very wealthy donors, corporations, and unions to pump money into the system.²⁷¹ But the soft money and electioneering communications provisions of the BCRA, as sustained by the Supreme Court in *McConnell v. FEC*, to a considerable degree restored the post-Watergate era campaign finance structure. Although outside groups like 527s and 501(c)s played a role in the 2004 and 2006 elections, they were still relatively peripheral, and the possibility of new rules addressing those organizations was under active consideration in both Congress and the FEC.²⁷² The 2008 presidential election largely abided by the post-Watergate rules, supplemented by BCRA.

That system has now begun to come apart. The Supreme Court initiated the process in 2007 when its decision in *Federal Election Commission v. Wisconsin Right to Life, Inc.* (“*WRTL*”)²⁷³ effectively eviscerated BCRA’s restrictions on electioneering communications by non-party outside groups, including corporations and labor unions.²⁷⁴ Indeed, much of the work of unleashing the potential for unrestricted corporate and union spending was actually accomplished by *WRTL*, not *Citizens United*. After *WRTL*, corporations, unions, and outside groups could spend whatever they wanted on elections, provided they avoided express advocacy, or the functional equivalent of express advocacy. However, that requirement still created some uncertainty. Moreover, although wealthy individuals could spend as much as they wanted on independent spending

271. See Ctr. for Responsive Politics, *Supreme Court Reaffirms Ban on Soft Money, Once a Powerful Factor in Political Campaigns*, OPENSECRETS BLOG (June 29, 2010, 5:13 PM), <http://www.opensecrets.org/news/2010/06/supreme-court-re-affirms-ban-on-sof.html>.

272. See Briffault, *supra* note 19, at 950–52.

273. See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

274. See Richard Briffault, *WRTL II: The Sharpest Turn in Campaign Finance’s Long and Winding Road*, 1 ALB. GOV’T L. REV. 101, 113–15 (2008).

individually, if they sought to pool their funds to enhance their impact and to engage in express advocacy they were still blocked by FECA's limits on contributions to political committees.²⁷⁵ *Citizens United* directly eliminated any remaining uncertainty about the legality of corporate campaign spending, and indirectly, but at least as significantly, contributed to the decisions of the lower courts and the FEC to eliminate the barriers to unlimited donations to political committees that engage in express advocacy. It is possible, given *Leake*, *EMILY's List*, and Justice Blackmun's *CalMed* concurrence that that barrier would have come down anyway. But *Citizens United* provided an impetus that led to its immediate dismantling.

Citizens United left the monetary and source limits on contributions to candidates and political parties formally intact, but the rise of Super PACs has rendered them functionally meaningless. Any individual who has "maxed out" on a contribution to a candidate or party, or any corporation or union barred from giving to a candidate or party, can give without limit to the candidate's designated Super PAC, to one of the large Super PACs dedicated to advancing the fortunes of a specific party, or to one of the Super PACs organized by the Republican or Democratic leaders of the House or Senate.²⁷⁶ In August 2011, Sheldon Adelson and his wife Miriam each gave the Gingrich campaign for the Republican presidential nomination—the maximum \$2500 per person federal law permits in individual donations to candidates.²⁷⁷ Then in January 2012, Mr. Adelson gave Winning Our Future, a Super PAC dedicated to promoting Gingrich's nomination campaign, \$5 million—or two thousand times more than the law allowed him to give the candidate. Ultimately, Adelson, his wife and daughter together gave the pro-Gingrich PAC \$16.5 million.²⁷⁸ Multi-hundred-thousand and million-dollar donations—contributions of a size not seen since before the enactment of the 1974 campaign fi-

275. See *Buckley*, 424 U.S. at 38.

276. Cf. Maggie Haberman and Kenneth P. Vogel, *Adelson Discusses \$20 Million Check to Pro-Newt Gingrich Group, Denies Commitment*, POLITICO (Dec. 15, 2011), <http://www.politico.com/news/stories/1211/70501> (last updated Dec. 16, 2011, 5:56 AM) (discussing the multitude of Super PACs in existence and noting that "the sheer volume of these super PACs with names that are kind of similar" can cause confusion).

