



Brooklyn Law School Legal Studies

Research Papers

Accepted Paper Series

Research Paper No. 364

January 2014

**In Defense of “Super PAC’s” and of the First
Amendment**

Joel M. Gora

This paper can be downloaded without charge from the
Social Science Research Network Electronic Paper Collection:
<http://ssrn.com/abstract=2376894>

11-1-2013

In Defense of “Super PACs” and of the First Amendment

Joel M. Gora

Follow this and additional works at: <http://erepository.law.shu.edu/shlr>

Recommended Citation

Gora, Joel M. (2013) "In Defense of “Super PACs” and of the First Amendment," *Seton Hall Law Review*: Vol. 43: Iss. 4, Article 2.
Available at: <http://erepository.law.shu.edu/shlr/vol43/iss4/2>

This Essay is brought to you for free and open access by Seton Hall Law eRepository. It has been accepted for inclusion in Seton Hall Law Review by an authorized administrator of Seton Hall Law eRepository. For more information, please contact lawlibdigital@shu.edu.

In Defense of “Super PACs” and of the First Amendment

Joel M. Gora*

I. INTRODUCTION

Super PACs seem to have burst upon the electoral scene in 2010, following the United States Supreme Court’s decision in *Citizens United v. Federal Elections Commission*.¹ Like that decision, Super PACs have generally drawn a bad press for similar reasons and from the usual suspects. Critics claim they will buy our elections, steal our democracy, and drown out the voices of the average voter.² They will allow the tiniest top sliver of “the 1%” to dominate our elections and pollute our politics.³ We must find a way to stop them!

Well, of course, any attempt to “stop them” immediately bumps into the First Amendment to the Constitution, which provides, in relevant part, that: “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”⁴ These efforts may also be contrary to the reasons why the Framers wrote, and we cherish, those protections in the first place: to have the most robust, uninhibited, and wide-open discussion and debate about the politicians and the policies that have an

* Professor of Law, Brooklyn Law School. I want to thank Anna Kordas, Brooklyn Law School, class of 2014, for her research assistance on this article. Some of the themes suggested in this article are also briefly set forth in Joel M. Gora, *Free Speech, Fair Elections, and Campaign Finance Laws: Can They Co-Exist?* 56 HOW. L.J. 763, 774–80 (2013). I should also note that as a lawyer for the American Civil Liberties Union (ACLU), I helped challenge the campaign finance restrictions at issue in many of the cases discussed in this article, most notably, *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Citizens United v. Fed. Election Comm’n.*, 558 U.S. 310 (2010).

¹ 558 U.S. 310 (2010).

² See, e.g., Adam Lioz, *Where The Voting Rights Act of 1965 and Money in Politics Meet*, DEMOS, Sept. 13, 2012, <http://www.demos.org/blog/where-voting-rights-act-1965-and-money-politics-meet>; Editorial, *When Other Voices Are Drowned Out*, N.Y. TIMES, Mar. 25, 2012, http://www.nytimes.com/2012/03/26/opinion/when-other-voices-are-drowned-out.html?_r=0.

³ Liz Kennedy, *Stop The Next Citizens United*, DEMOS, Sept. 10, 2013, <http://www.demos.org/publication/stop-next-citizens-united>.

⁴ U.S. CONST. amend. I.

increasingly large impact on our everyday lives. The Framers' goal was to disable the government from controlling the political speech and association indispensable to choosing and controlling the government.⁵ Viewed in that light, Super PACs, far from being the enemy of democracy, become its ally. This article is a defense of Super PACs and of the First Amendment principles and imperatives they embody and reflect.

II. THE ORIGINAL "SUPER PAC"

Sheldon Adelson—famous wealthy backer of Newt Gingrich and Mitt Romney and staunch supporter of Israel and other causes—was not the first big donor to a "Super PAC" in modern times. Arguably, that honor belongs to a man named Randolph Phillips. His group was not very "super" in financial terms, and it was not ultimately found by a federal appellate court to be a political action committee (PAC).⁶ Phillips was a relatively wealthy person and a liberal critic of the war in Vietnam. In the spring of 1972, he and a few like-minded friends, who were very upset about the way President Nixon was conducting the war, decided to do something about it. They passed the hat among themselves, raised a considerable amount of money—slightly over \$100,000 by today's standards—and sponsored a two-page ad in the New York Times.⁷ The ad was the print version of a "negative" attack ad. It called Nixon a "war criminal," accused him of committing specific war crimes—such as ordering the bombing of innocent civilian non-combatants—and urged that he be impeached.⁸ The advertisement also praised a lonely handful of members of Congress who had introduced an impeachment resolution.⁹ The ad hoc group was called the National Committee for Impeachment.¹⁰

No one paid much attention to the group or the ad, except for the United States Department of Justice. They looked at the ad, and

⁵ See *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966).

⁶ The statutory term is "political committee," defined as a group that makes contributions or expenditures for the purpose of influencing a federal election. See 2 U.S.C. §431(4) (2006 & Supp. IV 2006). The term "political action committee" is a popular, though not technically accurate, substitute. See Richard Briffault, *Super PACs*, 96 MINN L. REV. 1644, 1652, n.11 (2012).

⁷ *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1136–37 (2d Cir. 1972).

⁸ Note, *Federal Election Campaign Act—Political Committee (United States v. National Committee for Impeachment)*, 48 ST. JOHN'S L. REV. 316, 318 (1973).

⁹ *Id.*

¹⁰ *Id.* at 317.

2013]

IN DEFENSE OF SUPER PACS

1187

at the calendar (it was May of an election year) and, with the passage of the brand-new Federal Election Campaign Act of 1971 (FECA)—which, for the first time, required serious regulation and disclosure of any individual or group that spent any money “for the purpose of influencing” a federal election¹¹—concluded that this was a campaign ad under that new law.¹² So the executive branch of the United States Government—run, of course, by the President attacked in the ad—through the Department of Justice, run by his friend, Attorney General John Mitchell, brought the litigation weight of the United States down on Phillips and his friends. The government’s theory was that the ad was a campaign ad in “opposing” President Nixon, who was up for re-election, and “supporting” the praised members of Congress, also up for re-election, and, therefore, within the regulatory ambit of the FECA.¹³ This meant that the group violated that law by not registering with the government, failing to provide information about its officers, receipts, and expenditures and failing to disclose to the government the identity of anyone who had contributed more than \$100 to the activity—a ready-made “enemies list” in the offing. This also meant that the group could not engage in any future political speech of that kind without complying with the new law.¹⁴ Indeed, the government sought an injunction against the group’s further First Amendment activity unless it complied—an almost unprecedented request for a prior restraint on speech.

The courts quickly dispatched this effort to suppress political speech. A federal appeals court said that the First Amendment requires giving a narrow scope to the FECA.¹⁵ The Court explained that the FECA could not be used to regulate what we now call “issue advocacy,” speech which criticizes—or supports—politicians and public officials on the basis of the stance they take on issues and does not constitute explicit electoral advocacy.¹⁶ Here, the group was concerned with war crimes, not with the election or defeat of candidates—even though the ad pledged to raise funds for future ads and for efforts to support candidates who saw things the same way as

¹¹ See Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431–57 (2006)).

