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The Real Problem with *Citizens United*:

# CAMPAIGN FINANCE, DARK Money, and Shadow Parties

By Heather K. Gerken



## Introduction

I want to begin by thanking Marquette University Law School and the organizers of the Boden Lecture for inviting me here today. It's an honor to be invited to deliver a lecture named after such an illustrious dean. And it's an honor to be invited by Dean Joseph Kearney, who is not just a distinguished dean in his own right but someone known in the legal world for his integrity and decency. Even back in the days when we clerked together, he held the respect of every clerk at the Supreme Court. It has been especially lovely to watch him during the last 24 hours. There's an old saw in election circles that one campaigns in poetry and governs in prose, and it's been a delight to watch Dean Kearney move seamlessly from one to the other. When he speaks about the students, the faculty, or the mission of Marquette Law School, it's all poetry. And yet he is also the person who instructed me that this talk should be 43 minutes long.

Today I will use my 43 minutes to offer food for thought. Not a fully worked out theory, not a firm claim, but a series of observations about the current state of campaign-finance law and its long-term effects on American politics.

Here's what I'm *not* going to say: I'm not going to tell you the near-ubiquitous tale that reformers, reporters, and even a fair number of academics tell about the current state of campaign finance. That story is that the Supreme Court's decision in *Citizens United v. Federal Election Commission* (2010) treated corporations as if they were individuals for the first time. It thereby ushered in a new era of corporate spending, with wealthy corporations spending wildly, saturating the airwaves, and taking over American politics. The story is that *Citizens United* has caused a sea change in American politics, and the Court's overturning of *Austin v. Michigan Chamber of Commerce* (1990)—the much-revered case in which the Court upheld campaign-finance regulations in order to promote equality—was the modern-day equivalent of *Plessy v. Ferguson*.

Even to set aside the overwrought reference to *Plessy*, almost all of that story is wrong, and some of it is utter nonsense. And I say this not as someone who is against campaign-finance regulation, but as someone who believes in it. I say this as someone who believes that there *is* a bigger story about the relationship between *Citizens United* and American politics; it's just not the story the media and reformers are telling.

Here I will argue that the so-called dark-money trend may be a symptom of a deeper shift taking place in our political process. And it is one that *Citizens United* has helped bring about. *Citizens United* mattered, but not for the reasons that most people seem to think. Here, in short, I hope to tell you the *real* problem with *Citizens United*.

Part I offers a brief history of campaign-finance reform and debunks the conventional wisdom about the case. It ends by suggesting that *Citizens United* mattered for reasons that have little to do with corporations or equality. Instead, the most important part of the opinion concerned the relationship between independent spending and corruption.

Part II shows how the Court's corruption ruling has changed the political landscape. We all know that there is more "dark money" in the system—money spent by sources that are virtually untraceable—and we all know how troubling it is to have large amounts of dark money flowing through the election system. But the conventional wisdom may be missing something more fundamental about the effects of *Citizens United*: The decision may ultimately push our current party system toward one that is dominated by powerful groups acting outside the formal party structure. The worry, then, isn't about dark money so much as "shadow parties"—organizations outside of the party that house the party elites.

Part III explains why the emergence of shadow parties could further weaken our already-flagging political system. It suggests that shadow parties risk undermining the influence of the saving grace of politics: the "party faithful," who play a crucial role in connecting everyday citizens to party elites. ▶▶

» Heather K. Gerken delivered Marquette University Law School's annual Boden Lecture this past academic year. The lecture remembers the late Robert F. Boden, L'52, who served as dean of the Law School from 1965 to 1984. Gerken is the J. Skelly Wright Professor at Yale Law School, having previously clerked for Justice David H. Souter at the United States Supreme Court, been a professor at Harvard Law School, and practiced law in Washington, D.C. This is a lightly edited version of Professor Gerken's lecture. A version with footnotes will appear in the summer issue of the *Marquette Law Review*.

## I. The REAL PROBLEM with *Citizens United*

To understand why *Citizens United* really matters, you have to know some history. I suggested some of this background shortly after the *Citizens United* decision, in conference remarks printed in the *Georgia State Law Review*, but let me elaborate here as we begin.

The tale we tell in the academy is that in the beginning (or the early 1970s at any rate) Congress created the Federal Election Campaign Act, and we saw that it was good. The snake in this garden of campaign-finance Eden was the Supreme Court's 1976 decision in *Buckley v. Valeo*. There, the Supreme Court famously drew a distinction for First Amendment purposes between contributions (the money given to a campaign) and expenditures (the money spent on a campaign). In the Court's view, expenditures were closely tied to cherished First Amendment activities and thus hard to regulate, let alone cap. Contributions, on the other hand, raised weaker First Amendment concerns and thus could be subject to more regulation, including caps.

You can see the problem. Congress intended to regulate both sides of the money/politics equation—the money donated and the money spent. By lifting the cap on expenditures while leaving in place the cap on contributions, the Supreme Court created a world in which politicians' appetite for money would be limitless but their ability to get it would not. Two of my academic colleagues (Samuel Issacharoff and Pamela Karlan) analogized it to giving money-starved politicians access to an all-you-can-eat financial buffet but insisting they can only serve themselves with a teaspoon.

