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POLITICAL HATE MACHINES:  
OUTSIDE GROUPS AND THE 2012 PRESIDENTIAL CAMPAIGN  
ADVERTISING MARKET

by

Martin James Nader

A DISSERTATION

Presented to the Faculty of  
The Graduate College at the University of Nebraska  
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POLITICAL HATE MACHINES:  
OUTSIDE GROUPS AND THE 2012 PRESIDENTIAL CAMPAIGN  
ADVERTISING MARKET

Martin James Nader, Ph.D

University of Nebraska, 2013

This dissertation explores the rise of outside groups and their influence in the 2012 presidential campaign advertising market. Unlike official candidates, outside groups are not vulnerable to the potential electoral risks of public backlash for being too negative; therefore, outside groups do not possess the same incentives as official candidates to regulate their use of attack ads. Compared to campaign ads produced by official presidential candidates, ads produced by outside groups are (1) overwhelmingly negative attack ads, (2) utilize a backwards-looking retrospective orientation, and (3) draw heavily on negative emotions like anger, fear and disgust. Considering the role of outside groups in the 2010 midterm elections and 2012 presidential primaries, it was my expectation that official presidential candidates in the 2012 general election adapted their advertising strategies to balance the anticipated negativity of outside groups. By utilizing more promotional and comparative advertising, official candidates can in effect outsource some of their negativity to outside groups who are willing and able to act, without coordination, as negativity surrogates. In the first presidential election post-*Citizens United*, however, official candidates did not outsource their attack ads to outside groups. Official candidates were as negative as ever.

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## **CHAPTER 1**

# **DISTINCTIONS WITHOUT DIFFERENCES**

Over the last sixty years, official presidential candidates had unrivaled control over the tone and messaging of their campaigns. The political news media and the Washington, D.C. rumor mill had the ability to at least temporarily influence the narrative of campaigns, but beyond these sources of uncertainty official candidates had a monopoly on crafting their own public image. Official presidential campaigns could control what the public knew and thought about the official candidates. From 1952 to 2008, official candidates and national party committees sponsored nearly every single presidential campaign advertisement. Official candidates were in control of their campaign messaging and there were few, if any, outside actors competing for influence and airtime within the campaign advertising market.

Prior to 2012 outside groups played a very minor role in presidential campaign advertising. There are only a few instances in presidential campaign history where outside groups were even capable of raising enough money to produce a single campaign ad. In 1972, President Nixon's Treasury Secretary John Connally (former Democratic

governor of Texas) resigned from the administration to manage “Democrats for Nixon,” an outside group that sponsored a few campaign ads supporting President Nixon’s reelection (Shanahan 1972). In 1988, the conservative group “National Security PAC” produced the now infamous “Willie Horton” attack ad against Democratic presidential nominee Michael Dukakis. In 2004, the progressive group “MoveOn.org” sponsored an attack ad which alleged that President Bush used “family connections to avoid the Vietnam War” (Fournier 2004). That same year, the outside group “Swift Boat Veterans for Truth” (SBVT) produced four campaign ads that questioned Democratic presidential candidate John Kerry’s patriotism and war record in Vietnam. SBVT and their ads were highly criticized by the media, Democrats and even a few notable Republicans like John McCain. While the Bush campaign denied any connection to or responsibility for the SBVT ads, John Kerry accused the group of being a “front for the Bush campaign” and further claimed that President Bush “wants [SBVT] to do his dirty work” (James and Pearson 2004; Fournier 2004). A subsequent FEC investigation of SBVT proved Senator Kerry partially correct.

Past presidential elections witnessed a handful of ads produced by a few outside groups, but never an election where outside groups produced more than 5% of all unique ads. In 2012, outside groups produced more than 20% of the total unique ads in the presidential campaign advertising market and accounted for 20% of total expenditures in the presidential race. Their role in the 2012 campaign was both transformative and unprecedented. While many commentators accurately predicted the influx of money into the campaign following the Supreme Court’s infamous decision in *Citizens United v. Federal Election Commission* (2010), the political community was relatively unprepared

for the auxiliary function that outside groups would perform in the overall campaign advertising market. As a result of the unexpected and unanticipated clout of outside groups and the ads they produced, the political science literature on presidential campaigns is in serious need of an examination of the importance of outside groups in the presidential campaign advertising market.

Building upon past research on the tone, perspective and emotional content of presidential campaign ads (Jamieson 1996; Kaid and Johnston 2000; Jamieson, Waldman and Sheer 2000; Vavreck 2001; Goldstein and Freedman 2002; Johnston and Kaid 2002; West 2005; Geer 2006; Brader 2006), and taking into consideration the influx of an unrivaled amount of outside spending and advertising in the 2012 presidential campaign, this dissertation examines the influence of outside groups in the overall campaign advertising market. Given the considerable amount of money spent and the incomparable number of unique ads produced by outside groups in 2012, it is very likely that outside groups significantly changed the established dynamics of presidential campaign advertising through their own unique contributions to the advertising market and through their indirect influence on the strategies of official candidates. Therefore, it is the purpose of this dissertation to determine if and how outside groups altered the presidential campaign advertising market in 2012.

The objectives of this research endeavor can be separated into two narratives. First, I will compare official candidate ads and outside group ads from 2012 in order to ascertain whether or not outside ads are significantly different from ads produced by official candidates. Official candidates are held accountable by certain incentives and motivations that punish or reward them for acceptable or unacceptable behavior in the

campaign. If official candidates go “too negative” or “steps over the line” of decency they risk public backlash for playing dirty and could suffer in the polls. The potential electoral consequences of backlash mitigate the attack messaging of official campaigns. Outside groups, however, do not have such electoral consequences. There is no candidate at the center of an outside group that can be punished in the court of public opinion. Because official candidates and outside groups operate under different sets of rules and norms, it is likely that the two types of campaign actors will produce different kinds of campaign advertisements. If outside ads are more negative in tone and emotional appeal and more retrospective in orientation than official ads, then hundreds of millions of dollars are being spent (on top of the billions spent by official candidates) to make the presidential campaign advertising market even more negative and retrospective. In other words, outside groups might be taking the aspects of official campaign ads that the public already despises and amplifying them to an extreme degree.

