It is almost two years since the Supreme Court handed down Citizens United. In that time, the opinion has come to serve as a popular shorthand for all that is wrong with the campaign finance system. With the emergence of Super PACs as the latest vehicle for sidestepping contribution limitations, the overwhelming temptation is to attribute this latest money pit to the Supreme Court’s contributions to this woeful area of law. For example, just today, the New York Times intones, “A $5 million check from Sheldon Adelson underscores how a Supreme Court ruling has made it possible for a wealthy individual to influence an election.”

From the Times, one does not necessarily expect further legal analysis – and one does not get it. The article goes on to claim only the following: “The last-minute injection underscores how last year’s landmark Supreme Court ruling on campaign finance has made it possible for a wealthy individual to influence an election. Mr. Adelson’s contribution to the super PAC is 1,000 times the $5,000 he could legally give directly to Mr. Gingrich’s campaign this year.”

The simple concern is that this compressing of campaign finance law misrepresents the problematic holding of Citizens United, a

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case that addressed the use of corporate and union treasury funds for
electioneering activity. Nothing in BCRA at issue in Citizens United
would have addressed Mr. Adelson’s outpouring of money into the
latest permutation of third-party control over campaign activities.
At best, Citizens United provided indirect legal cover for Mr. Adelson
by reaffirming the long-standing (from Buckley v. Valeo) nar-
row definition of corruption to cordon off all uncoordinated uses of
money that cannot be deemed in sufficient proximity to candidates
or political parties.

But the more difficult problem is the flip-side of the inquiry. The
activities of Mr. Adelson reveal just how thread-bare have become
the legal covers for money in politics. To the extent that the con-
cern is that a contribution of $5 million directly from Mr. Adelson
to Mr. Gingrich would invite corruption or the appearance of cor-
ruption, can anyone believe that this one-step remove alleviates the
problem? Will Mr. Gingrich be any less likely to take a phone call
from Mr. Adelson, or any less likely to be influenced by the needs
of Mr. Adelson’s pursuits than if he had received the money direct-
ly?

It is more than a decade since Pam Karlan and I wrote about the
“hydraulics” of circumvention in the political arena. Among the con-
cerns was the redirection of money into the hands of putatively in-
dependent third-party actors, ones who can dominate campaign de-
bate without putting themselves directly before the voters. No bet-
ter example is necessary than Mr. Romney’s claims at one of the
New Hampshire debates that he had no responsibility for the inde-
pendent attacks of his Super PAC on Mr. Gingrich, followed by his
use the electoral platform to endorse those same attacks.

The rise of the Super PACs is a real problem for the shaky sys-
tem of campaign finance as it now exists. But the problem is not
Citizens United – there is scant evidence, even anecdotally, of cor-
porate or union treasuries being the source of funding at issue for
the new candidate-specific Super PACs. By contrast, there are genu-
ine concerns for transparency of donations, and for accountability of
the relation of the donors to the candidates before and after the
elections. Super PACs are only the latest of the institutional forms
of circumvention, a list that runs through ordinary PACs, 527s, 501(c)(4)s, and so forth. But they are a particularly virulent form of circumvention because of the proximity they offer between candidates for office and lobbyists, patronage seekers, and contractors for government services. The issue is one that requires a serious regulatory response, not the incantation of Citizens United. //