We all know what happened: just what you would expect to happen. Political interests inevitably

looked for loopholes, they inevitably found loopholes, and they inevitably drove big trucks of money through those loopholes. There was the soft-money loophole. When that got closed, people started to use issue ads to bypass the existing rules. Then came 527s and “swift boating.” The 527s have been displaced by SuperPACs and 501(c)(4)s and (c)(6)s. As a result, the entire reform game has been focused on closing those loopholes, engaging in the regulatory equivalent of whack-a-mole.

### Why the Court's rulings on corporations and *Austin* were doctrinal sideshows

This brings me to the first mistake in the tale we tell about *Citizens United*, and it will be a familiar point to anyone who has been involved in this game of regulatory whack-a-mole. As suggested early on by Nathaniel Persily, the floodgates of corporate spending were open well before *Citizens United*. On account of an earlier Supreme Court decision that originated from Marquette's home state of Wisconsin (*FEC v. Wisconsin Right to Life* in 2007), certain kinds of corporate and union ads were constitutionally protected so long as they were phrased carefully. Provided that those ads didn't explicitly encourage people to vote for or against a candidate, they were protected. *Citizens United* simply eliminated the need to be careful about phrasing the ad copy. To offer a crude example, before *Citizens United*, a corporation could run an ad saying, “Senator X kicks puppies—Call Senator X and tell him to stop kicking puppies.” After *Citizens United*, a corporation could run an ad saying, “Senator X kicks puppies—Don't vote for the puppy-kicking Senator X.” If there was a time to amend the Constitution to prohibit corporate speech, it was well before *Citizens United*, which means it was well before anyone thought that there was a problem.

Nor can we blame *Citizens United* for the fact that independent spending—corporate or other—is hard to trace. *Citizens United* ruled eight to one in favor of the constitutionality of transparency measures, upholding a variety of disclosure and disclaimer rules. The fact that so much independent election spending is “dark money” must be laid at the feet of Congress and the Federal Election Commission (FEC), which have failed to enact adequate disclosure regulations. ▶▶



Heather K. Gerken



The final mistake in the reformers' tale of woe is the suggestion that it was a disaster when *Citizens United* overruled *Austin*, the solitary Supreme Court case, from 1990, that relied on the equality rationale to uphold a campaign-finance regulation. You can imagine why reformers were so attached to *Austin*. Equality is a deeply intuitive justification for campaign-finance regulation. But the overruling of *Austin* was even less significant than what the Court said about corporate speech. *Austin* was a symbol, to be sure. In terms of the doctrine, however, the case was a sport. *Austin* would have been an important case if it had ever been followed. But it hadn't. By overruling *Austin*, all the Court did was formally confirm the case's irrelevance to current doctrine.

### Why the Court's ruling on corruption mattered

*Citizens United* was important, however. It was important for reasons that reformers, in particular, don't want to talk about. That's because *Citizens United* substantially cut back on the power that Congress has to regulate in this area. It is *that* part of the ruling—not the part about corporations, not the part about equality—that is reshaping the campaign-finance landscape.

As any first-year law student can tell you, when Congress regulates in this area, it must have a good reason to do so. And *Citizens United* seems to have dramatically cut back on the reasons Congress can regulate. That's because it substantially narrowed the definition of corruption, which is regularly invoked whenever Congress wants to pass reform. Indeed, while reformers have mourned the Court's rejection of the equality rationale, the most important line in *Citizens United* was not the one overruling *Austin*. It was this one: "Ingratiation and access . . . are not corruption."

For many years before *Citizens United*, the Court had gradually expanded the corruption rationale to extend beyond "quid pro quo corruption" (I give you money, you give me votes). The Court had licensed Congress to regulate even when the threat was simply that large

donors had better access to politicians or that politicians had become "too compliant with the[ir] wishes" (in the words of a 2000 case). Indeed, at times the Court went so far as to say that even the mere *appearance* of "undue influence" or the public's "cynical assumption that large donors call the tune" was enough to justify regulation.

Before *Citizens United*, in other words, "ingratiation and access" *were* corruption. This loose definition of corruption was easy to satisfy and easy to invoke when regulating campaign finance. After all, if Congress can

regulate whenever the American people think the fix is in, it can regulate at any time. What this meant in practice is that reformers could get almost everything they would have gotten from *Austin* without ever having to say the word *equality*.

But Justice Anthony Kennedy isn't a fool. He was well aware of what his more-liberal colleagues had been doing with the corruption rationale, and he did everything he could in *Citizens United* to put a stop to it. Kennedy didn't say that the Court was overruling these cases. But that's just what it was doing.

*Citizens United* thus shifted the regulatory terrain surrounding independent spending—the spending that is not done in conjunction with the party or the candidate. That's the money spent by SuperPACs. That's the money spent by Karl Rove's Crossroads GPS. That's the money that Justice Kennedy told us

does not corrupt, which means that's the money that neither Congress nor the FEC can regulate heavily going forward. *Citizens United*, in sum, didn't matter because of what it said about corporations. It mattered because of what it said about corruption. If you are going to amend the Constitution, focus on the corruption ruling, not on whether, to quote Mitt Romney, "corporations are people," too.

