

How Much Has Citizens United Changed the Political Game?

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“A hundred million dollars is nothing,” the venture capitalist Andy Rappaport told me back in the summer of 2004. This was at a moment when wealthy liberals like George Soros and Peter Lewis were looking to influence national politics by financing their own voter-turnout machine and TV ads and by creating an investment fund for start-ups. Rappaport’s statement struck me as an expression of supreme hubris. In American politics at that time, \$100 million really meant something.

Eight years later, of course, his pronouncement seems quaint. Conservative groups alone, including a super PAC led by Karl Rove and another group backed by the brothers Charles and David Koch, will likely spend more than a billion dollars trying to take down Barack Obama by the time November rolls around.

The reason for this exponential leap in political spending, if you talk to most Democrats or read most news reports, comes down to two words: Citizens United. The term is shorthand for a Supreme Court decision that gave corporations much of the same right to political speech as individuals have, thus removing virtually any restriction on corporate money in politics. The oft-repeated narrative of 2012 goes like this: Citizens United unleashed a torrent of money from businesses and the multimillionaires who run them, and as a result we are now seeing the corporate takeover of American politics.

As a matter of political strategy, this is a useful story to tell, appealing to liberals and independent voters who aren’t necessarily enthusiastic about the administration but who are concerned about societal inequality, which is why President Obama has made it a rallying cry almost from the moment the Citizens United ruling was made. But if you’re trying to understand what’s really going on with politics and money, the accepted narrative around Citizens United is, at best, overly simplistic. And in some respects, it’s just plain wrong.

It helps first to understand what Citizens United did and didn’t do to change the opaque rules governing outside money. Go back to, say, 2007, and pretend you’re a conservative donor. At this moment, you would still have been free to write a check for any amount to a 527 — so named because of the shadowy provision in the tax code that made such groups legal. (America Coming Together and the infamous Swift Boat Veterans for Truth were both 527s.) Even corporations, though they couldn’t contribute to a candidate or a party, were free to write unlimited checks to something called a social-welfare group, whose principal purpose, ostensibly, is issue advocacy rather than political activity. The anti-tax Club for Growth, for

instance, is a social-welfare group. So, remarkably, is the Koch brothers' Americans for Prosperity and Karl Rove's Crossroads GPS.

There were, however, a few caveats when it came to the way these groups could spend their money. Neither a 527 nor a social-welfare group could engage in "express advocacy" — that is, overtly making the case for one candidate over another. Nor could they use corporate money for "electioneering communications" — a category defined as radio or television advertising that even mentions a candidate's name within 30 days of a primary or 60 days of a general election. So under the old rules, the Club for Growth couldn't broadcast an ad that said "Vote Against Barack Obama," but it could spend that money on as many ads as it wanted that said "Barack Obama has ruined America — call and tell him to stop!" as long as it did so more than 60 days before an election. (The distinction between those two ads may sound silly and arcane to you, but that's why you don't sit on the Federal Election Commission.)

Citizens United and a couple of related court decisions changed all of this in two essential ways, and each of them was more incremental than transformational. First, the Supreme Court wiped away much of the rigmarole about "express advocacy" and "electioneering." Now any outside group can use corporate money to make a direct case for who deserves your vote and why, and they can do so right up to Election Day. The second change is that the old 527s have now been made effectively obsolete, replaced by the super PAC. The main difference between a super PAC and a social-welfare group, practically speaking, is that a super PAC has to disclose the identity of its donors, while social-welfare groups generally do not.

Those who criticize the effect of Citizens United look at these very technical changes and see an obvious causal relationship. The high court says outside groups are allowed to use corporate dollars to expressly support candidates, and suddenly we have this tidal wave of money threatening to overwhelm the airways. One must have led to the other, right?

Well, not necessarily. Legally speaking, zillionaires were no less able to write fat checks four years ago than they are today. And while it is true that corporations can now give money for specific purposes that were prohibited before, it seems they aren't, or at least not at a level that accounts for anything like the sudden influx of money into the system. According to a brief filed by Mitch McConnell, the Senate minority leader, and Floyd Abrams, the First Amendment lawyer, in a Montana case on which the Supreme Court ruled last month, not a single Fortune 100 company contributed to a candidate's super PAC during this year's Republican primaries. Of the \$96 million or more raised by these super PACs, only about 13 percent came from privately held corporations, and less than 1 percent came from publicly traded corporations.

