

# Boden Lecture: The Real Problem With Citizens United: Campaign Finance, Dark Money, and Shadow Parties

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## BODEN LECTURE

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### **THE REAL PROBLEM WITH *CITIZENS UNITED*: CAMPAIGN FINANCE, DARK MONEY, AND SHADOW PARTIES**

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\*J. Skelly Wright Professor of Law, Yale Law School. What follows is a lightly footnoted, lightly edited version of the speech I delivered as the Boden Lecture at the Marquette University Law School. Many thanks to the dean and faculty of Marquette University Law School for giving me this extraordinary opportunity and offering such helpful comments. Thanks also to Ana Muñoz for a comment in class that prompted me to think harder about the role of the party faithful.

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#### 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 twenty-four 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 Dean Kearney is also the person who instructed me that this talk should be forty-three minutes long.

Today I will use my forty-three 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*<sup>1</sup> 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*<sup>2</sup>—the much-revered case in which the Court upheld campaign-finance regulations in

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

2. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990).

order to promote equality—was the modern-day equivalent of *Plessy v. Ferguson*.<sup>3</sup>

Even setting aside the overwrought reference to *Plessy*, almost all of that story is wrong, and some of it is utter nonsense. And I say that not as someone who is against campaign-finance regulation, but as someone who believes in it. I say that 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 so much about dark money, but “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 politics' saving grace: the “party faithful,” who play a crucial role in connecting everyday citizens to party elites.

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3. 163 U.S. 537 (1896).

I. THE REAL PROBLEM WITH *CITIZENS UNITED*

To understand why *Citizens United* really matters, you have to know some history.<sup>4</sup> 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,<sup>5</sup> and we saw that it was good. The snake in this garden of campaign-finance Eden was the Supreme Court's decision in *Buckley v. Valeo*.<sup>6</sup> 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). On 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 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.<sup>7</sup>

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.

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4. The next few paragraphs are drawn from a speech I delivered at Georgia State Law School. See Heather Gerken, *Keynote Address: Lobbying as the New Campaign Finance*, 27 GA. ST. U. L. REV. 1155 (2011).

5. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431 et seq. (2012)).

6. 424 U.S. 1 (1976).

7. See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1711 (1999).

A. *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. The floodgates of corporate spending were open well before *Citizens United*.<sup>8</sup> Due to an earlier Supreme Court decision that originated from Marquette's home state of Wisconsin,<sup>9</sup> 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 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.<sup>10</sup> 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.

The final mistake in the reformers' tale of woe is the suggestion that it was a disaster when *Citizens United* overruled *Austin*,<sup>11</sup> the solitary Supreme Court case that relied on the equality rationale to uphold a campaign-finance regulation.<sup>12</sup> 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

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8. This point was made early on by Nate Persily. See Nathaniel Persily, *The Floodgates Were Already Open*, SLATE (Jan. 25, 2010, 2:30 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/01/the\\_floodgates\\_were\\_already\\_open.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/the_floodgates_were_already_open.html).

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

10. *Citizens United v. FEC*, 558 U.S. 310, 365–71 (2010).

11. *Id.* at 365.

12. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990).

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.

### *B. 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.<sup>13</sup>

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."<sup>14</sup>

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."<sup>15</sup> 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"<sup>16</sup> 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

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13. The next three paragraphs are drawn from a speech I delivered at Georgia State. See Gerken, *supra* note 4.

14. *Citizens United*, 558 U.S. at 360.

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

16. *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001); *Nixon*, 528 U.S. at 390.

Congress can regulate whenever the American people think the fix is in, it can regulate at any time.<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup> That's why we have SuperPACs. That's why the 501(c)(4)s and (c)(6)s are hard to regulate.

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.

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17. Cf. Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119 (2004) (showing that public perceptions of corruption have remained strong over time and are unaffected by changes in campaign-finance regulation).

18. Philip Rucker, *Mitt Romney Says 'Corporations are People' at Iowa State Fair*, WASH. POST (Aug. 11, 2011), [http://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I\\_story.html](http://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html).

19. See, e.g., *Iowa Right To Life Comm. v. Tooker*, 717 F.3d 576 (8th Cir. 2013); *Texans for Free Enter. v. Texas Ethics Comm'n*, 732 F.3d 535 (5th Cir. 2013); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010); *Green Party of Conn. v. Garfield*, 616 F.3d 189 (2d Cir. 2010).

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.<sup>20</sup> 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 suggest in Part II.

## 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 dollars. 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. 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.<sup>21</sup> The push toward independent spending was already

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20. Andrea Chang, *Target, Gay Rights Supporters at Odds Over How to Settle Dispute*, L.A. TIMES (Apr. 8, 2011), <http://articles.latimes.com/2011/apr/08/business/la-fi-target-gay-20110409>; Andrew Stern, *Target Corp Targeted for Political Donation*, REUTERS (Aug. 3, 2010), <http://www.reuters.com/article/2010/08/03/usa-elections-contributions-idUSN0316847320100803>.