277. *Id.*

278. See Paul Blumenthal, *Super PAC Mega-Donors Still Contributing Most of the Money*, HUFFINGTON POST, Mar. 23, 2012, *supra*.

nance reforms—are now common.²⁸⁰ As of the end of February 2012, more than \$100 million in Super PAC funds had come from donors of \$500,000 or more,²⁸¹ with 25 individuals having each donated \$1 million or more.²⁸² Campaign finance observers have noted that with the emergence of Super PACs, “you make a phone call and get a million dollars.”²⁸³

Not only are campaign contributions now effectively unrestricted in amount, they are also for all practical purposes contributions to the candidates.²⁸⁵ To be sure, these over-sized contributions are going to committees that are technically independent of the candidates, and are not allowed to coordinate their activities with the candidates.²⁸⁶ But in practice a committee is part of the campaign of the candidate it is aiding.²⁸⁷ As already noted, candidates have raised funds for “their” Super PACs and have sent their surrogates to meet with the Super PACs and their financial supporters and the Super PACs consistently employ former staffers of the candidates they are backing.²⁸⁸ As Mitt Romney pointed out when called on the anti-Gingrich ads aired by Restore Our Future during the New Hampshire primary, “of course they’re former staff of mine.”²⁸⁹ Moreover, there are all sorts of ways in which a candidate and the Super PAC backing him can collaborate without coordinating.²⁹⁰ They can simply listen to each other’s press conferences, watching each other’s commercials, and checking

280. *See id.* *See also* Eggen, *supra* note 3, at A6 (noting \$1 million and \$500,000 donations to the pro-Romney Restore Our Future Super PAC and \$2 million and \$500,000 donations to the pro-Obama Priorities USA Action Super PAC).

281. *See* Blumenthal, *supra*.

282. *See* Phil Hirschhorn, *Super PAC donors by the numbers*, CBS News Political Hotsheet, Mar. 22, 2012, http://www.cbsnews.com/8301-503544_162-57402073-503544/super-pac-donors-by-the-numbers/.

283. T.W. Farnam, *Super PACs Alter the Dynamics of Fundraising*, WASH. POST (Jan. 8, 2012), http://www.washingtonpost.com/politics/super-pacs-alter-the-dynamics-of-fundraising/2012/01/05/gIQAH3dz5P_print.html.

285. *See id.* (noting that Super PACs “have quickly evolved into de facto shadow operations of the traditional campaigns”).

286. *See id.* (observing the existence of rules designed to prohibit direct cooperation between campaigns and their affiliated Super PAC, but doubting the effectiveness of those rules).

287. *Id.*

288. *Id.*

289. Kenneth P. Vogel, *Debate Shows Upper PACs’ Strength*, POLITICO (Jan. 8, 2012), www.politico.com/news/stories/0112/71217.html.

290. *See id.* (questioning the familiarity Gingrich and Romney had with the activities of their Super PACs).

the same publically available poll data and focus group results.

As a result, even without actions that would trigger a finding of coordination, a Super PAC can follow the candidate's lead in deciding what campaign themes to stress or which audiences to target.²⁹¹ As Rick Tyler, Newt Gingrich's former spokesman and subsequent adviser to Winning Our Future, explained, "[w]e're Newt's super PAC. We take out [sic] marching orders through the media for Newt Gingrich I do what Newt tells me through the media. And it's all within the confines of the law."²⁹² A spokesman for the Super PAC backing Rick Santorum made the same point, stating that, "[m]ore or less everyone is looking at the same numbers A corollary to that is that you can obviously see what the candidate is doing, whether it's on the stump or on the TV."²⁹³ Frequently, a candidate's ads and those of his supportive Super PAC "sound almost exactly the same."²⁹⁴ Indeed, during one of the New Hampshire debates, both Mitt Romney and Newt Gingrich demonstrated close familiarity with ads run—and even campaign ads not yet aired—by their supportive Super PACs, and defended the content of the ads these ostensibly independent committees ran from charges that the allegations in the ads were untrue or misleading.²⁹⁵ Just as the Super PACs are able to follow the signals sent by their candidates, the candidates are well aware of what their Super PACs are doing, even as the formal independence of candidate and Super PAC enables the candidate to distance himself from the most negative Super PAC ads.²⁹⁶

With the ability to raise and spend unlimited amounts and create messages expressly advocating the election or defeat of specific candidates, Super PACs are poised to be important campaign finance players—if they don't dominate the system outright. Super PAC activity resulted in far more total media spending in the early Republican presidential nomination con-

291. *Id.* (quoting an insider as declaring that "I have a big imagination but I just can't imagine that father and son don't talk").