¹² United States v. Nat’l Comm. for Impeachment, 469 F. 2d 1135, 1136–37 (2d Cir. 1972).

¹³ *Id.* at 1138.

¹⁴ *Id.* at 1136–37.

¹⁵ See *id.* at 1141.

¹⁶ See *id.* at 1142.

the impeachment group.¹⁷ The American Civil Liberties Union (ACLU), fearing that the theory of the government's lawsuit might threaten its own non-partisan, issue-oriented criticism of public officials—most of whom were elected to office—filed suit and secured a similar exemption from the campaign finance laws for its issue advocacy.¹⁸ A proper balance between campaign finance regulations and First Amendment rights seemed to have been reached.

III. THE ACHILLES HEEL OF CAMPAIGN FINANCE CONTROLS

This judicially-fashioned equilibrium between campaign finance regulation and protected political advocacy would be upended a year later when Congress, pointing to “Watergate” as a claimed justification, passed new and sweeping expansions of the federal campaign finance laws.¹⁹ These campaign finance laws were subsequently challenged on First Amendment grounds in the landmark case of *Buckley v. Valeo*.²⁰

The new FECA provisions not only severely limited how much money could be donated to or spent by candidates and their campaigns, but also limited to a paltry \$1,000 what any independent individual or group could spend in an entire year “relative to a clearly identified candidate.”²¹ That would barely pay for one 1/4 page ad in the New York Times.²² Once you or your group sponsored that ad, spending a dollar more on speech “relative to” a candidate became a federal crime, subject to fine and imprisonment. That is a pretty

¹⁷ Note, *supra* note 8, at 319.

¹⁸ See *Am. Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot sub nom. Staats v. American Civil Liberties Union, Inc.*, 422 U.S. 1030 (1975). One of the key players organizing the ACLU participation in both cases was Ira Glasser, then the Executive Director of the New York Civil Liberties Union, the New York State affiliate of the ACLU. Glasser, who would later become the long-time Executive Director of the ACLU, championed the liberal organization's opposition to campaign finance restrictions as fundamentally inconsistent with robust free speech, vigorous criticism of government, and enhanced political participation. See Ira Glasser, *Understanding the Citizens United Ruling*, HUFFINGTON POST, Feb. 3, 2010, http://www.huffingtonpost.com/ira-glasser/understanding-the-emcitiz_b_447342.html.

¹⁹ Joel M. Gora, *Don't Feed the Alligators: Government Funding of Political Speech and the Unyielding Vigilance of the First Amendment*, CATO S. CT. REV. 81, 88 (2010-2011).

²⁰ See 424 U.S. 1 (1976) (involving an across-the-board challenge to the FECA Amendments of 1974). See generally Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

²¹ 18 U.S.C. § 608(e) (Supp. IV 1974) (repealed 1976); see *Buckley*, 424 U.S. at 13, n.13.

²² *Buckley*, 424 U.S. at 40.

2013]

IN DEFENSE OF SUPER PACS

1189

brehtaking prospect in a democracy, especially considering the First Amendment’s language protecting the right of citizens to criticize their government and those who run it. Overall, the new laws seemed to cut to the heart of the First Amendment. They effectively silenced any organized or effective criticism of politicians by limiting the amount that could be spent on speech about them and their conduct in office. Limiting the funding of speech clearly limits the speech itself—how much one can say, how many issues one can discuss, and how deeply one can discuss them.²³

That \$1,000 limit on independent political speech, which would silence or mute the Phillipses of yesteryear (not to mention the Sheldon Adelsons, George Soros and the David Kochs of today) and, by doing so, all of us whose views they represent and whose voices they amplify, seemed aimed at the heart of the First Amendment. The Supreme Court agreed, and in its landmark *Buckley* decision, ruled that limits on how much money one can spend for political speech are effective limits on that speech itself.²⁴ The Court’s reasoning is instructive for our debates today about the validity of Super PACs.

First, the *Buckley* Court decided that the First Amendment required the law limiting independent expenditures to be applied narrowly and interpreted only to cover “express advocacy,” i.e. speech which in express terms advocates the election or defeat of a political candidate.²⁵ Any broader application would threaten “issue” speech involving candidates and undermine the whole point of the First Amendment, which was to free up the ability of the citizenry to criticize the government.²⁶ Only independent speech that explicitly advocated election or defeat could be regulated *in any fashion* by the government, whether through prohibition, regulation, or disclosure.²⁷

But even as so narrowed and limited, the law’s restriction still cut to the very heart of the First Amendment right of the people to criticize the policies and actions of the government and the politicians who run it and to advocate their election or defeat. That undermines both free speech and democracy, since you cannot have one without the other. The government offered three rationales to

²³ *Id.* at 19.

²⁴ *See id.* at 39.

²⁵ *Id.* at 44.

²⁶ *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

²⁷ *See Buckley*, 424 U.S. at 39–44.

uphold this law and they are echoed strongly in today's debates about Super PACs specifically and campaign finance controls generally.

First, the government asserted that independent expenditures for "outside" speech would corrupt the politicians helped by that speech. Since contributions given directly to candidates were to be limited to \$1,000, in order to prevent corruption, independent expenditures had to be limited to the same amount in order to prevent the creation of a loophole in the law.²⁸ The fear was that supporters of candidates, limited in how much they could give to that candidate, would go out and spend more money independently to support that candidate; this practice had to be thwarted if the contribution limits were going to be meaningful and effective. In a way, the government had a point—after all, what's the point of limiting contributions to a candidate if the donor can go out and spend much more money independently to help that candidate? But the Court correctly observed that independent expenditures for speech posed none of the "corruption" concerns posed by direct contributions.²⁹ They were, by definition, *independent* and not coordinated with the candidates or his campaign. So they could not serve the same functions as contributions. And sometimes the support might actually be most unwelcome—Nazis for Romney, for one hypothetical example.³⁰ Moreover, the Court noted, one of the reasons it was willing to allow limitations on contributions to candidates in the first place was that the donors would then be free to go out independently and spend as much as they wanted to support those same candidates—a kind of constitutional *quid pro quo*.³¹ Finally, since such individuals or groups were now free to spend unlimited amounts on speech that fell short of constituting "express advocacy," but might impact campaigns and elections nonetheless, it was pointless to limit independent expenditures that did engage in express advocacy.³² So, the Court concluded, where independent expenditures are concerned, the risks of corruption are low and the First Amendment benefits, namely, ensuring robust, uninhibited, and wide open debate on politics, politicians, and the conduct of

²⁸ See *id.* at 44–45.

²⁹ *Id.* at 46.

³⁰ See *id.* at 47 ("Unlike contributions . . . independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive.")

³¹ See *id.* at 45.

³² See *id.* at 47–48.