The second narrative of this dissertation focuses on the differences between official campaign ads pre- and post-*Citizens United*. If outside groups were, in fact, influential players in the 2012 presidential campaign advertising market, then official candidates might have adjusted and calibrated their campaign messaging to the sudden presence of new campaign actors. While the presidential campaigns of 2008 and 2012 are only four years apart, the 2008 Obama and McCain campaigns did not have to compete with a cacophony of outside groups all trying to influence the scoreboard. The 2012 Obama and Romney campaigns were forced to accept the new political reality that they were no longer in total control of their campaigns’ messaging. After *Citizens United*, official candidates have to share the main stage and microphone with outside

groups. As a result, official candidates in 2012 had a choice to make concerning the rather unexpected rise of outside groups: proceed with the traditional campaign advertising strategy as though the market had not changed, or adapt to the campaign advertising strategies of outside groups by balancing, reframing and/or complementing the messaging of outside groups. If official candidate ads from 2008 and 2012 are not significantly different, then official candidates must not have adjusted their strategies to the introduction of outside groups; business as usual. If, however, the advertising campaigns of 2008 and 2012 are noticeably different, it could suggest that official candidates adjusted their advertising strategies to accommodate the existence of outside groups.

### **Follow the Money**

In order to truly appreciate the role and influence of outside groups in the 2012 presidential election, it is necessary to understand how these groups get ahold of so much money and why wealthy contributors are so willing to give vast sums of cash to non-traditional campaign actors. Unlike official candidates, outside groups are not financed by millions of \$20 contributions; they are financed by twenty wealthy contributors each giving millions of dollars. Therefore, it is absolutely essential to follow the money in presidential campaigns to recognize the truly corrupting influence (or potentially corrupting influence) of outside groups within the presidential campaign advertising market.

The 2012 presidential campaign has the distinction of being the most expensive election in American history (though not for long). The official Obama and Romney

presidential campaigns spent close to \$1 billion each, or \$30 per second in 2012 (Javers and Joseph 2012). Swing states like Ohio were inundated with a blitzkrieg of campaign ads by official campaigns and outside groups to such an unprecedented degree that many Ohio residents simply stopped watching television because ads were back-to-back-to-back ad infinitum (Eggen 2012). More than \$6 billion was spent in total during the 2012 campaign with most of the money going towards televised campaign advertisements (Hudson 2012). Outside groups spent nearly \$1 billion on campaign advertisements; almost \$500 million on the presidential election alone, meaning outside groups in 2012 spent more than George W. Bush and John Kerry combined in the 2004 presidential election.

Most of the money pouring into elections, and nearly *all* of the money pouring into outside groups, come from the “the 1% of the 1%,” or the 31,385 wealthy Americans who contributed nearly \$1.7 billion (28% of total spending) to official candidates in 2012 (Drutman 2013). When Americans are asked if they have *ever* contributed more than \$200 in a campaign, less than one-half of one percent say they have done so, while less than 10% report ever having contributed money to politics at all (Seitz-Wald 2013). The contribution-side of campaign finance is clearly a game for the richest of the rich, with the overwhelming majority of Americans completely unaffected by limits to campaign contributions. And it is not just wealthy individuals buying access to politicians through direct contributions and independent expenditures. The list of the top ten corporate contributors in 2012 is a list of the most profitable corporations in the United States, many of whom have government contracts worth billions of dollars: Lockheed Martin,

Bank of America, Microsoft, AT&T, Comcast, and Goldman Sachs to name a few (McIntyre and Hess 2012).

Wealthy individuals and corporations want their money to flow freely into campaigns (for various reasons of self-interest), but existing constraints and regulations force the excess cash into outside groups that can accumulate and spend money without interference. Prohibited from making unlimited financial contributions directly to official candidates, wealthy donors are limited to three sanctioned contribution vehicles: (1) contribute the maximum \$2,600 to the candidates of their choice, (2) contribute a maximum \$5,000 to federally registered political action committees (PACs) that bundle money for candidate(s) of their choice, and (3) contribute an *unlimited* amount of money to outside groups that do whatever they want. The existence of the third option seriously brings into question the legitimacy and utility of the first two.

The average American family is not affected by campaign finance laws because most cannot afford to contribute any money to campaign politics, with those that can only able to contribute a few hundred dollars, which is far below the current individual contribution limit. Campaign finance laws, specifically contribution limits, were clearly designed to balance the disparity of influence between regular people and the super-rich in campaigns, and to ensure that politicians would not be asymmetrically beholden to a short list of wealthy donors instead of the masses. Unfortunately, contribution limits merely divert and channel the money of wealthy contributors to outside groups and away from official candidates.

Concomitant with contribution limits and the flow of money into outside groups is the phenomenon of the permanent fundraising campaign. Presidential candidates are

obligated to spend more of their time fundraising for small amounts of money from lots of contributors, while outside groups are free to raise lots of money from a small amount of contributors (Herrnson 2009, 1211). As Brendan Doherty (2012) explains,

Ironically, campaign finance legislation designed in part to limit the importance of money in politics has incentivized presidents to devote more time to fundraising throughout their term in office due to the combination of rising campaign costs and the limits on contribution amounts (151).

The rising cost of presidential campaigns is entirely the result of increasingly robust campaign advertising strategies. Presidential candidates (and all national-level candidates for that matter) have to raise more and more money every election cycle just to be considered legitimate candidates and to remain competitive in the campaign ad wars (Doherty 2012; Herrnson 2009; Cronin and Genovese 2004; Gross and Goidel 2001; King 1997).