292. Kenneth P. Vogel & Dave Levinthal, *Newt Gingrich Suffers from Super PAC Buyer's Remorse*, POLITICO (Jan. 5, 2012, 4:31 AM), <http://www.politico.com/news/stories/0112/71097.html>.

293. T.W. Farnam, *PAC Ads Adding Confusion*, WASH. POST (Jan. 11, 2012), http://www.washingtonpost.com/politics/super-pac-ads-addingconfusion/2012/01/09/gIQAJ5vsrP_story.html.

294. *Id.*

295. Vogel, *supra* note 289.

296. *See id.* (observing that both Gingrich and Romney claimed to be ignorant of unpopular negative ads aired by their respective Super PACs).

tests compared with four years earlier.²⁹⁷ Often, the Super PACs spend more than the candidates they are backing, and Super PAC ads can overshadow the campaign ads of their candidates.²⁹⁸ In New Hampshire and South Carolina the Super PACs backing Ron Paul and Rick Santorum “seemed to be defining the battlefield for the two candidates.”²⁹⁹ Super PACs had a major impact on the unfolding of the campaign, with heavy spending by Romney’s Restore Our Future PAC knocking Gingrich out of the polling lead he briefly enjoyed in Iowa, while a surge in donations to the pro-Santorum and pro-Gingrich Super PACs—especially the \$5 million Adelson contribution—kept those two candidates in contention in South Carolina and after.³⁰⁰ Although the early demise of the Huntsman and Perry candidacies demonstrates that even a well-funded Super PAC is no guarantee of victory, the overall pattern of the Republican nominating contest demonstrates the significant role Super PACs played as central vehicles for the raising and spending of campaign money.³⁰¹

With multi-million dollar contributions from donors who maxed out on donations to candidates, de facto collaboration with candidates, ads that echo the candidates’ own ads, and a volume of money that outpaces the candidates, the age of Super PACs has arrived. Super PACs have shattered the contribution limits that have been central to the campaign finance regime created by FECA, sustained in significant part by *Buckley*, and reinforced by BCRA. The other two elements of the *FECA/Buckley* system—disclosure and public funding—remain legally sound, but practically weak.

297. Farnam, *supra* note 283 (discussing that as of early January 2012 spending by outside groups in the Republican nomination contest was five times the level of outside group spending in the entire Republican primary season in 2008); see also Jeremy W. Peters, *Multiplied by PACs, Ads Overwhelm the Airwaves in S.C.*, N.Y. TIMES (Jan. 15, 2012) (showing that a week before the South Carolina Republican primary, advertising spending was already \$1.1 million more than in the entire primary four years earlier), <http://www.nytimes.com/2012/01/16/us/politics/in-south-carolina-record-barrage-of-political-ads.html>.

298. See Peters, *supra* note 297 (describing outside money as an “arms race” that is reaching a new level due to rules changes).

299. Vogel, *supra* note 289.

300. Nicholas Confessore & Jim Rutenberg, *PACs’ Aid Allows Romney’s Rivals to Extend Race*, N.Y. TIMES (Jan. 12, 2012), at A14 (contending that Super PACs have “propped up” Romney’s opponents).

301. *Id.*

In *Citizens United*³⁰² and *Doe v. Reed*,³⁰³ the Supreme Court resoundingly endorsed disclosure.³⁰⁴ *Citizens United*, in particular, treated disclosure as the constitutionally preferred form of campaign finance regulation.³⁰⁵ However, the statutes and regulations requiring disclosure will have to be significantly updated to reflect both *Citizens United* and the new candidate-specific Super PACs.³⁰⁶ For example, reporting schedules will have to be revised to deal with the surge of Super PAC activity in pre-election years and in connection with early caucuses and primaries,³⁰⁷ and greater disclosure of the network of relationships linking Super PACs to 527s and 501(c) organizations is necessary.³⁰⁸ Moreover, *Citizens United* and *Commonsense Ten*, by making it possible for corporations to give to Super PACs, have also opened up a new means for donors to evade disclosure.³⁰⁹ If a corporation gives to a trade association, which in turn contributes to a Super PAC, the Super PAC must report the trade association's donation, but the sources of the trade association's funds need not be reported.³¹⁰

Additionally, an individual can create a shell corporation,

302. *Citizens United v. FEC*, 130 S. Ct. 876, 913–14 (2010) (upholding application of disclosure law to corporate electioneering communication).