The evidence that the corruption rationale is the one that matters is clear. Lower court decision after lower court decision has struck down regulations on independent spending. That's why we have SuperPACs. That's why the 501(c)(4)s and (c)(6)s are hard to regulate.

...Citizens United substantially cut back on the power that Congress has to regulate in this area. It is that part of the ruling—not the part about corporations, not the part about equality—that is reshaping the campaign-finance landscape."

The numbers tell the same story. There was a lot more money swishing around in 2012 than in prior years. And much of that money involved independent expenditures, often untraceable ones. But that money—as best we can tell—hasn't signaled a giant uptick in *corporate* spending. The share of corporate spending looks roughly the same. And it's not hard to guess why. Most corporations would rather stay out of the game. It's dangerous, for one thing, as Target learned when it was subjected to a boycott for supporting a conservative gubernatorial candidate who opposed same-sex marriage. Companies also worry about getting shaken down by politicians on both sides of the aisle. As a general matter, corporations do much better

by investing their resources in lobbying, where their influence is both outsized and hidden from view. That's where the smart corporate money goes.

To conclude the point: *Citizens United* mattered. But it mattered for reasons that people have largely ignored. It didn't unleash the corporate floodgates. It didn't fundamentally shift the doctrine when it overruled *Austin*. It didn't even prevent Congress or the FEC from shedding light on the sources of "dark money." What *Citizens United* did do is substantially limit the extent to which Congress or the states can limit independent expenditures. That mattered for 2012. And it may matter even more, going forward, for the reasons I am about to suggest. ▶▶

## REACTION FROM RUSS FEINGOLD

# Reactions

The question facing reformers isn't whether power will attempt to corrupt our government—there is overwhelming evidence that it does. Instead, the crucial question is how we prevent that power from corrupting.

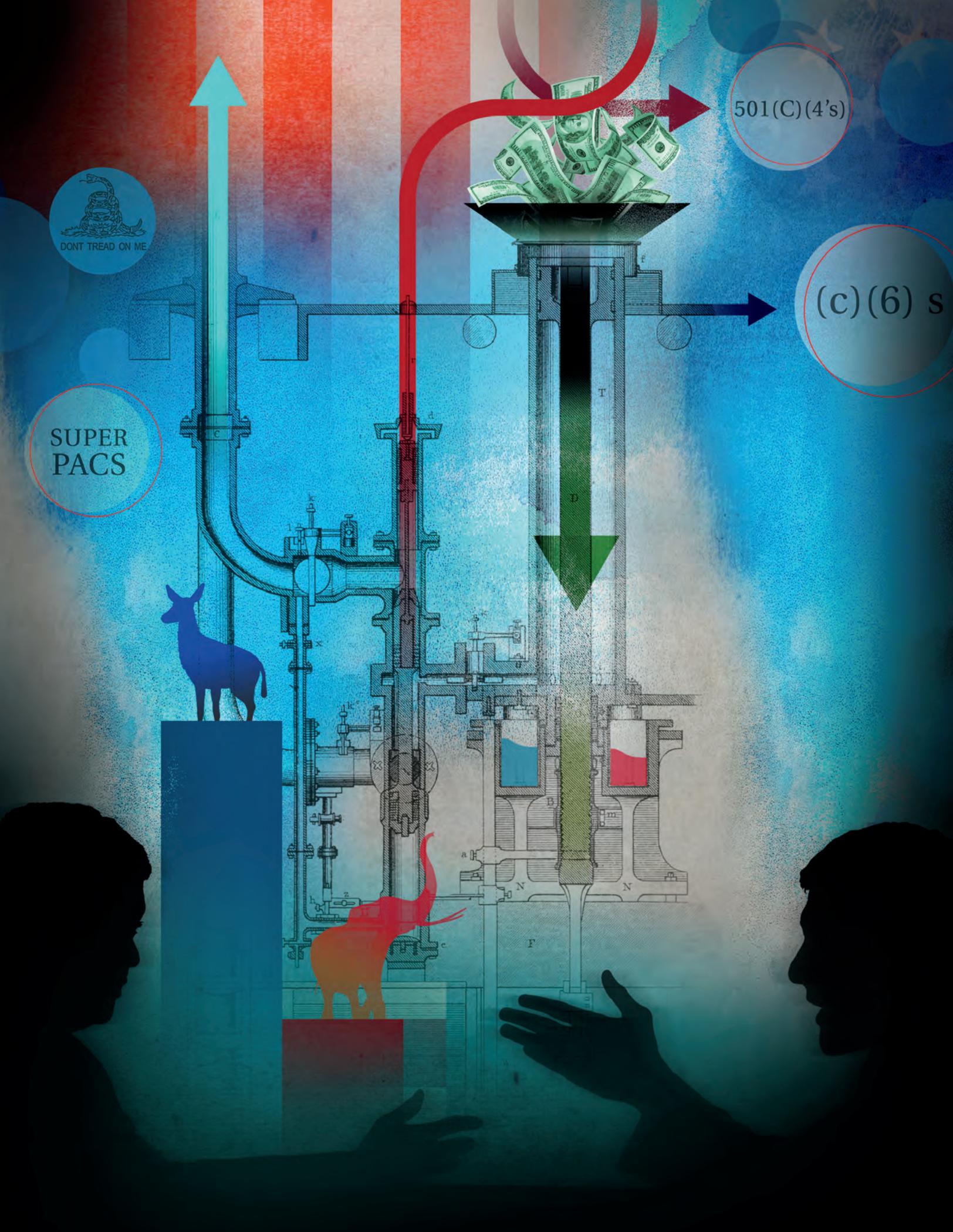
In the age of Internet activism, political parties no longer serve as the exclusive home base for rank-and-file voters. Today, people come to the political process through issue-specific organizations, campaigns, and, sadly, top-down corporate-funded groups like those that spawned the Tea Party. Many if not most of these entities conduct their own get-out-the-vote effort. And while political parties certainly serve an important function, the soft-money era of the 1990s proved that parties are certainly not immune from corruption when we allow huge corporate contributions to fund them.