This only tells part of the story. The general election has just begun, and big energy and health care companies may still be pouring money into social-welfare groups that don't have to disclose their donors. The watchdog group Citizens for Responsibility and Ethics in Washington reported last month, for instance, that Aetna anonymously contributed more than \$7 million to two such groups. We may never know precisely how much money is coming from similar companies, which should alarm anyone who cares about the integrity and transparency of government.

But the best anecdotal evidence suggests that this kind of thing isn't happening in nearly the proportions you might expect. Kenneth Gross, an election lawyer who represents an array of large corporations, told me that few of his clients have contributed to the social-welfare groups engaged in political activity this year. They know those contributions might become public at some point, and no company that sells a product wants to risk the kind of consumer reaction that engulfed Target in 2010, after it contributed \$150,000 to a Minnesota group backing a conservative candidate opposing gay marriage. "If you've got a bank on every corner, if you've got stores in every strip mall, you don't want to be associated with a social cause," Gross told me.

None of this is to say that Citizens United hasn't had an impact. Gross and others point out that in the era before Citizens United, while individuals and companies could still contribute huge sums to outside groups, they were to some extent deterred by the confusing web of rules and the liability they might incur for violations. What the new rulings did, as the experts like to put it, was to "lift the cloud of uncertainty" that hung over such expenditures, and the effect of this psychological shift should not be underestimated. It almost certainly accounts for some rise in political money this year, both from individuals and companies.

Even so, the Supreme Court's ruling really wasn't the sort of tectonic event that Obama and his allies would have you believe it was. "I'd go so far as to call it a liberal delusion," Ira Glasser, the former executive director of the A.C.L.U. and a liberal dissenter on Citizens United, told me. Which leads to an obvious question: If Citizens United doesn't explain this billion-dollar blast of outside money, then what does?

You may remember that back in the '90s, the most nefarious influence in politics emanated from what was then called "soft money" — basically, unlimited contributions from rich people, corporations and labor unions to both major parties. According to data from the Center for Responsive Politics, in 2000, the last presidential year in which soft money was legal, the two parties raised more than \$450 million of it, divided almost equally between them. Only 38 percent of that came from individuals.

That all changed with the passage of the Bipartisan Campaign Reform Act of 2002, popularly known as the McCain-Feingold law. The new law stamped out soft money for good, but it also created a vacuum in political fund-raising. The parties could no longer tap an endless stream of soft money, but thanks to the advent of the 527, rich ideologues with their own agendas could write massive checks for the purpose of building what were, essentially, shadow parties — independent groups with their own turnout and advertising campaigns, limited in what they could say but accountable to no candidate or party boss. Wealthy liberals like Soros and Lewis, along with groups like MoveOn.org, were the first to spot the opportunity. All told, wealthy liberals spent something close to \$200 million in an effort to oust George W. Bush in 2004, setting an entirely new standard for outside spending.

Richard L. Hasen, an expert on campaign finance at the University of California at Irvine, recently wrote an article for Slate titled, "The Numbers Don't Lie," in which he showed that total outside spending, as measured through March 8 of every election season, seemed to explode after the Citizens United decision, reaching about \$15.9 million in 2010 (compared with \$1.8

million in the previous midterm cycle) and \$88 million this year (compared with \$37.5 million at the same point in 2008). “If this was not caused by Citizens United,” he wrote, “we have a mighty big coincidence on our hands.”

But there are alternate ways to interpret this data. The level of outside money increased 164 percent from 2004 to 2008. Then it rose 135 percent from 2008 to 2012. In other words, while the sheer amount of dollars seems considerably more ominous after Citizens United, the percentage of change from one presidential election to the next has remained pretty consistent since the passage of McCain-Feingold. And this suggests that the rising amount of outside money was probably bound to reach ever more staggering levels with or without Citizens United. The unintended consequence of McCain-Feingold was to begin a gradual migration of political might from inside the party structure to outside it.