2013]

IN DEFENSE OF SUPER PACS

1191

government, are high.³³

Second, the government argued the Adelsons and Phillipases of the world had to be restrained in order to, as the well-worn phrase goes, “level the playing field.”³⁴ This is also like a negative “redistribution of speech”: those that can afford to engage in more speech should be limited so that those who lack the resources for speech will not be disadvantaged. This philosophy is also frequently called the “equality” rationale for campaign finance limitations, a kind of lowest common denominator version of free speech. This was a “one person, one picket sign” kind of approach.³⁵ But the Court sharply rejected the argument that the government interest in “equalizing the relative ability of individuals and groups to influence the outcome of elections” justifies controls on independent political speech advocating election or defeat of candidates:

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the ‘widest possible dissemination of information from diverse and antagonistic sources,’ and to ‘assure the unfettered exchange of ideas for the bringing about of political and social changes desired by the people.’ The First Amendment’s protection against governmental abridgement of free expression cannot properly be made to depend on a person’s financial ability to engage in public

³³ *Buckley*, at 45–48.

³⁴ *Id.* at 48–49.

³⁵ The argument borrowed a theme from the Supreme Court’s “one person, one vote” ruling that required each electoral district to contain approximately the same number of voters in order to end the gross malapportionment where some districts had ten times as many people as others, undermining the influence of the voters in the more populous districts. *See Reynolds v. Sims*, 377 U.S. 533 (1964). The *Buckley* Court rejected this analogy, reasoning that equal political opportunity in apportioning electoral districts did not justify a principle of equally limited speech. *See Buckley*, 424 U.S. at 49, n.55. A similar theme was invoked by the so-called “access to the media” movement, which argued that the concentration of media power in a relatively few hands undermined the First Amendment and democracy. *See Jerome A. Barron, Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1644 (1967). As with the FECA effort to limit speech in order to equalize it, the Court resoundingly rejected this form of speech distribution as well by striking down a “right of reply” statute which compelled the media to offer free space for rebuttals by those whom it had criticized. Such a government-run requirement and mechanism was anathema to free press and free speech principles. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 257–58 (1974).

discussion.³⁶

The Court's description of the purposes of the First Amendment, where campaign finance and independent speech is concerned, fits both Randolph Phillips and Sheldon Adelson perfectly.

The government's final argument to justify campaign finance limitations on independent expenditures was built on the idea that campaigns had become too expensive, that their heavy use of thirty-second television ads was not what the First Amendment was about and that we simply had too much uninformative and unreflective campaign speech which had to be limited. The Court rejected that theory in no uncertain terms:

The First Amendment denies government the power to determine that spending to promote one's views is wasteful, excessive or unwise. In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues on a political campaign.³⁷

This insight fits the framework of democracy well, and is reflected in the high-spending, vibrant, exciting political campaigns we have been conducting in America in recent years. It also reflects a libertarian, anti-censorship theme, which has sounded throughout the Court's First Amendment jurisprudence for a generation now.³⁸

Sheldon Adelson can thank the Supreme Court's wisdom in the *Buckley* case for giving constitutional validation to what he is doing to support his views on government and politics, advocate for those candidates who share those views and will implement those policies and amplify the voices of those who think and believe as he does. In doing so, as the Court in *Buckley* suggested, he is advancing the cause of democracy.³⁹ Ever since *Buckley*, with one exception, the Court has reaffirmed that independent campaign expenditures lie at the core of the First Amendment and cannot be limited. The Court applied this principle to a small donor PAC,⁴⁰ a nonprofit ideological

³⁶ *Buckley*, 424 U.S. at 49–50 (internal citations omitted).

³⁷ *Id.* at 57.

³⁸ See Joel M. Gora, *An Essay in Honor of Robert Sedler*, 58 WAYNE L. REV. 1087, 1091–98 (2012) (discussing cases in a variety of First Amendment areas where the Court has used the anti-censorship theme to reject restrictions on speech).

³⁹ See *Buckley*, 424 U.S. at 22.

⁴⁰ See *Fed. Election Comm'n. v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985).

2013]

IN DEFENSE OF SUPER PACS

1193

corporation funded only by individuals,⁴¹ and to independent expenditures by political parties to support their candidates.⁴² All are free to spend money for independent political advocacy.

The major doctrinal exception was spelled out in the Court’s 1990 decision in *Austin v. Michigan Chamber of Commerce*,⁴³ which held that corporations could be silenced from engaging in independent candidate advocacy because they have too much wealth, which might be used to distort the political process.⁴⁴ Put another way, corporations might exercise too much political speech and therefore need to be restrained. That same reasoning was again employed a decade later in *McConnell v. Federal Election Commission*⁴⁵ which relied on *Austin* to justify the McCain-Feingold law which banned *any* corporation—profit, nonprofit, shareholder or closely-held, large, medium, or small—and *any* labor union from sponsoring *any* broadcast advertisement that even stated the name of a politician during the months before an election.⁴⁶

It was these two cases which the Court overturned, properly in my view, in its well-known *Citizens United* decision, ruling that just because an organization or group might use its resources to engage in free speech, Congress is not justified in banning or limiting it from doing so.⁴⁷ In so ruling, the Court swept away all of the pointless distinctions and limitations on expenditures for independent political speech. Individuals and groups, along with corporations, unions, and nonprofit organizations, all have the same First Amendment rights to use their resources to get out their messages about government and the officials who run it.⁴⁸ As a result, the Court upheld the right of a conservative, nonprofit advocacy corporation to make, distribute, and advertise a movie criticizing a

⁴¹ See Fed. Election Comm’n v. Mass. Citizens for Life, 479 U.S. 238 (1976).

⁴² See Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n, 518 U.S. 604 (1996).

⁴³ 494 U.S. 652 (1990) *overruled by* Citizens United v. Fed. Election Comm’n, 558 U.S. 310 (2010).

⁴⁴ *Id.* at 660.

⁴⁵ 540 U.S. 93 (2003) *overruled by* Citizens United v. Fed. Election Comm’n, 558 U.S. 310 (2010).

⁴⁶ See Bipartisan Campaign Reform Act of 2002 § 201, 2 U.S.C. 434(f).

⁴⁷ *Citizens United*, 558 U.S. at 365.

⁴⁸ See generally Joel M. Gora, *The First Amendment . . . United*, 27 GA. ST. U. L. REV. 935, (2011) (suggesting that the Court properly interpreted the First Amendment in the *Citizens United* case as not allowing distinctions among different persons and groups where the right to engage in political speech is concerned).

leading candidate for President of the United States.⁴⁹ What more classic embodiment of First Amendment activity could you find?

In *Citizens United*, the Court took the *Buckley* principles of protecting the financing of political speech by people, and especially independent speech, and made clear that they applied to organizations of people as well—namely, corporations, nonprofits, and labor unions. But at the core of both cases is the notion that the activities of the Adelsons and the Phillipses, far from being condemned and demonized, should be applauded and praised as embodiments of the purposes and implementations of the most important First Amendment principle of all: the insistence on more speech, not government-enforced silence. *Citizens United* is certainly an important case for protecting independent political speech, but the seeds were planted thirty-five years ago in *Buckley*.