Power amassed by corporate spending is corrupting regardless of whether it resides in or out of a political party. So while I share Professor Gerken's concern that big-money influence is amassing outside the party system, I believe the only conclusion is to regulate groups outside the party in a way that assures that their amassed power does not corrupt, just as John McCain and I did by banning soft money within the party.

The preservation of our system of elections must be a continual, sometimes ungratifying process as technologies and legal entities continuously evolve. But an argument that corporate money's influence can never be bridled is simply an invitation for corruption itself.

**The Hon. Russ Feingold** served as a U.S. Senator from Wisconsin from 1993 to 2011. He currently serves as the secretary of state's special envoy to the Great Lakes region of Africa, including Rwanda and the eastern reaches of the Democratic Republic of Congo.





501(C)(4's)

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SUPER PACS

DONT TREAD ON ME



## II. DARK Money *and* Shadow Parties

The corruption ruling leads me to what I believe to be the real problem with *Citizens United*. Or, more accurately, it leads me to the two real problems with *Citizens United*. The first is dark money, and the second is shadow parties.

Dark money is the problem that you know. Thanks in part to the Court's corruption ruling, there was a lot of dark money in 2012. In 2008 the Obama campaign had a record \$800 million. One political scientist told me at the time that Obama had more money than God, although I'm not sure how we'd verify that. But the independent groups that were spending in 2012 had a great deal more money than that. Estimates consistently put that number well over a billion dollars. That's *billion* with a "b." And much of that was dark money that cannot be traced to its origins.

As I noted above, we can't really lay the blame for dark money at the Court's feet. The push toward independent spending was already happening in large part because of the failure of Congress and the FEC to keep up with the game of regulatory whack-a-mole. Even before *Citizens United*, 501(c) organizations such as

the Chamber of Commerce and Crossroads GPS—the independent organizations that absolutely dominated the 2012 elections—fell outside current regulations. Nor has Congress or the FEC done what is needed to trace where the independent money is flowing. *Citizens United* didn't cause that problem. But by deregulating independent spending in a world without adequate disclosure measures, it exacerbated the situation and prevented Congress and the FEC from adopting sensible fixes going forward. Needless to say, dark money is a problem. We worry when billionaires can secretly spend gigantic amounts of cash to support candidates.

I won't rehash those worries here. I'll just say that as much as I worry about dark money, I worry more

that dark money is just a symptom of a deeper trend in campaign finance. My worry is less about money and politics and more about *power* and politics. My worry isn't about dark money. It's about shadow parties. My worry is that the SuperPACs and 501(c) organizations might someday become shadow parties, as political elites adapt to the new regulatory environment ushered in by *Citizens United*.

### The challenge of party regulation: political elites as shape-shifters

So what *is* the relationship between money and power in this cycle? It's a perfect example of what Sam Issacharoff and Pam Karlan call the "hydraulics" of campaign finance. Campaign-finance regulations do not reduce money's influence; they simply force it into different outlets. Party donors whose contributions were limited turned to soft money. When the soft-money loophole was closed, the money went into 527s. Then 527s morphed into SuperPACs, and thereupon 501(c)(4)s and (c)(6)s. The money is still in the system; it's just traveling down different channels. Hence the depressing lesson about the hydraulics of campaign-finance reform: Regulation doesn't necessarily reduce the amount of money in the system. It may just shift money into different channels.

That is what many people in my field predicted would be happening in 2012. But they missed a crucial feature about 2012 spending. They assumed that money in 2012 would move away from the parties into other structures and that the parties would therefore lose control of it. Some even thought this would give incumbent politicians an incentive to regulate independent spending. Incumbents, after all, naturally worry about independent organizations stepping on a campaign's message, sending the wrong signal, and depriving candidates and parties of the control they prefer to exercise over spending. Indeed, the one point of agreement between incumbents on both sides of the aisles is that they'd prefer to keep the money in *their* hands. ▶▶

It turns out, however, that parties still exercise a great deal of control over independent spending. What do I mean by that? If the money is being spent by outside groups, how can “the parties” control it? To understand how the parties can still control independent spending—to understand why *Citizens United* might shift the terrain of politics—you have to understand not the hydraulics of campaign finance, but the hydraulics of party power. You have to understand that parties are not stable legal entities but shape-shifters. Once you understand how party elites can retain control over “independent”

organizations, you might start to worry that *Citizens United* matters for quite different reasons from what we’ve suspected.