And in his examination of raw numbers, Hasen managed to ignore what is probably the most relevant bit of data during this period: 2010 and 2012 were the first election cycles since the enactment of McCain-Feingold in which a Democrat occupied the White House. Rich conservatives weren't inspired to invest their fortunes in 2004, when Bush ran for the second time while waging an unpopular war, or in 2008, when they were forced to endure the nomination of McCain. But now there's a president and a legislative agenda they bitterly despise (much as Soros and his friends saw the Bush presidency as an existential threat to the country), so it's not surprising that outside spending by Republicans in 2010 and 2012 would dwarf everything that came before. What we are seeing — what we almost certainly would have seen even without the court's ruling in Citizens United — is the full force of conservative wealth in America, mobilized by a common enemy for the first time since the fall of party monopolies.

A consequence of McCain-Feingold has been to flip on its head an old truism of politics, which is that incumbency comes with a fixed financial advantage. In the era of soft money, controlling the White House meant that a party could almost always leverage its considerable resources to dominate fund-raising. But today it's much easier to tap into the fury and anxiety of out-of-power millionaires than it is to amass contributions in defense of the status quo. This dynamic probably explains why wealthy Democrats who pioneered the idea of outside money during the Bush years have largely stood down this year, even while conservative fund-raising has soared. It isn't that liberals don't like Obama or grow queasy at the mention of super PACs. It's a function of human nature: nobody really gets pumped up to write a \$10 million check just to keep things more or less as they are.

If you're a Democrat, there's some good news here. One persistent fear you hear from liberals is that Citizens United altered the balance between the parties in a permanent way — that corporate money will give Republicans a structural advantage that can never be overcome. What's more likely is that the boom in outside money will prove to be cyclical, with the momentum swinging toward whoever feels shut out and persecuted at the moment. Liberals dominated outside spending in 2004 and 2006. And should Romney become president, they'll most likely do so again.

It's worth asking just how much an advantage all of this outside money actually confers. The greatest impact of this year's imbalance in outside money will be felt on the state level, where a

lot of House seats and control of the Senate hang in the balance, and where a sharp gust of advertising can often blow the results in one direction or another. But a presidential campaign is different, focusing as it does on a dozen or so pivotal states and a limited number of advertising markets. There's probably a limit to how many 30-second spots all of these groups can cram onto cable stations during late-night showings of "Turner & Hooch."

I recently called Carter Eskew, a longtime Democratic adman and strategist whose clients included Al Gore in 2000, and asked him a simple question: How much did he think he would really need for a candidate today, if he could have an unlimited budget to run a national ad campaign, including all the outside money? Eskew paused before giving a declarative answer: \$500 million. Anything beyond that, he said, was probably overkill.

In other words, there's a threshold below which a presidential candidate can't really compete effectively, and that number — whether it's \$500 million or something less — is outlandish enough that it should give us pause. But beyond that number, it's not clear that spending an extra \$200 million or \$500 million will really make all that much of a difference on Election Day. More likely, the two ideological factions are now like rivals of the nuclear age, stockpiling enough bombs to destroy the same cities over and over again, when one would do the job.

You could even argue that whatever benefit a campaign derives from all this money is balanced, somewhat, by the threat it poses. Back in the days of soft money, a candidate had ownership of his party's national apparatus and the accusations it hurled on prime-time TV. He was responsible for the integrity of his argument, and his advisers ultimately controlled it. What the reform-minded architects of McCain-Feingold inadvertently unleashed, what Citizens United intensified but by no means created, is a world in which a big part of the money in a presidential campaign is spent by political entrepreneurs and strategists who are unanswerable to any institution. Candidates and parties who become the vehicles of angry outsiders, as Mitt Romney is now, don't really have control of their own campaigns anymore; to a large extent, they are the instruments of volatile forces beyond their own reckoning.

Maybe that makes for a cleaner and more democratic system than the one we had before, in the way the campaign-finance reformers intended. Standing here in 2012, it's just hard to see how.