303. 130 S. Ct. 2811, 2819–20 (2010) (upholding application of disclosure law to names and addresses of signers of ballot petition).

304. See generally Richard Briffault, *Two Challenges for Campaign Finance Disclosure After Citizens United and Doe v. Reed*, 19 WM. & MARY BILL RIGHTS J. 983, 993–99 (2011) (noting that the Roberts Court has “strongly upheld” disclosure laws).

305. *Citizens United*, 130 S. Ct. at 915 (declaring that “disclosure is a less restrictive alternative to more comprehensive regulations of speech”).

³⁰⁶ See Richard Briffault *Updating Disclosure for the New Era of Independent Spending*, ___ J. L. & POL. ___ (2012) (forthcoming).

307. See, e.g., Keenan Steiner, *Presidential Super PAC Disclosures May Leave Voters in the Dark*, SUNLIGHT FOUND. REPORTING GRP. (Dec. 22, 2011, 11:56 AM), <http://reporting.sunlightfoundation.com/2011/presidential-super-pac-disclosures-may-leave-voters-in-the-dark> (observing that manipulation of reporting schedules can allow Super PACs to “evade important campaign finance disclosure requirements”).

308. See GARRETT, *supra* note 2, at 25 (“[R]elationships between super PACs and possibly related entities . . . cannot be . . . reliably established based on current reporting requirements.”).

309. *Id.* (contending that Super PACs allow donors to avoid disclosure requirements).

310. *Id.* at 23. See also Daniel Stone, Michael Beckel, and Rachel Marcus, *Donors to conservative super PAC masked by nonprofit*, iWatchNews (Center for Public Integrity), Mar. 11, 2012, <http://www.iwatchnews.org/2012/03/11/8360/donors-conservative-super-pac-masked-nonprofit>.

and contribute to the shell, which in turn contributes to the Super PAC.³¹¹ The donation from the shell corporation will be reported, but not the underlying individual donor.³¹² The possibility of such a tactic was underscored in August 2011 when reporters noted that the Romney Super PAC, Restore Our Future, had received a \$1 million donation from “W Spann LLC,” a Delaware corporation with a Manhattan address that had been formed in March, made its contribution in April, and dissolved in July, with no apparent activity other than the donation to Restore Our Future.³¹³ To tamp down the resulting controversy, the anonymous donor—a former official at the investment firm Romney once headed—soon came forward.³¹⁴ But that is unlikely to be the last time such a device is used to avoid disclosure. Indeed, Super PACs have continued to report donations from such cryptic backers as F8 LLC³¹⁵ and RTTA LLC.³¹⁶ The comedian Stephen Colbert, who had already created his own Super PAC to draw attention to the Super PAC phenomenon,³¹⁷ announced he would form a shell corporation—appropriately named “Anonymous Shell Corporation”—to provide his donors with the same opportunity.³¹⁸

Thus, disclosure laws will require significant revision to deal with the rise of Super PACs.³¹⁹ And, of course, even if ef-

311. *Id.* at 23 n.49.

312. *Id.* at 23.

313. Michael Isikoff, *Mystery Million-Dollar Romney Donor Revealed*, NBC NEWS (Aug. 6, 2011, 4:48 PM), <http://www.msnbc.msn.com/id/44046063/ns/politics/t/mystery-million-dollar-romney-donor-revealed/#.TzL1UvmlN2k>.

314. *Id.*

315. Nicholas Confessore, Michael Luo, and Mike McIntire, In Republican Race, a New Breed of Superdonor, N.Y. Times, Feb. 21, 2012, http://www.nytimes.com/2012/02/22/us/politics/in-republican-race-a-new-breed-of-superdonor.html?_r=1&ref=mikemcintire.

316. Jonathan D. Salant, Payday Lender Political Donors Hidden in Corporate Names, Bloomberg, Mar. 21, 2012, <http://www.bloomberg.com/news/2012-03-22/payday-lender-political-donors-hidden-in-corporate-names.html>.