In their endless scramble for campaign cash, official candidates quickly max out their sources of legal contributions. Since contribution limits to official campaigns are capped at \$2,600 per election, most of the wealthy donors, corporate lobbyists and interest groups who want to secure influence with a candidate are constrained to giving a pittance. Giving \$2,600 to a presidential candidate will certainly earn the contributor a Christmas card and future fundraising phone calls, but it will not likely lead to the type of subtle favoritism that many big donors are looking to acquire. Federal contribution limits, then, have unintentionally led wealthy donors who wish to do more for their preferred candidate to contribute vast sums of money to outside groups that do not have contribution limits (or any other limits for that matter). These outside groups are then

free to make independent expenditures (meaning campaign ads) in support of candidates or in opposition to candidates without obstruction.

It is not as though wealthy donors are forcing candidates to accept contributions that amount to legal political bribes. Candidates and their fundraisers spend most of their waking hours “dialing for dollars” from rich donors who have excess cash. This fundraising burden is the result of the escalating costs of campaigns which have risen exponentially in the last fifty years, primarily because candidates try to intensify their prior campaign efforts. Campaigns did not qualitatively improve or change much as more money was spent. Campaigns are not getting “better,” however subjective that term may be, with more cash. More money in campaigns has translated into more campaign advertisements, and little else. Candidates and their consultants, strategists and pollsters are relatively powerless to influence the outcomes of elections, but they still feel the need to do everything in their power to affect their chances. This means more ads with more emotion and more drama, with more micro-targeting of even more specific demographic niches. The only way campaigns can do “more” is if they have more money.

If official candidates have an insatiable thirst for *more* and wealthy donors have a willingness and ability to contribute millions of dollars to candidates which could, in turn, have a corrupting influence on an elected official, then it is logical to consider capping the amount of money that wealthy donors can legally contribute directly to a candidate. Such contribution limits were enacted in the Federal Election Campaign Act of 1971. The Supreme Court has regularly ruled, most notably in *Buckley v. Valeo* (1976), that contribution limits to candidates are justified because contributing money directly to a candidate creates the potential for *quid pro quo* corruption or, in the very

least, the appearance of *quid pro quo* corruption. Contribution limits to outside groups, however, are *not* justified because contributing money to an outside group that supports a candidate is not technically an act of *quid pro quo* corruption; therefore the federal government has no compelling interest to limit outside groups' freedom of speech. Put another way, putting money into a candidate's official campaign account could cause corruption, but putting money into the candidate's friend's unregulated bank account is totally fine.

Of course, like the child who clearly sees that the "emperor has no clothes," it is obvious that the difference between contributing money to an official candidate and contributing money to an outside group that supports the candidate is a distinction without much of a difference. In the end, the candidate knows who supported his or her candidacy and returns the favor whenever possible, regardless of how the donor contributed the money. As was customary two millennia ago (and, to a certain extent, still today), ambitious vassals and satraps looking to control provincialized regions within the Roman Empire would need to bribe a high-ranking Roman official (usually a consul, governor or influential senator) who would propose a motion on the Senate floor in the vassal's favor. In a scene from the HBO series *Rome*, King Herod of biblical infamy and triumvir Mark Antony meet to discuss the Roman Senate's official support of Herod's rule in Judea:

HEROD:	I am told Roman gentlemen do not solicit bribes. One must offer the bribe as a "gift." Is that so?
ANTONY:	Yes. Yes, that is so. We are the most dreadful hypocrites I'm afraid.
HEROD:	I offer you a gift then. Help me take the throne of Judea, make my enemies your enemies and I offer you a substantial gift [twenty thousand pounds of gold].

...

ANTONY: Congratulations then, Herod. You have the full backing of Rome.<sup>1</sup>

Bribery was, of course, illegal under Roman law. By accepting the bribe as a gift, however, Roman politicians could easily accept gold for political favors without fear of consequences. The “gift” is still a bribe in all but name, demonstrating that even Lex Romana had its own problems with loopholes. Lex Americana, while having strict definitions about gifts and bribery, allows for the same type of loophole to exist between contributions to candidates and contributions to outside groups. One is limited, one is unlimited, yet both serve the same end of financing campaign advertisements. A distinction without a difference.

The desire of wealthy Americans to contribute more money beyond what is legally allowed coupled with the loophole in campaign finance where outside groups can act as surrogates for official candidates has led to the emergence of a phenomenon within campaign politics. Once the sole domain of official party- and candidate-centered campaigns and the advertising gurus behind the scenes, the presidential campaign advertising market now has many independent actors capable of raising substantial amounts of money and waging very formidable proxy campaigns. After the Supreme Court’s decision in *Citizens United v. Federal Election Commission* (2010), 527 independent expenditure committees and 501(c)4 social welfare organizations were unleashed to raise and spend an unlimited amount of money on behalf of candidates. The 2012 presidential election was the first testing grounds for the aptly named “Super PACs” and they did not disappoint. Outside groups raised an impressive amount of money and conducted their own comprehensive proxy presidential campaigns complete with their

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<sup>1</sup> This scene is from the seventh episode of the second season (2007) titled “Death Mask”

own arsenal of campaign advertisements. Outside groups were major players in the 2012 election and they dutifully fulfilled their responsibilities as surrogates for official candidates.