### Parties as shape-shifters

Here I draw heavily on an article by Michael Kang, although it was written almost a decade ago and devoted to different questions. Kang argued that Issacharoff and Karlan had it wrong when they talked about the hydraulics of campaign finance. He claimed that they mistook what is really a symptom of the hydraulics of

## REACTION FROM RICHARD M. ESENBERG

I agree with Professor Gerken that the conventional story about *Citizens United* is not only overwrought but wrong. The spigot for independent spenders—Professor Gerken’s “shadow parties”—was already wide open. *Citizen United*’s principal innovation was to free that spending from the easily manipulated distinction between “express” and “issue” advocacy. This was an important development but not a revolution.

Whatever its provenance, how does this independent spending matter? Any answer must be tentative. American politics is a bit like the weather in Wisconsin. If you don’t like what’s happening today, just wait until tomorrow.

Still I wonder whether Professor Gerken has it precisely wrong.

The rise of her shadow parties may not marginalize the party faithful at all. Indeed, the rise of independent spenders may enhance political competition and empower candidates more responsive to the parties’ ideological bases.

I doubt that the party faithful “reside in the formal party.” Grassroots activists—Professor Gerken’s “glorious creatures”—are far more likely to call themselves “progressives” or “conservatives” than “Democrats” or “Republicans.” Thus, each party’s base tends to enforce ideological discipline.

Professor Gerken’s assumption is that the shadow parties are synonymous with the party elites. I’m not as sure. What if independent spending is also ideologically motivated and can operate as a vehicle by which insurgent candidates can become relevant? George McGovern’s 1972 candidacy was a grassroots uprising. It was also bankrolled by Stewart Mott—an early and portside version of Charles Koch.

Of course, this may not be optimal. If our current campaign-finance regime leads to the rise of shadow parties, it will be, in part, because it helped to destroy the old ones. If the messages of independent spenders eclipse those of the candidates, it is because we chose to silence the latter while the Constitution prevented us from muzzling the former.

My own response to our inability to manage money in politics might be to call the whole thing off. But that’s a topic for another day.

**Richard M. Esenberg** is the founder and president of the Wisconsin Institute for Law & Liberty, a nonprofit and nonpartisan organization whose activities include litigation in the areas of property rights, economic freedom, voting rights, regulation, taxation, school choice, and religious freedom. He is a longtime member of the Marquette University Law School faculty, currently serving as adjunct professor of law, with courses including Election Law.



party power for an independent phenomenon. It's not money that has a hydraulic force, Kang tells us. It's power. Political energy. Campaign-finance regulation is but the most visible example of the ways in which legal regulation can redirect, but not eliminate, political energies.

To understand the argument, it's useful to start with the basic point. To paraphrase Dan Lowenstein, political parties are not a thing, like a table or a chair. They aren't stable legal entities. They are a loose collection of interests, gathered together to compete with other interests to put policies into place. They can thus take different forms as circumstances dictate.

This means that political parties are very hard to regulate. They are *shape-shifters*. Each time we try to regulate a particular type of political institution, political entrepreneurs find new outlets to channel their energies, new institutions to occupy, new means of exercising power.

#### The presidential nomination process

The best known example in political science is the McGovern-Fraser reforms, and here I should apologize to my political science readers for retelling what has become a bedtime story for their graduate students. In the wake of the 1968 nominating convention, the Democratic Party substantially reformed the nominating process. We now think of conventions as something akin to a coronation—a chance to sell a candidate to the public, not a moment when decisions get made. But for those too young to remember, conventions used to be the moment when the standard-bearer was chosen. There really were smoke-filled rooms, and the nominating process was almost entirely in control of party bosses.

The reforms had one major purpose: to take power away from the party bosses and give it to the party membership. It was the party elites vs. the party faithful, the party leadership vs. its ground troops, the people who controlled the money vs. the people who cast the ballots. Thus was born the nominating process we know today, one relying on primaries and caucuses and involving broad participation by party members.

For a long time, political scientists thought that McGovern-Fraser meant the end of party elites. But it

turns out that the Empire always strikes back. Party elites have still managed to exercise a substantial amount of control over the nominating process despite the absolutely fundamental structural changes that McGovern-Fraser introduced. In fact, over the last decades, almost every single presidential candidate nominated by either party has been the candidate favored by the political elites. The Democrats are more fractious, admittedly, but the Republicans have been virtually in lockstep with their party leaders. The year 2008 was an outlier in this respect. It was the only recent election where both candidates were not the candidates chosen by the elite. John McCain looked like a traditional GOP candidate, but he was loathed by party insiders because he was perceived as disloyal. And Hillary Clinton was the choice of party elites, at least at the beginning of the process.