317. See FEC Advisory Op. Request 2011-23 (Americans for Tomorrow, Tomorrow, Nov. 6, 2011) (detailing the mission statement and other goals of Mr. Colbert’s Super PAC).

318. See Justin Sink, *Colbert Creates Shell Corporation to Lampoon Karl Rove’s Groups*, THE HILL (Sept. 30, 2011, 9:31 AM), <http://thehill.com/video/in-the-news/184755-colbert-creates-shell-corporation-to-lampoon-rove-money-laundering> (announcing Mr. Colbert’s anonymous shell corporation).

319. For some proposed reforms to our disclosure laws that address the rise of Super PACs and other forms of independent spending, see Richard Briffault *Updating Disclosure for the New Era of Independent Spending*, ___ J. L. & POL. ___ (2012) (forthcoming).

fectively so revised, disclosure can do nothing to limit large donations to and spending by Super PACs.

Although last year's decision in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*³²⁰ will make it more difficult to develop mechanisms that enable publicly funded candidates to compete with privately-funded ones or—and this is more salient given the rise of Super PACs—to respond to hostile independent spending, public funding still remains a constitutionally viable form of campaign finance regulation.³²¹ The real difficulty for public funding, particularly at the federal level, is the unwillingness of legislators to offer public funds at high enough levels to make public funding attractive to serious candidates, as well as the failure to revise the presidential public funding program to take into account the fact that the initial caucuses and primaries of the nomination campaign now start much earlier than they did when public funding was first enacted.³²² As a result of the weaknesses of the public funding program, 2012 marks the first election since the enactment of the presidential public funding program in 1974 in which not a single serious presidential candidate is taking public funding.³²³ Given that the House of Representatives has just voted to abolish public funding for presidential campaigns,³²⁴ it seems extremely unlikely that Congress will do anything to strengthen public funding in practice, even though it remains constitutionally available in theory.

Contribution limits to candidates, too, are available in theory but dead in practice. The FEC might be able to restore some semblance of the old order by more effectively defining and enforcing the rules distinguishing between independent

320. 131 S. Ct. 2806, 2813 (2011) (holding that Arizona's matching funds scheme did not survive strict scrutiny).

321. *Id.* at 2828 (“We do not today call into question the wisdom of public financing as a means of funding political candidacy.”).

322. See Stephen Dinan, *Federal Matching Campaign Funds Find No Major Takers*, WASH. TIMES (Jan. 8, 2012), <http://www.washingtontimes.com/news/2012/jan/8/federal-campaign-funds-find-no-candidate-takers/?page=all> (calling the public funding system “out of sync” with the timing and cost of modern campaigns).

323. See *id.*

324. Ben Pershing, *House Votes to End Public Funding for Presidential Campaigns*, WASH. POST (Dec. 1, 2011, 3:13 PM), http://www.washingtonpost.com/blogs/2chambers/post/house-votes-to-end-public-funding-for-presidential-campaigns/2011/12/01/gIQAc8SaHO_blog.html (reporting that the House of Representatives voted 235 to 190 to end the funding, although the matter is not likely to come before the Senate).

and coordinated activity.³²⁵ For starters, that would require the Commission to reconsider its decision to allow candidates and officeholders to raise funds for Super PACs, and its failure to bar Super PACs and candidates from sharing ad content and coordinating messages. Alternatively, new rules challenging the “independence” of committees run by former staffers of candidates aided by those committees could be considered. Certainly, the Commission could conclude that a candidate is coordinating with a Super PAC when he or a member of his campaign staff raises funds for or meets with staff to the Super PAC. But given the current make-up of the Commission, there is no prospect for any such action any time soon.³²⁶

More seriously, either the FEC or Congress could begin the process of compiling the information which could demonstrate that, large contributions that are solicited by candidates and party leaders and given to committees run by former campaign or party staff and dedicated to promoting the elections of specific candidates or groups of candidates raise the same dangers of money-purchased preferential access to elected officials as the contributions to political parties restricted by the Bipartisan Campaign Reform Act of 2002 and sustained in *McConnell*, or on the contributions to candidates and committees that give to candidates that were sustained in *Buckley*.