From *Citizens United*, it was but a short step to eliminate any doubts that if one person, group, or organization can spend independently without restraint on political speech, they can associate together for the same purposes and without restraint. Free speech plus freedom to associate equals Super PACs. A lower court decision, *SpeechNow.org v. Federal Election Commission*,⁵⁰ along with several advisory opinions promulgated by the FEC, makes that clear.⁵¹

IV. THE ROAD TO TODAY'S SUPER PACS

The Supreme Court's ruling in *Citizens United* is often pointed to as facilitating the creation of Super PACs and opening "floodgates to unlimited corporate spending" in elections.⁵² While the decision did enhance the ability of corporations and other entities, like labor unions, to participate in political speech, *Citizens United* alone should not be blamed—or credited—for the creation of Super PACs. In fact, the opponents of unrestrained campaign spending have indiscriminately attacked both corporate political spending and Super PACs in an effort, unfortunately quite successful, to create the misimpression of one gigantic, corrupt, and undemocratic mess.⁵³

⁴⁹ *Citizens United*, 558 U.S. at 365.

⁵⁰ See 599 F.3d 686 (D.C. Cir. 2010).

⁵¹ See discussion *Infra* Part IV.

⁵² Sean Siperstein, *Citizens United v. We the People*, HUFFINGTON POST, Jan. 20, 2012, http://www.huffingtonpost.com/sean-siperstein/citizens-united-v-we-the-_b_1219221.html.

⁵³ See, e.g., Liz Kennedy, *10 Ways Citizens United Endangers Democracy*, DEMOS, Jan. 19, 2012, <http://www.demos.org/publication/10-ways-citizens-united-endangers-democracy>; Chris Cillizza and Aaron Blake, *Poll: Voters Want Super PACs to be Illegal*,

2013]

IN DEFENSE OF SUPER PACS

1195

Three facts need to be kept in mind to sort out the purposely created confusion.⁵⁴ First, the corporation or entity spending on express political advocacy that *Citizens United* authorized never produced the avalanche of corporate spending feared.⁵⁵ Second, the increased Super PAC spending was mostly funded by large, indeed, very large, donations from *individuals*—not corporations or unions— independent spending which was valid from the time of *Buckley*.⁵⁶ Finally, to the extent that corporate—or union—money has been funding electorally-related activities by nonprofit organizations, the precise extent of which is unknown, that phenomenon well pre-dated *Citizens United*, though that ruling might have given such funding a psychological lift.⁵⁷

In terms of explicit legal encouragement, the so-called “Super PAC frenzy”⁵⁸ of 2010 and especially 2012 came about as a result of several lower court decisions as well as certain advisory opinions promulgated by the Federal Election Commission.

Once again, it all started with *Buckley v. Valeo* and the Court’s holding that while Congress was at liberty to set limitations on contributions to political campaigns in the interest of preventing corruption or appearance thereof, the legislature had no legitimate governmental interest in infringing on individuals’ freedom of speech through limiting expenditures, especially independent expenditures.⁵⁹ The *Buckley* Court did not deal directly with the

WASH. POST, Mar. 13, 2012, http://www.washingtonpost.com/blogs/the-fix/post/poll-voters-want-super-pacs-to-be-illegal/2012/03/12/gIQA6skT8R_blog.html

⁵⁴ See Dan Abrams, *The Media’s Shameful, Inexcusable Distortion of the Citizens United Decision*, MEDIATE, Feb. 8, 2012, <http://www.mediaite.com/online/the-medias-shameful-inexcusable-distortion-of-the-supreme-courts-citizens-united-decision/>

⁵⁵ See Briffault, *supra* note 6, at 1674; see also Eduardo Porter, *Business Losing Clout in a G.O.P. Moving Right*, N.Y. TIMES, Sept. 3, 2013 <http://www.nytimes.com/2013/09/04/business/economy/business-losing-clout-in-a-gop-moving-right.html?pagewanted=all&r=0> (noting that corporate political spending never materialized after *Citizens United*, despite all the dire predictions to the contrary).

⁵⁶ See James Bennet, *The New Price of American Politics*, THE ATLANTIC, Sept. 19, 2012, available at <http://www.theatlantic.com/magazine/archive/2012/10/the/309086/>.

⁵⁷ See Dan Eggen, *The Influence Industry: Activist Groups Want to Undo Ruling that Led to ‘Super PAC’ Frenzy*, WASH. POST, Jan. 18, 2012, http://articles.washingtonpost.com/2012-01-18/politics/35440052_1_petition-drive-pacs-watchdog-groups; see also Matt Bai, *How Much Has Citizens United Changed the Political Game?*, N.Y. TIMES, July 17, 2012, http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html?_r=0

⁵⁸ See Bai, *supra* note 57.

⁵⁹ See *Buckley*, 424 U.S. at 45. An independent expenditure is an expenditure

provision of the FECA banning unions and corporations, including nonprofits, from using treasury funds for direct political campaign contributions or expenditures.⁶⁰ Instead, a corporation or a union could pay the expenses to set up a PAC, which could then solicit and use individual contributions that were limited in both source and amount pursuant to the statute.⁶¹

Following *Buckley*, courts generally struck down limits imposed on independent expenditures, finding them to represent “direct and substantial restraints on the quantity of political speech” that could not be justified by any governmental interest.⁶² On the other hand, courts upheld contribution limits as an effective method of preventing corruption, unless the limits were so low, as to prevent a candidate from amassing enough funds to effectively advocate his or her candidacy.⁶³ Nonetheless, in 1981, the Supreme Court decided *Citizens Against Rent Control v. City of Berkeley*, in which the court struck down a municipal ordinance setting contribution limits on donations to committees formed to support or oppose ballot propositions.⁶⁴ As one scholar put it, the Court found that the contributions “pose[d] no danger of corruption as they [did] not involve the election of a candidate”⁶⁵

In 2002, Congress amended the FECA by adopting the

that expressly advocates the election or defeat of a clearly identified candidate, but is not made in cooperation or coordination with the candidate or the candidate’s campaign. The *Citizens United* Court observed that the *Buckley* Court had not dealt explicitly with the ban on corporate or union expenditures, but would have likely invalidated such a ban if it had addressed the issue. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 346 (2010).

⁶⁰ See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81; 2 U.S.C. § 441b (2012). The ban on corporate/union contributions directly to federal candidates has been upheld against a constitutional challenge. See *Fed. Election Comm’n v. Beaumont*, 539 U.S. 146, 163 (2003). A post-*Citizens United* case reached the same conclusion. See *United States v. Danielczyk*, 683 F.3d 611 (2012); see generally Case Note, *Fourth Circuit Holds That Ban on Corporate Direct Contributions Does Not Violate First Amendment*, 126 HARV. L. REV. 1707 (2013) (analyzing *Danielczyk*).