How is it that political elites no longer have the formal power to choose, and yet they still choose? How do they manage it? Elites exercise influence through what political scientists call the “invisible primary.” If you watch a presidential race closely, you'll notice that before a single vote is cast, there is a seemingly endless array of endorsements (the infamous superdelegate controversy of 2008 just scratches the surface). What elites do, in essence, is signal to each other which candidate they prefer. Money, support, and boots on the ground come with those endorsements. And with money, support, and boots on the ground come votes. Hence the rather astonishing success of party elites. It's not a foolproof system, but it has a far better record of success than most things in politics. ▶▶



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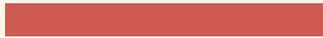
### Shape-shifting and party regulation in Wisconsin

The invisible primary is just one example of the hydraulics of party power—the way that shutting down one outlet for political power leads others to be forced open. Marquette is an especially great place to talk about this trend because one of the most vivid examples of the hydraulics of party power comes from Wisconsin’s own history. It’s an excellent illustration of how party elites shape-shift in response to regulation.

During the first half of the 20th century, Wisconsin imposed substantial regulations on political parties, limiting their ability to electioneer, make endorsements, raise money, etc. Formal political parties couldn’t do much save run the nomination process.

How did party elites respond to Wisconsin’s regulation? They shape-shifted. They looked to “statewide voluntary committees,” which interestingly enough had been created mostly by dissidents within the party. Those nonparty organizations proved to be incredibly enticing to the party organization. Party elites abandoned the official party structure for the private statewide voluntary committees that supported the party. Party elites did all the electioneering and fund-raising they needed to do through private associations. And just as the Supreme Court in *Citizens United* blessed independent spending as “independent” from parties and candidates and thus protected by the First Amendment, the Wisconsin Supreme Court blessed voluntary committees as “independent” from the formal parties’ candidates and thus protected by the First Amendment.

The hydraulics of political power, in short, worked just as you’d expect. When one outlet for power (the formal party) was closed, power found another outlet (a shadow party). As the power of the voluntary committees grew, they became the de facto parties in Wisconsin politics. The shadow parties, in short, became more important than the parties themselves.



*“I’m worried about whether the Jim Messinas of the world will be working inside the formal party structure or outside of it, inside the Democratic and Republican parties or inside the shadow parties.”*

### Independent spending in 2012 and beyond: the rise of shadow parties?

The Wisconsin example strikes me as quite salient today. Once you understand the hydraulics of party power, once you recognize that party elites will shape-shift in response to changes in the regulatory environment, you can see that it’s quite easy to imagine the rise of shadow parties in the wake of *Citizens United*. In fact, we *already* see party elites exercising a great deal of control over independent-spending organizations. Despite the formal prohibitions on coordination, the

independent SuperPACs and 501(c)(4)s are intimately interconnected with the real parties. These organizations have started to look like shadow parties—they are outside of the formal structure, but they have begun to house the party leadership.

#### SuperPACs and nonprofits: the new home for party elites?

To get a sense of which institutions party elites occupy nowadays, take a look at a great paper coauthored by one of my favorite political scientists, Seth Masket. It graphs the connections among the people who run 527s and party elites. The connections are so deep and so pervasive that the diagram looks like a rat’s nest.

The same deep connections run between the SuperPACs and the candidates they support. Most of the SuperPACs are run by the people who used to run the candidate’s campaign. And it’s not just staff members that tie the SuperPACs to their candidates and party. It’s the candidates themselves, as has been brilliantly shown by Stephen Colbert, who has singlehandedly done more for campaign-finance reform than anyone in the last hundred years save Richard Nixon. Colbert did a great skit with his fellow comedian, Jon Stewart, and his lawyer, Trevor Potter, in which Potter represented both Colbert and Colbert’s SuperPAC at the same time. Colbert even put the leaders of both the campaign and the SuperPAC on the same conference call to talk strategy.

The only problem with Colbert's running joke is that it's too accurate to be funny. Colbert is playing it straight. The reality *is* the farce; the comedy is the tragedy. While there is no commonsense definition of *coordination* that would allow what we see today, the legal definition of coordination allows a great deal of, well, coordination.

SuperPACs have used the same footage in advertisements as the campaigns they are supporting. SuperPACs and campaigns have even run what are basically the same ads. Sometimes they even share the same office. For instance, companies working for both the Mitt Romney SuperPAC and his campaign were in exactly the same suites in Alexandria, Virginia.

Better yet, the founder of one of the companies was married to a deputy campaign manager for the Romney campaign. She, conveniently enough, also ran a consulting firm housed—you guessed it—in the same suite. The husband, temporarily cursed with self-awareness, did at least admit that the arrangement looked “ridiculous.” But, returning to Ferdinand the Bull mode, he also insisted that he and his wife never talked about the campaign. He also told us not to worry about coordination with the *third* company in the suite—one also working for Romney's SuperPAC as well as Karl Rove's Crossroads GPS. Why? Because it was separated from the other companies by . . . a conference room. ▶▶

## REACTION FROM SHIRLEY S. ABRAHAMSON

Wisconsin conducts nonpartisan judicial elections in which independent groups (some identified with political parties) have begun to expend substantial sums of money. These sums invariably raise issues of the appearance of partiality and recusal standards for judges. The public is concerned. Recent poll results show that more than 80 percent of respondents believe that campaign financing influences court decisions.