Like the contributors to candidates before FECA and the major soft money donors before BCRA, the contributors to Super PACs often have significant interests that will be affected by the decisions of the officials whose elections they are trying to influence. Many Super PAC donors are actively engaged in lobbying over a wide range of tax, regulatory, and other legislative issues.³²⁸ Individuals, firms, trade associations, and unions interested in such questions as the tax treatment of hedge fund income, the eligibility of students attending for-profit colleges for federal financial assistance, defense contracts, and the regulation of payday lending have all been major donors to Super PACs.³²⁹ Other leading Super PAC donors have comparably in-

325. GARRETT, *supra* note 2, at 24.

326. *Id.* at 23–24.

328. See Alexander Bolton, *Romney and Obama super-PAC backers also spent big dollars on lobbying*, THE HILL, Feb. 25, 2012.

329. See, e.g., Salant, *supra*, *Payday Lenders*; Michael Scherer, *When Obama Regulates, Companies Retaliate with Donations to Romney Super PAC*, TIME, Mar. 22, 2012, <http://swampland.time.com/2012/03/22/when-obama-regulates-companies-retaliate-with-donations-to-romney-super-pac/>; Ian Duncan & Matea Gold, *Federal contractors donate to ‘super PAC’ backing Romney*, L.A. Times, Mar. 18, 2012,

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tense in ideological or foreign policy issues.³³⁰ The prospect of obtaining the benefit of extremely large – and legally unlimited – donations to an allied Super PAC and of avoiding the costs of having an unlimited amount of hostile Super PAC spending against you is at least as likely to affect the legislative, regulatory, and appointments decisions of elected officials as the relatively paltry amounts that candidates’ personal campaign committees are allowed to receive. And surely the demoralizing effects on voters “stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions” that so concerned the Supreme Court in *Buckley*³³¹ and has since become known as the “appearance of corruption” justification for the regulation of contributions is just as likely to result from the multi-hundred-thousand and multi-million dollar donations to Super PACs as from contributions to candidates and political parties.

At present there is little prospect of the FEC or Congress assessing the improper influence and appearance of corruption effects of unlimited donations to Super PACs, and taking action either to limit Super PAC contributions or even to force a greater separation of Super PACs from the candidates they are backing. Even if such a law were to be enacted, it is doubtful whether it would pass constitutional muster with the current Supreme Court, which, unless it now agrees with Justices Ginsburg and Breyer that “Montana’s experience, and experience elsewhere since this Court’s decision in *Citizens United v. Federal Election Comm’n*, 558 U. S. ___ (2010), make it exceedingly difficult to maintain that independent expenditures by corporations ‘do not give rise to corruption or the appearance of corruption.’”³³³ would have to be persuaded that at least in some circumstances donations to independent committees can be limited even if

<http://swampland.time.com/2012/03/22/when-obama-regulates-companies-retaliate-with-donations-to-romney-super-pac/>; Kevin Bogardus & Rachel Levin, *Super-PACs a new tool in trade groups’ 2012 election arsenal*, The Hill, Mar. 7, 2012, <http://swampland.time.com/2012/03/22/when-obama-regulates-companies-retaliate-with-donations-to-romney-super-pac/>; Dan Froomkin, *Mitt Romney Super PAC’s Big Donors Could Reap Many Dividends*, HUFFINGTON POST, Mar. 1, 2012, http://www.huffingtonpost.com/2012/03/01/mitt-romney-super-pac-big-donors_n_1306868.html.

³³⁰ See, e.g., Kenneth P. Vogel, *Campaigns can push mega donors’ pet causes?*, POLITICO, Mar. 2, 2012, <http://www.politico.com/news/stories/0312/73518.html>.

³³¹ 424 U.S. at 27.

³³³ *American Tradition Partnership v. Bullock*, 132 S.Ct. 1307 (Feb. 17, 2012) (statement respecting grant of the application for stay).

spending by such committees cannot be.

CONCLUSION

More than a century after Congress enacted the first restrictions on contributions in federal elections, and thirty-eight years after the comprehensive post-Watergate contribution limits were adopted, we appear to be rapidly heading into an era in which those contribution limits have been rendered functionally meaningless. We shall soon find out what this means for our campaign finance system, our elections, and our politics.