21. See *supra* Part I.A.

happening in large part due to 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 or 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*.

*A. 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.<sup>22</sup> 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. 527s morphed into SuperPACs, then 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.

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22. Issacharoff & Karlan, *supra* note 7.

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 aisle 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 than we've suspected.

### *B. 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.<sup>23</sup> 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 party power for an independent phenomenon.<sup>24</sup> 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. Political parties are not a thing, like a table or a chair.<sup>25</sup> They aren't stable legal entities.<sup>26</sup> They are a loose collection of interests, gathered

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23. Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131 (2005).

24. *Id.* at 149.

25. To use Dan Lowenstein's colorful phrase, parties aren't like "a chair, or a planet, or a baked potato." Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1759 (1993).

26. Kang, *supra* note 23, at 143–46; *see also* Lowenstein, *supra* note 25.

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.<sup>27</sup> 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.

### 1. 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.<sup>28</sup> 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 the 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

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27. Kang, *supra* note 23, at 155–60.

28. For an overview, see, e.g., LARRY M. BARTELS, *PRESIDENTIAL PRIMARIES AND THE DYNAMICS OF PUBLIC CHOICE* (1988); NELSON W. POLSBY, *CONSEQUENCES OF PARTY REFORM* (1983).

Republicans have been virtually in lockstep with their party leaders. 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.”<sup>29</sup> 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.

## 2. 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.<sup>30</sup>

During the first half of the twentieth century, Wisconsin imposed substantial regulations on political parties, limiting their ability to

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29. For a description and an overview of the political science literature, see Kang, *supra* note 23, at 151–55.

30. The classic account is Frank J. Sorauf, *Extra-Legal Political Parties in Wisconsin*, 48 AM. POL. SCI. REV. 692 (1954). See LEON D. EPSTEIN, *POLITICS IN WISCONSIN* 28–29 (1958); Steven E. Schier, *New Rules, New Games: National Party Guidelines and Democratic National Convention Delegate Selection in Iowa and Wisconsin, 1968–1976*, 10 PUBLIUS 101, 104–05 (1980). For a similar take on this history, see SETH E. MASKET, *NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLZARIZE LEGISLATURES* 44 (2012) and Kang, *supra* note 23, at 147.

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.<sup>31</sup> Those non-party 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 fundraising 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.<sup>32</sup>

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.

### *C. 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.

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31. Sorauf, *supra* note 30, at 692.

32. Sorauf, *supra* note 30, at 698 (citing *State ex rel. La Follette v. Kohler*, 200 Wis. 518, 563–64, 228 N.W. 895 (1930)).

### 1. 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 co-authored by one of my favorite political scientists, Seth Masket.<sup>33</sup> 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.<sup>34</sup> 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 common-sense 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.<sup>35</sup> SuperPACs and campaigns have even run what are basically the same ads.<sup>36</sup> Sometimes they even share the

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33. Richard M. Skinner, Seth E. Masket & David A. Dulio, *527 Committees and the Political Party Network*, 40 AM. POL. RES. 60 (2012).

34. *The Colbert Report: Mike Allen* (Comedy Central television broadcast Jan. 12, 2012), available at <http://www.colbertnation.com/the-colbert-report-videos/405889/january-12-2012/indecision-2012—colbert-super-pac—coordination-resolution-with-jon-stewart>.

35. The story first appeared in *Politico*. Ben Smith, *Perry Ad Features SuperPAC Footage*, POLITICO (Nov. 26, 2011), [http://www.politico.com/blogs/bensmith/1111/Perry\\_ad\\_features\\_SuprPAC\\_footage.html](http://www.politico.com/blogs/bensmith/1111/Perry_ad_features_SuprPAC_footage.html). The Campaign Legal Center filed a complaint in response. Complaint, Campaign Legal Ctr. v. Make Us Great Again, Inc., MUR No. 6514 (Dec. 15, 2011); see also *FEC Complaint Filed Against Perry Campaign and Perry-Supporting Super PAC Urging Investigation of Shared Video Footage*, CAMPAIGN LEGAL CENTER (Dec. 15, 2011), [http://www.campaignlegalcenter.org/index.php?option=com\\_content&view=article&id=1565:december-15-2011-fec-complaint-filed-against-perry-campaign-and-perry-supporting-super-pac-urging-investigation-of-shared-video-footage&catid=63:legal-center-press-releases&Itemid=61](http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1565:december-15-2011-fec-complaint-filed-against-perry-campaign-and-perry-supporting-super-pac-urging-investigation-of-shared-video-footage&catid=63:legal-center-press-releases&Itemid=61).