⁶¹ Paul S. Ryan, *Wisconsin Right to Life and the Resurrection of Furgatch*, 19 STAN. L. & POL’Y REV. 130, 157–58 (2008) (citing *Fed. Election Comm’n v. Wis. Right to Life*, 127 S. Ct. 2652, 2660–61 (2007)); see also *Fed. Election Comm’n Campaign Guide, Corporations and Labor Organizations 9* (2007), available at <http://www.fec.gov/pdf/colagui.pdf>.

⁶² *Buckley*, 424 U.S. at 55.

⁶³ See *id.* at 21; see also *Randall v. Sorrell*, 548 U.S. 230, 249 (2006) (finding that contribution limits that are too stringent “can harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability”).

⁶⁴ See 454 U.S. 290, 291, 300 (1981).

⁶⁵ Briffault, *supra* note 6, at 1657.

2013]

IN DEFENSE OF SUPER PACS

1197

Bipartisan Campaign Reform Act (BCRA). The BCRA retained the broad ban on political contributions or expenditures using corporate and union treasury funds, and implemented a new, additional ban on corporate or union expenditures for electioneering communications.⁶⁶ The court upheld the ban in *McConnell v. FEC*, reasoning that Congress had a legitimate interest in controlling the funding of ads that were the “functional equivalent of express advocacy.”⁶⁷ Part of the concern was that such expenditures, like direct contributions, might permit preferential access to politicians for those sponsoring the ads.

In a series of post-*McConnell* decisions, several lower courts reconsidered whether such preferential access necessarily constituted corruption when applied to independent expenditures. In 2003, in *North Carolina Right to Life, Inc. v. Leake*, the United States Court of Appeals for the Fourth Circuit struck down a statute limiting individual contributions to independent expenditure committees.⁶⁸ The court found that the legislature “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.⁶⁹ Subsequently, in *EMILYs List v. Federal Election Commission*,⁷⁰ the United States Court of Appeals for the District of Columbia Circuit also ruled, in effect, that “as independent expenditures are not corrupting, the contributions funding them could not be corrupting.”⁷¹

The Court first revisited corporate participation in independent expenditures in *Federal Election Commission v. Wisconsin Right to Life (“WRTL”)*.⁷² The case involved a nonprofit, 501(c)(4) organization, which ran ads criticizing the State’s two United States Senators, one of whom was up for reelection, on the pace of judicial confirmations. The organization argued that the ads were not the “functional

⁶⁶ See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81. Electioneering communications are defined as broadcast or similar medium messages even mentioning or identifying a federal candidate near to an election. No express advocacy is required.

⁶⁷ *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 203–07 (2003).

⁶⁸ See 344 F.3d 418 (4th Cir. 2003).

⁶⁹ *Id.* at 434.

⁷⁰ 581 F.3d 1 (D.C. Cir. 2009).

⁷¹ Briffault, *supra* note 6, at 1659. The statement by the court was technically dicta. The case dealt with FEC regulations limiting which funds certain non-candidate-specific activity could be funded with and not with independent expenditures specifically.

⁷² See *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

equivalent” of express advocacy, and, thus qualified for a constitutional exemption from the BCRA’s electioneering communication restriction.⁷³ The Court agreed, finding that the prohibition did not apply to corporate expenditures for advertisements that did not constitute “express advocacy” or the functional equivalent of “express advocacy.”⁷⁴ Effectively, “after *WRTL*, . . . while corporations still could not expressly advocate for candidates, they could do most of the issue advocacy they had done before the electioneering-communication prohibition”⁷⁵

Finally, the *Citizens United* Court revisited the portion of *McConnell* that upheld the ban on “electioneering communication,” and concluded that the provision was unconstitutional as applied to all types of advocacy by all types of entities.⁷⁶ As is well known by now, *Citizens United*, a nonprofit organization, financed with donations from individuals and for-profit corporations, intended to air a film entitled “Hillary: The Movie.”⁷⁷ The film, which mentioned then Senator Hillary Clinton by name, was to be available in theaters, on DVD, and through a video-on-demand channel beginning in December of 2007.⁷⁸ *Citizens United* also intended to broadcast television advertising to promote the film within thirty days of the 2008 primary elections, in violation of the ban pursuant to § 203 of BCRA, codified under 2 U.S.C. § 441(b).

The *Citizens United* Court agreed with the *Buckley* Court, finding that prevention of quid pro quo corruption was the only legitimate governmental interest that could justify such infringement on constitutional rights.⁷⁹ The independent expenditures, however, due to their lack of prearrangement and coordination with any candidate, “[did] not lead to, or create the appearance of, *quid pro quo* corruption,” and therefore their regulation was not justified, whether the speaker was an individual or a corporate entity.⁸⁰ The

⁷³ Paul S. Ryan, *Wisconsin Right to Life and the Resurrection of Furgatch*, 19 STAN. L. & POL’Y REV. 130, 158 (2008).

⁷⁴ *Wis. Right to Life*, 551 U.S. 449, 470 (2007).

⁷⁵ James Bopp, Jr. & Richard E. Coleson, *Citizens United v. Federal Election Commission: “Precisely What WRTL Sought to Avoid”*, 2010-2011 CATO SUP. CT. REV. 29.

⁷⁶ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365–66 (2010).

⁷⁷ *See id.* at 320.

⁷⁸ *See* Matthew A. Melone, *Citizens United and Corporate Political Speech: Did the Supreme Court Enhance Political Discourse or Invite Corruption?*, 60 DEPAUL L. REV. 29, 69 (2010).

⁷⁹ *See Citizens United*, 558 U.S. at 345–46.

⁸⁰ *Id.* at 360.

2013]

IN DEFENSE OF SUPER PACS

1199

Court reasoned that elections call for “more speech, not less” and concluded that an “outright ban on corporate political speech during the critical pre-election period . . .” was not permissible.⁸¹ Thus, as indicated above, the portion of *McConnell* upholding the constitutionality of BCRA’s ban on corporate and union funding of electioneering communication was overruled, along with *Austin v. Michigan State Chamber of Commerce*,⁸² the earlier decision that had allowed limits on independent expenditures by corporations.⁸³ As a result, all corporations—and unions—were free to use treasury funds leading up to the elections.

This did not, however, affect contribution limits or prohibitions that corporations, unions, and individuals were subject to when contributing funds to PACs.⁸⁴ Thus, following the Court’s decision in *Citizens United*, opponents of campaign finance limits challenged these contribution limits both in courts and through the FEC. The United States Court of Appeals for the District of Columbia Circuit was first to proclaim in *SpeechNow.org v. Federal Election Commission* that Congress had no anti-corruption interest in limiting the amount or source of contributions to an independent group.⁸⁵ Filing suit well before the decision in *Citizens United* came down, SpeechNow.org (“SpeechNow”), a nonprofit, *unincorporated* association, planned to accept contributions only from individuals, and not corporations, in excess of federal limitations, to engage in “independent expenditures” expressly advocating the election or defeat of a clearly identified candidate, but without cooperation with or at the request or suggestion of such candidate.⁸⁶ The court concluded that *contribution* limits as applied to SpeechNow “violate[d] the First Amendment by preventing [individuals] from donating to SpeechNow in excess of the limits and by prohibiting SpeechNow from accepting donations in excess of the limits.”⁸⁷

Shortly after the Court of Appeals issued the decision, the FEC released two advisory opinions, which extended the *SpeechNow* holding to general public corporations, and labor unions, allowing them to contribute unlimited funds to PACs, provided that the funds

⁸¹ *Id.* at 361.