### **Clarification of Terms**

It is important to possess a basic lexicon about the various political actors and campaign finance minutia relevant to this dissertation. The focus of the next four chapters is on “official candidates” for president and “outside groups” that produce presidential campaign advertisements. Throughout the dissertation, the terms “official candidate” and “official campaign” are used interchangeably. Many times the word “campaign” is being over-used to refer to “campaign ads,” “campaigning,” “the presidential campaign,” etc., so using “official candidate” eliminates some of the intra-sentence word redundancy. Both terms refer to the official Republican and Democratic presidential nominees and their campaign staffs. In 2012, the official names of the Obama and Romney campaigns were “Obama for America” and “Romney for President,” respectively (obviously). When the topic of concern is the specifics of the 2012 presidential campaign, I will use the terms “official Obama,” “official Romney,” or the official names of their campaign organizations. When the topic at-hand is about the traditional Democratic and Republican presidential nominees in general (i.e., “Historically, official candidates/campaigns have used...”), I will use the term “official candidates” or “official campaigns.”

The term “outside groups” is used prolifically throughout this dissertation. The term refers to the independent campaign actors that produce campaign ads but are in no

way officially coordinating their affairs with official candidates. For the purposes of this dissertation, “outside groups” refers to 527 independent-expenditure-only committees and 501(c) organizations. Technically, federally registered PACs are also considered outside groups in the campaign finance literature. Federally registered PACs are called “bundlers” because of their ability to bundle campaign contributions from multiple sources and then make a maximum lump-sum contribution of \$5,000 to a candidate. Since wealthy donors are not allowed to give more than \$2,600 to a candidate every two years, PAC bundlers are a common destination for excess campaign spending. Such groups are not legally allowed to raise enough money to produce a nationwide advertising campaign, but they absolutely help official candidates raise a lot of money. Federally registered PACs will not be considered in my use of the term “outside groups” because federally registered PACs do not produce campaign ads.

527 independent-expenditure-only committees are outside groups that run parallel campaign activities in support of a particular position on an issue. The groups get their designation from the Internal Revenue Service code 527 that outlines the regulatory guidelines of groups whose express purpose is to influence elections. 527 committees operate like a hybrid between interest groups and traditional candidate-centered campaign operations. Imagine running a campaign during election season without having a candidate on the ballot, and instead of having a candidate at the center of the organization there is an issue or policy objective. 527 groups are not allowed to explicitly endorse a candidate for office (i.e., “Vote for Candidate Smith,” “We Support...,” etc.), but they can support or oppose a candidate’s position on an issue, which, again, is a distinction

without a difference. Supporting Candidate Smith's position on entitlement reform is not very different from endorsing Candidate Smith for President.

527 committees rose to their current prominence in the 2010 midterm elections. Empowered with the abilities to raise and spend an unlimited amount of money and to produce television advertisements without obstruction by the decision in *Citizens United v. FEC* (2010), long-time political operatives left their traditional occupations and formed 527 committees to run proxy campaigns in favor of candidates all over the country, up and down the ballot. The rapid rise of such groups and the enormous amounts of money they were raising in very short order earned them the moniker "Super PACs." It is no mystery that the media love good buzzwords. "Super PACs" is one such buzzword that the political news media overuses and sometimes even uses incorrectly. Many in the media mistakenly lump all outside groups into the term "Super PACs." While this is technically incorrect, it is only barely incorrect. As will become evident, the difference between 501(c)s and 527s is a distinction without a difference. The term "Super PACs" has all but replaced "527 committees" as the acceptable nomenclature of independent expenditure groups. This dissertation uses the terms "Super PAC" and "527 committee" interchangeably.

These groups are prohibited from coordinating with official candidates in any way, but every prominent Super PAC is chaired by former chiefs of staff, campaign managers, long-time friends, cousins, etc., of major candidates. For example, former Obama campaign manager Jim Messina could easily run a very pro-Obama, anti-Romney independent expenditure campaign through his Super PAC "Priorities USA Action" without needing to talk to anyone on the Obama for America staff. Technically he is not

coordinating with Obama for America, but he is as “insider” as it gets. He does not need to coordinate with Obama for America because he used to be the person running Obama for America. Super PACs like Priorities USA Action and its conservative equivalents are obviously extensions of official campaigns created by loopholes in the campaign finance regime. Both Obama for America and Priorities USA Action are working towards the same goal, but Obama for America has to abide by strict campaign finance guidelines and Priorities USA Action does not.

501(c) non-profit organizations derive their name from section 501(c) of the Internal Revenue Service code that governs non-profit organizations. In total, there are twenty-nine different types of 501(c) organizations covering everything from social welfare organizations, churches, charities, cemeteries, social and fraternal organizations, and various kinds of holding companies and pension funds. Basically, any organization that operates as a non-profit is a 501(c) organization. 501(c) organizations *cannot* be political in purpose and cannot work to influence election outcomes. If influencing elections is part of the organization’s official charter, the IRS will require the group to file as a political 527 committee. There is, of course, a loophole around this non-political requirement. 501(c) organizations are technically non-profit *corporations*. Since corporations now have the same First Amendment rights as individuals, 501(c) non-profit organizations can raise and spend money on politics without interruption or obstruction. A 501(c) can legally engage in political speech and political activity, but it must serve its original purpose. The most common 501(c) organizations to participate in politics are 501(c)4 social welfare organizations and civic leagues. These groups can hide under the guise of promoting economic and political policies that help improve livelihoods. Of

course, political parties, official campaigns and 527 committees all have that same exact purpose.

501(c)4 groups can make independent expenditures just like 527 committees, and, indeed, many 501(c)4 groups produced presidential campaign ads in 2012. The only real difference between 501(c)4 organizations and 527 committees is that 501(c)4s do not have to report their contributions or expenditures to the FEC while 527 committees are required to do so. Without any disclosure requirements, 501(c)4 groups become very attractive political contribution vehicles for individuals or groups that want to remain anonymous. Many billionaires like Foster Friess, Sheldon Adelson and Charles and David Koch like to have their names attached to the seven figure contributions they make to Super PACs. Others, however, do not. For various reasons, some wealthy donors do not want their contributions to outside groups to be public knowledge. 501(c)4 groups whose sole purpose is to engage in independent expenditure activity were created to provide a means for wealthy donors to contribute to an outside group without having to leave fingerprints on the money.