I have frequently said that the public's trust and confidence in the judiciary depend on the public's trust and confidence in a neutral, impartial, fair, and nonpartisan judiciary. No decision a judge makes is more important than the decision about whether to sit on the case. I have called upon our Office of Judicial Education, the two law schools—the University of Wisconsin and Marquette University—and the State Bar to develop education programs for the public, bar, and judges related to recusal.

Marquette University Law School took an important step in inviting Yale Law Professor Heather Gerken, an election law expert, to deliver the Boden Lecture on money and politics. I asked Professor Gerken about the effect of campaign contributions and expenditures on judicial campaigns. Her reply, as follows, should be made part of the public record:

Judicial elections are one of the places where money is likely to have the most corrosive effect. The obvious reason, of course, is that we have a different sense of the position (hence all the objections about judicial elections generally). But I have an additional worry that stems from my experience in election law. In most instances, big money funds races between the two major parties. There, at least, voters have some background sense of the politics of the candidates, which means that money may have less of an effect. In judicial elections, however, the money may matter more because we lack a “shorthand” (such as an identification with a political party) to guide our votes.

**The Hon. Shirley S. Abrahamson** is chief justice of the Wisconsin Supreme Court. She was appointed to the court in 1976 and won elections in 1979, 1989, 1999, and 2009. She is the longest-serving justice in the history of the court and has served as chief justice since 1996.



Even the top-tier leadership is connected. Campaign heads—even some candidates themselves—have begun to attend SuperPAC fund-raisers, while donors and operators of the SuperPACs regularly consult with party officials. My favorite example of “noncoordination” is when Newt Gingrich told *his own* SuperPAC to stop running certain advertisements.

#### Where will Jim Messina work in 2020?

This brings me to what *I* think is the real problem with *Citizens United*. What does the emergence of these independent organizations mean for the structure of American politics? What keeps me up at night is a simple question: Where is Jim Messina—Obama’s mad-genius of a campaign manager—going to work in 2016 or 2020? I’m worried about whether the Jim Messinas of the world will be working inside the formal party structure or outside of it, inside the Democratic and Republican parties or inside the shadow parties.

The SuperPACs and the nonprofits, after all, have started to function like shadow parties. They raise money, they push candidates and issues, and their leadership is often the mirror image of the leadership of the parties themselves. But these organizations have important advantages over the formal parties. They can raise unlimited sums of money, often with minimal disclosure. Election lawyers spend endless amounts of time dealing with the hassles associated with the formal parties’ raising money. If you are a lawyer for one of the shadow parties, your biggest worry is that Congress or the FEC might actually start doing its job and pass regulations. In this day and age, that’s not much of a worry.

Given all the advantages that the shadow parties have over the formal parties, money will continue to flow toward them. More importantly, power will continue to flow toward them. The worry, then, is that in the ongoing and ever-present battle between the party elite and the party faithful, the leadership and the membership, the independent groups may shift the balance of power between the two.

Before I talk about this possibility, I should offer a caveat. It may be that the emergence of these independent organizations will mean nothing in the long term. It’s important for academics to acknowledge that we don’t always know what’s going to happen next.

It wasn’t that long ago when academics were wringing their hands over the weakness of the parties, their lack

of unity, and their lack of a distinctive brand. Now it’s just the opposite, with almost every academic joining the hue and cry over powerful, united parties with deeply polarized identities. American politics churns at a marked pace. Any academic who tells you that she is sure what’s going to happen in the wild and woolly world of politics isn’t an academic worth her salt. Moreover, we are dealing with shape-shifters here. Change is necessarily part of the equation.

More concretely, it may not matter if the newly emerging shadow parties operate alongside the formal parties. The parties have often split their functions. They have, for example, sometimes contracted out their registration or get-out-the-vote work to independent organizations. It’s possible that the independent spending organizations will just be appendages—fund-raising machines that allow the major parties vastly to exceed the limits we’ve imposed on them.

Moreover, no matter how powerful they become, these independent organizations cannot displace the parties or their membership entirely. The party label is like a Good Housekeeping Seal of Approval. It’s a shorthand for voters, one whose importance shouldn’t be underestimated. Being the standard-bearer of a major political party matters. For all its money and power, Crossroads GPS is a political brand unknown to most Americans. It isn’t going to be running a presidential candidate anytime soon.

But the role of the party in American politics goes far deeper than merely serving as a political heuristic, and here’s where we might think harder about the emerging structure of American politics if the shadow parties emerge as a powerful force. Political parties don’t just matter because they provide a useful shorthand for voters. Parties are also the fora in which interest groups coalesce, battle, and reach deals that allow for governance when the time comes. Parties are where a great deal of democratic compromise takes place; each major party offers a package of policy-making compromises that Americans, often reluctantly, choose between. We sometimes think that politics and parties are a problem and governance is what matters. But politics and parties are what make governance possible.

Parties also provide the energy that fuels our democracy—they are the source of much of its creativity and generativity. Party elites serve as “conversational entrepreneurs” in American politics,



in Robert W. Bennett's term. The battles between the parties, the battles within the parties, the wars among political elites and factions and interest groups all help set the policy-making agenda, tee up questions for voters, frame issues, fracture existing coalitions, and generate new ones, as variously demonstrated in the legal literature by Michael Kang and by social scientists building on the late Erving Goffman's work.