⁸² *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) *overruled by* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

⁸³ *See Citizens United*, 558 U.S. at 365.

⁸⁴ *See* 11 C.F.R. § 114.2 (2011).

⁸⁵ *See* 599 F.3d 686, 696 (D.C. Cir. 2010).

⁸⁶ *See id.* at 690.

⁸⁷ *Id.* at 696.

were used solely for independent expenditures and not for direct contributions.⁸⁸ In Advisory Opinion 2010-09, the FEC allowed Club for Growth, a 501(c)(4) corporation established to participate exclusively in independent expenditures, to solicit unlimited contributions from the general public.⁸⁹ On the same date, in Advisory Opinion 2010-11, the FEC determined that Commonsense Ten, a registered nonconnected political committee (i.e. one not sponsored by a corporation or union), that intended to make only independent expenditures, could solicit and accept unlimited contributions from corporations and labor organizations in addition to the general public. The combination of the decisions by the FEC and the courts led to the creation of the so-called Super PACs,⁹⁰ also referred to as “independent-expenditure-only committees (IEOCs),”⁹¹ capable of unlimited fundraising for independent expenditures and unlimited non-coordinated spending.

In addition, another recent decision by the United States District Court for the District of Columbia allowed regular PACs to function like Super PACs as long as they maintained separate accounts exclusively for independent expenditures. The organization at issue in *Carey v. Federal Election Commission*—the National Defense PAC (NDPAC)—was planning on making direct political contributions and independent expenditures from two separate accounts.⁹² The court ruled and the FEC agreed that the contribution limits would not be enforced against the PAC with regard to contributions NDPAC received to make independent expenditures, as long as the organization maintained separate bank accounts for (1) independent

⁸⁸ See Commonsense Ten, A.O. 2010-11, 2010 WL 3184269 (Fed. Election Comm’n July 22, 2010); Club for Growth, A.O. 2010-09, 2010 WL3184267 (Fed. Election Comm’n July 22, 2010).

⁸⁹ Traditional PACs can only solicit contributions from certain categories of individuals known as “the restricted class.” See Fed. Election Comm’n Campaign Guide, Corporations and Labor Organizations, 20 (2007), available at <http://www.fec.gov/pdf/colagui.pdf>. For a corporation, such a class consists of the corporation’s executive and administrative personnel, the stockholders and their family members. For labor union, the class includes “union members, its executive and administrative personnel and families of both groups.” *Id.* at 20–21.

⁹⁰ Eliza Newlin Carney, *FEC Rulings Open Door for “Super” PACs*, NAT’L J., Aug. 2, 2010, <http://www.nationaljournal.com/columns/rules-of-the-game/fec-rulings-open-door-for-super-pacs-20100802>.

⁹¹ R. Sam Garrett, “Super PACs” in *Federal Elections: Overview and Issues for Congress*, CONG. RESEARCH SERV. 2 (Oct. 6, 2011), available at [http://op.bna.com/der.nsf/id/rtar-8n6pkq/\\$File/Super%20Pacs%20in%20Federal%20Elections.pdf](http://op.bna.com/der.nsf/id/rtar-8n6pkq/$File/Super%20Pacs%20in%20Federal%20Elections.pdf). Super

⁹² See 791 F. Supp. 2d 121, 127 (D.D.C. 2011).

2013]

IN DEFENSE OF SUPER PACS

1201

expenditures and (2) source and amount limited contributions for the purpose of making candidate contributions.⁹³

Thus, today’s Super PACs were born, through a complicated process, ultimately tracing its progenitor to *Buckley v. Valeo*, but with the important moment of midwifery by *Citizens United*.⁹⁴

V. WHAT IS TO BE DONE? THE VERDICT ON SUPER PACS

Are these Super PACs—anchored in *Buckley*, with a crucial assist from *Citizens United* and *SpeechNow.org*—wrecking our democracy and putting our government up for sale to the highest bidder? That is what many charge: there is too much speech; it is all so negative; it gives some points of view an unfair advantage; it will give undue access and influence to the Big Spenders.⁹⁵ That is not what I see on our electoral landscape. In the 2012 elections I saw Presidential and Congressional campaigns where the generous funding generated the kind of robust, wide-open, vigorous, unrestrained, competitive, and informative political campaigns that our elections should be and that our democracy requires. And Super PACs play an important role in fueling that debate and generating that interest. To those who complain about the “cacophony” that all of this campaign spending and speech is causing, the Supreme Court has provided an apt response: “[t]hat the air may at times seem filled with verbal cacophony is . . . not a sign of weakness but of strength.”⁹⁶

Current estimates put the total spending on the 2012 federal elections at approximately \$7.3 billion.⁹⁷ Of that amount, perhaps \$2 billion, or less than one third, was spent by “outside” groups and individuals—Super PACs, nonprofits, and others.⁹⁸ Of that \$2 billion only approximately \$383 million has been estimated to have come from undisclosed sources, and none from Super PACs which are subjected to extensive disclosure.⁹⁹ Thus, the so-called “dark money”

⁹³ See *id.* at 132.

⁹⁴ New Jersey has recently recognized the validity of Super PACs in state elections. See Matt Friedman, *State Campaign Finance Agency Lifts Political Contribution Caps for Independent Groups*, NJ.COM, (May 28, 2013 2:33 PM), http://www.nj.com/politics/index.ssf/2013/05/state_campaign_finance_lifts_p.html.

⁹⁵ See Editorial, *The Cacophony of Money*, N.Y. TIMES, Oct. 8, 2012, <http://www.nytimes.com/2012/10/08/opinion/the-cacophony-of-money.html>.

⁹⁶ *Cohen v. California*, 403 U.S. 15, 25 (1971).

⁹⁷ See *Current Issues in Campaign Finance Law Enforcement: Hearing Before the S. Comm. On Crime and Terrorism*, 113th Cong. 1 (2013) (statement of Bradley A. Smith, Chairman, Center for Competitive Politics).

⁹⁸ See *id.*

⁹⁹ See *id.*

or unreported money accounted for less than five percent of total election-related spending, and none of it involved Super PACs.¹⁰⁰ The amount of Super PAC spending has been estimated to be between \$600 million and \$800 million, approximately ten percent of overall federal spending.¹⁰¹ This was a dramatic increase over such spending in the 2010 Congressional elections, but was understandable since spending surrounding campaigns typically increases during Presidential election years; moreover, 2012 was a year with key hotly contested and expensive Senate races.¹⁰² Despite the myths and half truths about Super PACs, they are playing an important role in our elections by amplifying the voices of the people whose viewpoints they represent. Nor is big corporate money swamping these elections. In fact, precisely the opposite is the case. As the New York Times recently reported, very few public corporations contribute to Super PACs, and “[v]irtually no public corporations have spent their own money directly in political campaigns, a practice now permitted under the Supreme Court’s *Citizens United* decision.”¹⁰³ So, the immediate, post-decision hysteria that corporations would control our elections has proven to be totally unfounded.