36. Gerry Mullany, *Pro-Romney Super PAC Runs Ad Similar to 2007 Campaign Spot*,

same office. For instance, companies working for both the Mitt Romney SuperPAC and his campaign were in exactly the same suites in Alexandria, Virginia.<sup>37</sup> 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.

Even the top-tier leadership is connected. Campaign heads—even some candidates themselves—have begun to attend SuperPAC fundraisers, 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.<sup>38</sup>

## 2. 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?<sup>39</sup> 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.

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THE CAUCUS, (Feb. 23, 2012, 3:14 PM), [http://thecaucus.blogs.nytimes.com/2012/02/23/promney-super-pac-runs-ad-similar-to-2007-campaign-spot/?\\_php=true&\\_type=blogs&\\_php=true&\\_type=blogs&\\_r=2](http://thecaucus.blogs.nytimes.com/2012/02/23/promney-super-pac-runs-ad-similar-to-2007-campaign-spot/?_php=true&_type=blogs&_php=true&_type=blogs&_php=true&_type=blogs&_r=2).

37. Mike McIntire & Michael Luo, *Fine Line Between ‘Super PACs’ and Campaigns*, N. Y. TIMES, Feb. 26, 2012, at A1.

38. Sarah Huisenga, *Gingrich to Super PAC: Fix Negative Ad or Take It Down*, CBS NEWS (Jan. 13, 2012, 6:41 PM), <http://www.cbsnews.com/news/gingrich-to-super-pac-fix-negative-ad-or-take-it-down/>.

39. After this speech was delivered, we learned where Jim Messina himself is going to work. For the Hillary Clinton SuperPAC. See Nicholas Confessore, *Huge ‘Super PAC’ Is Moving Early to Back Clinton*, N. Y. TIMES, Jan. 24, 2014, at A1.

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 churn at a marked pace. Any academic who tells you 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—fundraising 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.<sup>40</sup> 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.<sup>41</sup> Parties are where a great deal of democratic compromise takes place; each major party offers a package of policymaking 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.<sup>42</sup> 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.<sup>43</sup>

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40. For an overview of the political science literature on party heuristics and a description of why they matter, see HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* 70–71 (2009).

41. For an overview, see, e.g., NANCY L. ROSENBLUM, *ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP* (2010); Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775 (2000); Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750 (2001); and Nancy L. Rosenblum, *Political Parties as Membership Groups*, 100 COLUM. L. REV. 813 (2000).

42. ROBERT W. BENNETT, *TALKING IT THROUGH: PUZZLES OF AMERICAN DEMOCRACY* 34–37 (2003).

43. Within the legal academy, Michael Kang has done some of the best work. See, e.g., Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734 (2008). In the realm of social science, the literature builds on the work of Erving Goffman. See ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974). For a sampling of this literature, see, e.g., FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (1993); SHANTO IYENGAR & DONALD R. KINDER, *NEWS THAT MATTERS: TELEVISION AND AMERICAN OPINION* (1987); WILLIAM H. RIKER, *THE ART OF POLITICAL MANIPULATION* (1986); DEBORAH A. STONE, *POLICY PARADOX AND POLITICAL REASON* (1988); Dennis Chong & James N. Druckman, *Framing*

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.<sup>44</sup> 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 the 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 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' influences grow, 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.<sup>45</sup> The story suggested that the Romney campaign didn't

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*Theory*, 10 ANN. REV. POL. SCI. 103 (2007); James N. Druckman, *Political Preference Formation: Competition, Deliberation, and the (Ir)relevance of Framing Effects*, 98 AM. POL. SCI. REV. 671 (2004); Deborah A. Stone, *Causal Stories and the Formation of Policy Agendas*, 104 POL. SCI. Q. 281 (1989).

44. *Supra* Part II.A.

45. Liz Marlantes, *Mitt Romney's Debate Challenge: Keeping Karl Rove On Board*,

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.

### 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.<sup>46</sup> 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?<sup>47</sup>

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

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CHRISTIAN SCI. MONITOR (Oct. 1, 2012), <http://www.csmonitor.com/USA/DC-Decoder/Decoder-Wire/2012/1001/Mitt-Romney-s-debate-challenge-keeping-Karl-Rove-on-board-video>.

46. See, e.g., JOHN H. ALDRICH, *WHY PARTIES?: THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 3–27 (1995).

47. For an overview of the literature and an astute take on the question, see Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999).

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.<sup>48</sup>

If you have faith in the party faithful, you might worry about shadow parties because they hive off the party elites from the party faithful, reducing the day-to-day interactions that have 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 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

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48. For a survey of this literature and its import, see GERKEN, *supra* note 40, at 87–88.

how that will be true if the power of the shadow parties exceeds that of the real ones.