Why does the IRS allow 501(c)4 groups to flaunt the regulations of non-profits? Why is the FEC not regulating 501(c)4 groups just like Super PACs? As always, distinctions without differences. The Supreme Court, the FEC and the IRS all maintain that so long as 501(c)4s do not spend 50% of their money on political activities they are not in breach of the law. Of course, being non-profit organizations, the IRS cannot require 501(c)4 groups to prove that they are not spending more than half of their resources on politics. A regulation with no teeth and a regulatory agency with no oversight power are supposed to make sure that 501(c)4s behave differently than Super

PACs. Needless to say, 501(c)4s are behaving exactly like Super PACs, with the added bonus of not having to keep records of where money is coming from and where that money is going. Some 501(c)4s use their contributions to make independent expenditures while other 501(c)4s act as bagmen who hand the money they have obtained anonymously and contribute it to a Super PAC. The Super PAC simply reports to the FEC that it received the contribution from a 501(c)4.

Political 501(c)4s and Super PACs are really the same type of organization with a different name tag. Instead of constantly using wonkish terms like “501(c)” and “527 committee” throughout this dissertation I will use the blanket term “outside groups” in the following chapters. The term “outside groups” adequately illustrates the outside-the-law status of these groups, while ironically serving as a reminder that such groups are as insider as they come.

### **Organization of Chapters**

This dissertation contributes original scholarship to the study of campaign advertising by analyzing the role of outside groups in the presidential campaign advertising market and their impact on the advertising strategies of official campaigns. In order to make novel observations about the phenomenon of outside groups in campaigns, it is first necessary to establish the scholarly and legal foundations this dissertation builds upon. It is essential that I position my own research within the existing work on campaign finance law and the political science literature concerning campaign advertising.

The second chapter tells the story of campaign finance reform from its origins in the late nineteenth century all the way to landmark court rulings of 2010. The history of campaign finance reform in United States is a rollercoaster ride of ups and downs, ebbs and flows of legislative and popular momentum in favor of reducing the role of money in political campaigns, countered by the judicial taming of such fervor by declaring political spending to be constitutionally sacrosanct. It is necessary to put the 2012 campaign cycle (particularly the amount of money spent) in its appropriate historical context by tracing the origins of the “deregulationist” campaign finance movement that began in the Supreme Court’s *Buckley v. Valeo* (1976) decision and continued right on through the infamous *Citizens United* (2010) decision. Forty years of split 5-4 Supreme Court decisions dealing with campaign finance regulation demonstrate just how divided the country and the courts are on campaign finance issues. Finally, chapter two also explores the major campaign finance reform packages that have come from Congress, most notably the Federal Election Campaign Act of 1971 (and 1974) and the Bipartisan Campaign Reform Act of 2002 (a.k.a McCain-Feingold).

The third chapter situates this dissertation’s original contributions within the relevant academic literature on campaign advertising. Chapter three explores the previous research on presidential campaign advertising while also bringing in some of the research on congressional and state campaign advertising. Presidential campaign advertising certainly has different dynamics than down-ballot political campaigns and consumer marketing campaigns, but each utilizes similar strategies and tactics to accomplish their objectives. Chapter three also dedicates a lot of attention to the previous research on the tone (i.e., promotional, attack, comparative), temporal orientation (i.e.,

retrospective and prospective) and emotional content of campaign advertisements. Some of the most foundational existing research on campaign advertising examined these elements and each played an important role in my analysis. Therefore, comprehension of this literature is essential for justifying my hypotheses.

The fourth chapter outlines the data collection process, research design and analytical framework of the dissertation. After clearly identifying specific research questions and hypotheses, chapter four uses quantitative analyses to investigate the influence of outside group advertising on the overall presidential campaign advertising market and its influence on official campaign advertising. If the campaign finance rulings in 2010 truly did change the dynamics of the campaign advertising market, then there should be noticeable differences between the style, substance and strategy of the campaign ads from 2008 and 2012. Outside groups were able to play an unprecedented role in the 2012 campaign, using more money and more ads than outside groups in any previous election; perhaps more than all previous outside groups combined. Did this huge influx of outside ads affect what the American people saw on television during the 2012 presidential campaign? Were outside ads substantially different than official ads? Was there a noticeable difference between official ads in 2008 and 2012? These questions guide my analyses and enable me to make original scholarly contributions to the understanding of outside groups in American politics and how such groups affect the presidential campaign advertising market. The results from and discussion of the analyses shed new light on the understanding of outside groups in campaign advertising and establishes certain expectations for outside groups in future elections.

The fifth and final chapter extrapolates and expands upon the trends observed in the 2012 election cycle. The conclusion chapter explains what outside groups have been up to since the end of the 2012 election cycle, the groundwork being laid for the 2014 and 2016 campaigns, as well as outside groups' off-season approach to influencing the national political agenda and meeting fundraising goals. The conclusion chapter also discusses the impact of the "IRS Scandal" of 2013 on the regulation and visibility of 501(c)4 groups in campaign politics. While the scandal was short-lived and was relatively fruitless, it did shine a bright light on the ludicrous state of campaign finance regulation and oversight. For a brief and fleeting moment, the scandal created a necessary national discussion about the importance of disclosure in campaign finance and the inability of the IRS and the FEC to properly monitor campaign fundraising and spending amidst a chaotic and incoherent regulatory framework that is riddled with exemptions and loopholes. Finally, the conclusion chapter examines the Supreme Court case *McCutcheon v. Federal Election Commission* (2013). Oral arguments in this case were heard in October 2013 and a decision is expected in early 2014 that could influence the 2014 midterms. The Supreme Court's *McCutcheon* decision has the potential to undo every single piece of campaign finance legislation and judicial precedent concerning contribution limits to candidates, therefore it is very worthy of consideration.