On the other hand, most of the money contributed to Super PACs comes from individuals, though a significant amount has come from unions and nonprofit organizations. To be sure, a large portion of the Super PAC funding has come from a relatively small number of very wealthy individuals. But the same can be said for ownership of major news media and sponsorship of major foundations, all of which are part of our political debate. Unless we want to impose some kind of across-the-board leveling principle on any individual’s annual financial participation in politics and government—a kind of “one

¹⁰⁰ *See id.*

¹⁰¹ Estimates vary as to the precise amount. *See* Briffault, *supra* note 6, at n.2 (“In 2010, Super PAC spending exceeded ten percent of total candidate spending in sixteen Senate and House elections.”). One of the campaign spending monitor groups puts the number at \$609 million. *Super PACs*, OPENSECRETS.ORG, www.opensecrets.org/pacs/Superpacs.php (last visited Sept. 26, 2013).

¹⁰² *See* R. Sam Garrett, *Super PACs in Federal Elections: Overview and Issues for Congress*, CONG. RESEARCH SERV. 18 (Apr. 4, 2013), available at <http://www.fas.org/sgp/crs/misc/R42042.pdf>; *see also*, *Super PACs*, OPENSECRETS.ORG, www.opensecrets.org/pacs/Superpacs.php (last visited Sept. 26, 2013) (estimating Super PAC spending at \$609 million).

¹⁰³ Nicholas Confessore, *S.E.C. Gets Plea: Force Companies to Air Donations*, N.Y. TIMES, Apr. 24, 2013, at A1. To be sure, some corporations—as well as many unions—may be funding nonprofit 501(c)(4) organizations, but that is a different issue from Super PACs.

2013]

IN DEFENSE OF SUPER PACS

1203

person/one picket sign” rule—we should celebrate the outputs, not condemn the inputs.

Similarly, Super PACs are anything but secret, and their funds are anything but “dark money.” On the contrary, those committees are fully registered with the Federal Election Commission, and they have to file periodic reports identifying everyone who contributes even a penny more than \$200 in an entire calendar year—a trivially low amount, which sacrifices political privacy and anonymity for no substantial government purpose. These committees must also detail expenditures, and they have to report any broadcast ads that constitute “electioneering communications” almost immediately. That is why we know so much about Sheldon Adelson and all the other people and groups that fund Super PACs.

As to the responsibility for “negative” “attack” ads, do not blame the Super PACs alone. The candidates themselves and their campaigns also showed a real appetite for brutal and harsh commentary about their opponents. Just look at the numerous 2012 attack ads on Governor Mitt Romney and Bain Capital by the Obama Campaign.¹⁰⁴ Finally, more often than not, Super PACs come to the aid of challengers and newcomers seeking to unseat incumbents and entrenched interests. In a real sense, the Super PACs have done their fair share to “level the playing field.” The enhanced competitiveness that they provide gives a shot in the arm to competitive politics, which, in turn, rejuvenates our political system and our democracy.

Unfortunately, the public has been told a different story, one which blames *Citizens United* for unleashing the “flood of unfettered political spending.”¹⁰⁵ “Not since the Gilded Age has our politics been opened so wide to corporate contributions and donations from secret sources.”¹⁰⁶ However, what many fail to realize is that while some Super PAC funds do come from corporations and unions, “the

¹⁰⁴ See, e.g., Sara Dover, *Obama Attack Ad Brings Up Mitt Romney’s Swiss Bank Account*, INT’L BUS. TIMES, May 1, 2012, <http://www.ibtimes.com/obama-attack-ad-brings-mitt-romneys-swiss-bank-account-694006>; Helene Cooper and Michael D. Shear, *Facing Criticism, Obama Defends Ads Attacking Romney’s Record at Bain Capital*, N.Y. TIMES, May 21, 2012, http://www.nytimes.com/2012/05/22/us/politics/obama-defends-attacks-on-romneys-record-at-bain.html?_r=0.

¹⁰⁵ Molly Ball, *Did Citizens United Help Democrats in 2012?*, NAT’L J. (Dec. 3, 2012 11:13 AM), http://www.nationaljournal.com/politics/did-citizens-united-help-democrats-in-2012-20121203?mrefid=site_search.

¹⁰⁶ Bennet, *supra* note 56.

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.¹⁰⁷ As previously explained, independent spending PACs were permitted to solicit unlimited donations from corporations, labor unions, and the general public after the FEC promulgated two advisory opinions post-*Citizens United*.

Likewise, despite all of the dire warnings that right-wing money would control the 2012 elections, President Obama secured reelection handily, and the Republicans managed to lose several Senate races they expected to win. The Republicans kept control of the House, but by a narrower margin. Overall, there was a good deal of spending on all sides, and lots of spending by conservative groups and Super PACs. But when the dust settled, despite all of that spending and the hundreds of millions of dollars spent by conservative groups attacking Democrats, little changed in Congress.¹⁰⁸ The Republican Party lost two seats in the Senate, which went to a Democrat and an Independent, and eight seats in the House of Representatives, with all eight seats now occupied by newly elected Democrats.¹⁰⁹

Ezra Klein described the myths that the media purveyed to the public concerning the role of money in the 2012 elections. Klein, a prominent political observer and journalist, introduced a recent panel discussion on money, politics, and inequality with the following *mea culpa*:

But it's hard to look at the 2012 election, with its record fundraising and the flood of Super PACs and all the rest of it, and come away really persuaded that money was a decisive player. And yet the way we talked about money in the run-up to the 2012 election, we really suggested it would be a decisive player. In fact, we suggested, quite often, that it wouldn't just decide the election, but that it would

¹⁰⁷ Briffault, *supra* note 6, at 1645. The constitutionality of such a ceiling as applied to donations to an independent spending group has been in question ever since Justice Harry Blackmun's concurring opinion in *CMA v. FEC*, 454 U.S. 182, 203 (1981).

¹⁰⁸ Matthew DeLuca & Michael Keller, *Not-So-Super PACs: 2012's Winners and Losers*, THE DAILY BEAST (Nov. 15, 2012 4:45 AM), <http://www.thedailybeast.com/articles/2012/11/15/not-so-Super-pacs-2012-s-winners-and-losers.html>.

¹⁰⁹ House Races, CBS NEWS, <http://www.cbsnews.com/election-results-2012/house.shtml?tag=contentMain;contentBody> (last visited Sept. 26 2013).

2013]

IN DEFENSE OF SUPER PACS

1205

imperil democracy itself. So I think we have some explaining to do. And I think this panel is a good time to start.¹¹⁰

So, in the final analysis, what is the harm in letting the Adelsons, the Kochs, and the Soroses spend vast amounts of money to support political activity and the ideas they believe? Two answers are usually given.