Given the role that the parties play in American politics, should we worry about the development of shadow parties? The nonprofits and SuperPACs do a lot of the things the major parties do. They are institutions where elites can bargain, strike compromises, drive debates, frame issues, and sell candidates. If these groups mostly existed separate and apart from the candidates, we might not worry, because the one thing a party requires is a candidate. That is, as I noted above, why many thought that incumbents might put a stop to independent spending at some point: they wouldn't like political power to exist outside the parties. But now incumbents can have their cake and eat it, too. These shadow parties are so tied to the candidates and the parties that politicians can take advantage of everything the formal party structure has to offer while being backed by a powerful independent fund-raising machine. For this reason, one can imagine these shadow parties developing into institutions with strong ties to a candidate, to his donor base, to all of the elite decision makers and interest groups that matter for a campaign.

The one group that these independent organizations will never house, however, is the party faithful. The party faithful are the people who knock on doors, make calls, show up at rallies, and spend countless hours

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working for campaigns. Everyday people who are passionate about politics, the party faithful do most of the ground work for the campaigns. Call them politics' foot soldiers, call them partisan hacks, call them crazy. I call them the most glorious creatures in American politics. And even as the shadow parties' influence grows, the party faithful still reside in the formal party.

What happens if the center of gravity shifts? What happens if the elites run the shadow parties and the party faithful are left by themselves in the shell of the formal party structure? What happens if what really matters in politics happens in the shadow party, not the formal party?

Let me give a crude example. The *Christian Science Monitor* ran a rather extraordinary story in the fall of 2012, when Romney was behind in the polls.

The story suggested that the Romney campaign didn't have enough money to take it through November. It was depending on outside spending, particularly Karl Rove's massive war chest. The reporter asked a simple question: What happens if Rove decides to cut Romney off?

Now imagine you want to be a player in GOP politics. Where do you want to work? Do you want to work for Romney's campaign? Or Rove's? Romney's formal party? Or Rove's shadow party?

As I said before, it's possible it won't matter. It's possible that these shadow parties will simply remain convenient means for evading campaign-finance rules. But it's also possible that the center of gravity will shift. We'll see a bipartite world, with elites and big donors occupying one institution—wielding enormous power by virtue of their money—and the party faithful occupying the other. ▶▶



Quis custodiet ipsos custodes?

### III. Why we should PLACE OUR FAITH *in the PARTY FAITHFUL*

I worry about a world dominated by shadow parties because I have a slightly romanticized view of the party faithful. I think of them as one of the few groups capable of keeping the parties honest.

There's long been a conundrum in politics. Given that no voter can monitor every vote of every representative, how does the principal control the agent? How do the people control their representatives?

For a long time, one answer to that question has been the political parties. They enforce party discipline, punish defectors, reward loyalists, and keep the brand

distinctive. But then, of course, one wonders *quis custodiet ipsos custodes?*

Who will guard the guardians themselves? Who will ensure that the parties do right by the voters?

The party faithful is a possible answer. They serve as a bridge between the elites and

*"I have faith in the party faithful and hope very much that they will continue to wield the power they do."*

the voter, between the party and the people. They provide an institutional check on the bargains that elites can strike, some brake on how many principles will get compromised along the way. Party faithful are often political realists. They understand that compromise needs to be made. But they also believe in something—that's why they are the party faithful.

The party faithful's influence comes through informal mechanisms. The influence that comes from being part of the same organization, being under one roof, interacting regularly with the campaign leadership. We are social animals. Our views are shaped by those around us whether we are aware of it or not.

If you have faith in the party faithful, you might worry about shadow parties because they hive off the party elite from the party faithful, reducing the day-to-day interaction that has long connected the two groups.

If you have faith in the party faithful, you might worry that the emergence of a dual system—a party and a shadow party—will reduce the party faithful's most important form of influence, the influence that they exercise by virtue of being part of the same organization. Big donors and big interests have always played an outsized role in politics. Until now, though, one important access point for the everyday concerns of everyday people has been the everyday people who work for campaigns. What happens when even that access point is eliminated?

If you have faith in the party faithful, the emergence of shadow parties might worry you for reasons that have nothing to do with the conventional wisdom about big donors and dark money.

### Conclusion

I'll end with a more modest, perhaps even a more optimistic claim. Politics is an ever-changing, dynamic force, and few things stay stable for long. But I'll stick with my romantic point as well. As the campaign-finance landscape evolves in response to *Citizens United's* deregulation of independent spending, we shouldn't lose track of the partisan hacks, the foot soldiers of politics, the worthiest and most honorable participants in the party structure: the party faithful. While I've been among those who worry about driving money outside the parties, my bigger worry has become that we're driving *power* outside the parties, turning them into shell organizations whose utility to candidates is little more than the heuristic. We're separating the party elites from the party faithful. We're ensuring that the party elites talk to the moneyed interests, and the party faithful talk to the rest of us. The informal social network that once provided a bridge between those two worlds is slowly being dismantled. I have faith in the party faithful and hope very much that they will continue to wield the power they do. And it's hard to see how that will be true if the power of the shadow parties exceeds that of the real ones. ■