## CHAPTER 2

# THE HUNDRED YEARS' WAR OF AMERICAN CAMPAIGN FINANCE

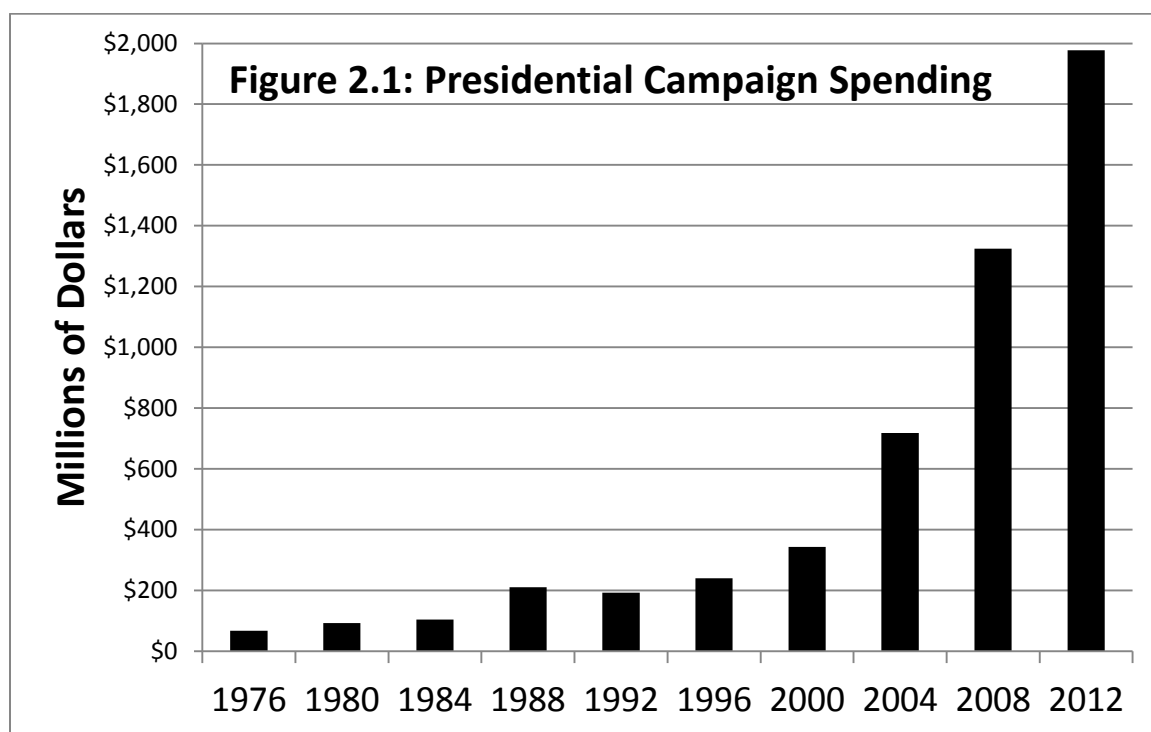
The corrupting influence of money in politics is not a new phenomenon. Not in American politics; not in human history. The story of civilization is filled with tales of political intrigue, bribery, extortion and unscrupulous profiteering. The role and influence of money on political power is as timeless as war itself. Unfortunately, the United States of America in the twentieth and twenty-first centuries is no exception to this enduring tradition of political malfeasance. While incidences of blatant *quid quo pro* corruption are infrequently exposed in the contemporary American political system, money still has an adulterating effect on the election and campaign financing systems.

Instead of handing a politician a bag with thirty pieces of silver and requiring a service or favor in return, moneyed interests are practiced in the arts of subtlety. Wealthy campaign contributors exploit elected officials and their career dependence on campaign fundraising. Elected officials need ever-increasing amounts of campaign cash in order to keep their jobs, and well-financed donors and interest groups are hyper-attuned to this desperation. While there is no empirical evidence demonstrating that campaign contributions influence roll-call voting behavior, the data on campaign contributions and spending over the decades strongly suggests that campaign contributors are perpetually willing to give more and more money to candidates in order to secure long-term loyalty. If there is, in fact, nothing to gain from contributing money to campaigns, then wealthy donors and interest groups seem unaware that they are throwing their money away. In reality, they seem to believe that it is a profitable investment to stack the deck of government in their favor.

For more than one hundred years, Congress and the American public have tried to mitigate, constrain and even remove the influence of money in elections. Campaign finance reformers in Congress have been intermittently successful at limiting both direct campaign contributions to candidates for elected office, and, for a very brief moment in history, candidate campaign expenditures. Regulation of candidate fundraising and spending, however, has been two steps forward and one step backward. Campaign finance legislation is often passed with high expectations, only to be neutered by Supreme Court rulings that roll back many of the reforms Congress has worked so tirelessly to institute. Even though Congress has occasionally succeeded in temporarily regulating direct contributions to and expenditures by candidates, campaign finance

reformers have had very little, if any, successes in regulating the independent expenditures of powerful and well-financed interest groups.

Powerful outside spending groups have their origins intertwined with the seemingly infinite arms race of campaign spending and the complex hodgepodge of more than one hundred years of campaign finance laws. Campaign spending has increased exponentially in the last half century despite numerous efforts by Congress to limit the role of money in campaigns. Both the Federal Election Campaign Act (FECA) of 1971 (plus the 1974 amendments) and the Bipartisan Campaign Reform Act (BCRA) of 2002 attempted to regulate and stabilize the amounts of money pouring into federal elections. While both pieces of legislation created a regulatory framework designed to monitor and record major transactions of candidates and their financial contributors, neither FECA nor BCRA succeeded in reducing the overall amount of campaign spending. Every election cycle since 1996 has been the *most* expensive presidential election (Figure 2.1).