First, no one person should have too much speech. But that flies directly in the face of a core First Amendment principle to encourage more speech, not to coerce silence, as campaign finance limits do. It also undermines the core purpose of the First Amendment: to get as much information to the public as possible, especially about government and politics and public officials. Indeed, democracy is dependent on the most well-informed electorate rather than one forced to get their information from limited sources. Similarly, the Adelsons of the world give voice to and amplify the voices of all of the people who believe as they do. If I agree with him, then when he speaks or supports speech, he speaks for me. My speech is leveraged by his. And, if he has too much speech, how much is too much? If the First Amendment allows the principle of not allowing any one person or group to have too much speech, or spend too much money on too much speech, should we take away Rupert Murdoch’s media empire, or George Soros’s foundation empire? Under such a leveling principle, we would also have to address the difficult question of exactly what speech we are covering here with our “too much” blanket: express advocacy speech, mere mention of a candidate speech, issue speech? And, of course, do not forget that we are letting a government full of incumbents make all these rules and appoint the people who will enforce them. The recent exposure of IRS political harassment of conservative groups provides a timely reminder, if one were necessary, of the perils of putting the fox in charge of the chicken coop.¹¹¹ Finally, we have never insisted on some kind of proportional representation between the resources available to support an idea and the popularity of that idea. If we

¹¹⁰ Ezra Klein, *We got way too excited about money in the 2012 elections*, WONK BLOG, (May 6, 2013, 11:00 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/06/we-got-way-too-excited-over-money-in-the-2012-elections/>.

¹¹¹ See Jonathan Weisman, *Scrutiny of Political Nonprofits Sets Off Claim of Harassment*, N.Y. TIMES, Mar. 6, 2012, <http://www.nytimes.com/2012/03/07/us/politics/irs-scrutiny-of-political-groups-stirs-harassment-claim.html?pagewanted=all>; see also Summary of IRS News, TAX PROF BLOG, http://taxprof.typepad.com/taxprof_blog/irs_news/ (last visited Oct. 11, 2013).

had, none of the rights movements of the last half century would have been possible, because they started out as unpopular or unaccepted ideas and required extensive resources to lift their voices and get their messages out; the gay rights movement is only one recent prominent example.¹¹²

Second, no person should have too much political influence based on their financial resources. But people and groups that use their resources to help elect candidates whose policies they support will always have influence with those candidates if they are elected. Once again, that is not corruption, but democracy—a feature, not a bug, of our system. It is why we have elections, so we can do all we can to support the candidates of our choice with the understanding they will carry out the policies we supported them to carry out in the first place. One major union devoted tens of millions of dollars to help elect President Obama in 2008 on the expectation that his policies would be labor-friendly if he was elected.¹¹³ And to ensure that was the case, the president of that union visited the White House on a dozen occasions in the first two years of the Obama Administration.¹¹⁴ By the way, of course, the much-reviled *Citizens United* decision freed up unions to spend money to support favored candidates just as it freed up corporations. This illustrates what many political scientists have shown: policy does not follow support, support follows policy.¹¹⁵ In short, there is no harm and much benefit in what the Super PACs and their supporters do.

There is only one severe drawback in all of this unlimited

¹¹² Civil rights groups such as the NAACP and the ACLU depended on a relatively small number of large donors to help them get started with their controversial causes. See Ralph K. Winter, *The History and Theory of Buckley v. Valeo*, 6 J. L. & POL'Y 93, 108–09 (1997). The same has been true of other left-wing groups. See Ben Joravsky, *Seed Money: The Crossroads Fund, a Foundation for the Left-out*, CHICAGO READER, Apr. 14, 1988, <http://www.chicagoreader.com/chicago/seed-money-the-crossroads-fund-a-foundation-for-the-left-out/Content?oid=872064#.UlniP27kL7c.email>. In contemporary times, the same has been true for the gay rights movement. See Erik Eckholm, *Supporters of Same-Sex Marriage See Room for Victories*, N.Y. TIMES, Oct. 30, 2012, http://www.nytimes.com/2012/10/31/us/politics/gay-marriage-supportors-hope-to-win-in-4-states.html?ref=erikeckholm&_r=0.

¹¹³ See Steven Greenhouse, *Obama Receives Union Endorsements*, N.Y. TIMES (Jan. 9, 2008), available at <http://thecaucus.blogs.nytimes.com/2008/01/09/obama-to-get-union-endorsement/>.

¹¹⁴ Steven Greenhouse, *In Obama, Labor Finds the Support It Expected*, N.Y. TIMES (Mar. 1, 2009), available at <http://www.nytimes.com/2009/03/02/washington/02labor.html>.

¹¹⁵ See Daniel Hays Lowenstein et. al., *Election Law: Cases and Materials* 676–79 (5th ed., 2012).

2013]

IN DEFENSE OF SUPER PACS

1207

political giving and spending, which is, by and large, so beneficial for our democracy. That is that our two most central, important political actors—our candidates and our parties—have to fight their political battles with one hand tied behind their back. While their expenditures cannot be limited, contributions to them can be.¹¹⁶ As a result, candidates and parties face the prospect of being outspent by independent individuals and groups who are no longer restrained in terms of what they can raise and spend. That is a potential imbalance in our political and electoral speech system that should concern us.¹¹⁷

In light of all the unrestrained independent spending, we need to revisit whether the continued limits on contributions to parties and candidates serve any of the purposes claimed for them or that are recognized as constitutionally acceptable. Maybe we should finish the job that *Buckley* solved only partially, that *Citizens United* improved considerably, but that still needs to be studied. That task is to develop a system of no limits on political giving and spending to expand the speech that is fostered thereby, smart disclosure of large contributions to candidates to assess improper influence potential, and, even more broadly, serious public funding to raise the playing field for all candidates. If this approach seems a bit jarring, consider the opposite end of the spectrum of alternatives: putting the government in charge of how much political speech we the people can have by ceding plenary control over the funding of that speech to the very government that our political speech is supposed to monitor, control, and change. That strikes me as the scariest proposition of all, and one that the First Amendment should not tolerate. I will take my chances with the wisdom and good judgment of the people, not the government.

¹¹⁶ The basic \$1,000 contribution limit, upheld in *Buckley*, is still the law, though it has been statutorily adjusted for inflation and is currently \$2,600. The question of the validity of *aggregate* contribution limits is currently before the Court in *McCutcheon v. Fed. Election Comm’n*, 893 F. Supp. 2d 133, 135 (D.D.C. 2012), *prob. juris.* ^{noted}, 133 S. Ct. 1242 (2013). See Joel M. Gora, *McCutcheon v. FEC and The Fork In the Road*, SCOTUS Blog, Aug. 15, 2013, <http://www.scotusblog.com/2013/08/symposium-mccutcheon-v-fec-and-the-fork-in-the-road/prob>.

¹¹⁷ See generally PETER J. WALLISON & JOEL M. GORA, *BETTER PARTIES, BETTER GOVERNMENT: A REALISTIC PROGRAM FOR CAMPAIGN FINANCE REFORM* (2009).