Overall campaign spending continues to increase year after year despite the considerable legislative efforts that have been made to dam the river of political money. Presidential candidates and their campaign staffs continue to raise more money than any of their predecessors while still abiding by the disclosure requirements and donor contribution limits placed on candidates and traditional political action committees. The ability to raise money in small amounts from millions of Americans over the Internet has dramatically improved the capabilities of candidates to continuously beat the fundraising records from previous elections, all while abiding by the labyrinth of campaign finance laws intended to curb and stabilize campaign spending levels.

Presidential candidates always need more money to purchase more time on television for campaign advertisements. The majority of campaign spending (particularly presidential campaign spending) is dedicated to television advertisements. More money means more ad purchases. Consultants and campaign strategists ardently believe that a bombardment of ads in key states or districts is the best way to move public opinion. As a result of the Supreme Court's decision in *Buckley v. Valeo* (1976), which declared limits on campaign expenditures unconstitutional (to be discussed more thoroughly in this chapter), presidential candidates and their campaign strategists are in a constant frenzy for cash. Since there is no limit to what a presidential campaign can spend (unless the candidate agrees to accept public finance and its associated restrictions), candidates will continue to raise more money for the purpose of televising more campaign ads. The absence of an expenditure cap incentivizes and motivates candidates to ceaselessly dedicate themselves to fundraising. If campaign ads are the best weapon that candidates can use to win office, it should be expected that the unrelenting pursuit of campaign

money and the subsequent purchase of advertising time would be the sole and primary objective of every presidential candidate.

As an unintended consequence of the contribution limits and disclosure requirements placed on candidates and federally-registered political action committees (PACs), so-called “soft money” or “dark money” began to flow into the alternative political tributaries and reservoirs that exist within the current campaign finance complex. Wealthy donors in particular wanted to contribute more than they were legally allowed. This desire to contribute money in excess of what was permitted created a whole host of interest groups and political non-profit organizations willing and ready to collect money from donors above and beyond what candidates and parties were capable of receiving. The rise of 501(c) non-profit organizations (particularly the (c)(4) variety) and 527 independent-expenditure-only committees enabled contributors to pour money into tax-exempt groups that can finance televised advertisements independent of traditional candidate organizations.

As outside spending groups like 501(c)(4)s and 527 committees gained legitimacy and demonstrated a serious presence in presidential campaigns (and also congressional and state-level campaigns), they became a very lucrative and formidable vehicle for large sums of undisclosed money to be converted into campaign communications. As these outside groups began to take on a greater role in campaigning, a “de facto division of labor” was created between candidate organizations and allied tax-exempt organizations (Herrnson 2009, 1209). While independent expenditure committees are not legally allowed to coordinate their actions with the candidate or party to whom they are

sympathetic, they are allowed to indirectly work towards the same objective (electoral victory) with the same means (campaign ads that are indistinguishable from one another).

These alliances between outside groups and formal partisan campaign organizations were evident in the 2004 and 2008 presidential elections, but traditional campaign organizations were overwhelmingly the dominant players in these partnerships. Outside groups were able to raise significant sums of money, but were mostly relegated to conducting get-out-the-vote operations and grassroots mobilization. Most 501(c)(4)s and 527s did not have the means in 2004 or 2008 to be influential actors in the presidential campaign ad wars (beyond a few ads in a few media markets). The Supreme Court's decision in *Citizens United v. Federal Election Commission* (2010) and D.C. Court of Appeals' decision in *SpeechNow.org v. Federal Election Commission* (2010) gave 527 independent-expenditure-only committees and 501(c) organizations the ability to raise unlimited amounts of money and the legal go-ahead to spend money on campaign ads without any restrictions. In the 2010 and 2012 election cycles, outside groups such as Karl Rove's American Crossroads and Crossroads GPS (a 527 committee and 501(c)(4) organization, respectively) were not only able to raise and spend record-breaking amounts of campaign cash but also record-breaking numbers of unique campaign advertisements and TV ad buys.

The transformation of the presidential advertising market over the last half century has largely been the result of and reaction to the evolving campaign finance legal regime. Historically, Congress passes campaign finance reform to limit and control the influence of money in politics, and piece by piece the Supreme Court renders provision after provision of campaign finance law to be either unconstitutional or meaningless

through exceptions and loopholes. It is a constant process of creation and destruction: Congress passes campaign finance laws and the judicial branch undermines the integrity of these laws, almost always on First Amendment grounds. The courts (primarily the Supreme Court) do not render campaign finance laws obsolete out of a desire to see more corruption in politics, but instead because the courts have consistently sympathized with the “freedom of speech” perspective rather than the “equality within elections” worldview that are in constant philosophical and legal competition with one another.

This chapter will examine the most important pieces of campaign finance legislation and the court cases that undermined those laws. As a result of the messy and convoluted complex of the various campaign finance laws and court cases, most people are left befuddled by the current campaign finance regime. This chapter will clearly trace the origins of campaign finance reform, the process through which such legislation is tested and called into question, the subsequent court cases that created the exceptions and legal gray areas where campaign finance laws and regulatory commissions have little or no jurisdiction, and, finally, the emergence of powerful outside groups popularly called “Super PACs.”

### *Campaign Finance Reform Prior to the Federal Election Campaign Act*

Most discussions and analyses of campaign finance reform in American politics begin with FECA (1971). The foundations of the existing campaign finance regime in the early twenty-first century were laid down by FECA, so it is certainly a suitable starting point for most studies. It is important to consider, however, that the origins of the campaign finance debate in the United States actually have their roots in the

Progressive Era of the late nineteenth and early twentieth centuries. The apparently evident “excesses of the [William] McKinley fundraising efforts” combined with the bombastically anti-corporate oratory of President Theodore Roosevelt propelled campaign finance reform onto Congress’ legislative agenda, and the eventual passage of the Tillman Act in 1907 “banned banks and corporations from making contributions to federal candidates” (Rozell, Wilcox and Franz 2012, 60). In the period directly preceding the Stock Market Crash of 1929 and embodied by the excesses of the Gilded Age, it should not be surprising that the early twentieth century provided the economic and political contexts necessary for campaign finance reform to be taken seriously. The Tillman Act’s primary purpose was to prohibit national banks (meaning Wall Street banks) and their corporate allies from purchasing a sympathetic government through campaign contributions.

Congress passed the Federal Corrupt Practices Act in 1910 and amended the bill in 1925. At the time, candidates were only required to disclose their fundraising sources in election years, thereby creating a system wherein campaign contributors wishing to remain anonymous could simply give candidates money in a non-election year. This type of loophole is unfortunately a common theme throughout the course of campaign finance history. The Federal Corrupt Practices Act (FCPA) closed this loophole by making no distinction between election and non-election years regarding the disclosure of campaign contributions (Farrar-Myers and Dwyre 2008, 9). In the end, neither the Tillman nor the FCPA Acts did anything to curb the amount of money spent in campaigns (which is also a common theme of campaign finance regulation). Throwing rocks into a river is not the same as building a dam.

As the political and economic influence of organized labor continued to grow in the post-Depression years, campaign contributions from unions became another target of campaign finance reform. During the Second World War, Congress passed the War Labor Disputes Act in 1943 (commonly called the Smith-Connally Act). In addition to giving the federal government the power to temporarily nationalize any industry essential to the war effort if it threatened to strike, the Smith-Connally Act also prohibited unions from directly contributing to a candidate for national office (Malsberger 2000).

In a far more concerted and comprehensive attempt to limit the political and economic influence of unions after the war, anti-labor Republicans passed the Labor Management Relations Act of 1947 (commonly called the Taft-Hartley Act), which in addition to (i) requiring unions to give 80-day notices to businesses if they intended to strike for a new collective bargaining agreement, (ii) requiring union leaders to sign affidavits declaring their opposition to the Communist Party, (iii) enabling employers to fire supervisors involved in union activities, and (iv) reinstating the right of employers to disseminate anti-union messages in the workplace, Taft-Hartley also prohibited unions from making independent expenditures in favor of or in opposition to any candidate for office (Nicholson 2004; McCarthy 2010). Both Smith-Connally and Taft-Hartley were aggressively anti-union bills designed purely to stifle the political mobilization of organized labor. Both pieces of legislation were also passed by Republican congresses overriding the presidential vetoes of Democratic presidents Franklin Roosevelt and Harry Truman. At the midpoint of the twentieth century, campaign finance laws prohibited corporations and unions from contributing money to candidates, but only unions from making independent expenditures.

*The Federal Election Campaign Act (1971 and 1974)*

The Federal Election Campaign Act (FECA) was originally passed by Congress in 1971. For all intents and purposes, the original FECA was little more than a consolidation and reaffirmation of the Tillman Act (1907), the Federal Corrupt Practices Act (1910, 1925), the Hatch Act (1937)<sup>2</sup>, Smith-Connally (1943), and Taft-Hartley (1947). The only original contributions of the initial FECA were stricter regulations for candidates, parties and traditional PACs regarding the disclosure of contributions. The Revenue Act of 1971, though not technically part of FECA, created a source of public financing for presidential elections through an income tax check off wherein taxpayers could contribute one dollar—later three dollars— of their tax liability to a Presidential Election Campaign Fund (Farrar-Myers and Dwyre 2008, 11). The Revenue Act also imposed expenditure limits on candidates choosing to use public financing as well as a general prohibition of all private contributions. As a result of the strict limitations that candidates would have to observe, public financing offered by the Revenue Act was not attractive enough for candidates to voluntarily surrender the ability to raise money through private contributions.

The original FECA was not much of a game-changer. It did little more than underline the existing campaign finance laws set decades prior. The amendments to FECA in 1974 finally gave some teeth to American campaign finance laws. Congress finally had the incentive to get serious about enforcing campaign finance laws after the many indiscretions of Nixon's reelection campaign were brought to light (Rozell, Wilcox and Franz 2012, 61). The amendments to FECA (i) created contribution limits from

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<sup>2</sup> Prohibited federal civil servants from donating to and working for campaigns for national office.

parties, interest groups and individuals, (ii) imposed expenditure limits on candidates (regardless of whether or not public financing was accepted), (iii) reinforced the existing disclosure requirements for candidates, parties and PACs, and (iv) created the Federal Election Commission to oversee and enforce campaign finance laws (Alexander 2011, 157). Interestingly, FECA (1974) created a campaign finance regime that is remarkably similar to what campaign finance reform advocates are calling for in the twenty-first century with the Fair Elections Now Act of 2012 and the DISCLOSE Act of 2013: strict disclosure requirements, contribution limits, expenditure limits and public financing (Clements 2012, 160).

With FECA in place, candidates and political parties were unable to raise and spend as much money as they could possibly acquire. It seemed as though the problem of money in politics was finally resolved. FECA's aspirations, however well-intentioned they may have been, were quickly undermined by the many loopholes that sources of campaign money learned to exploit. FECA did nothing to regulate soft money spending by political parties or expenditures made by non-profit interest groups such as 527 independent-expenditure committees and 501(c)(4) organizations. While FECA technically regulated any electioneering organization engaged in what the Supreme Court calls "express advocacy," non-profit groups and political parties could produce issue ads that did not expressly advocate for the election or defeat of a candidate. So long as groups refrained from using the so-called "magic words" (vote for, elect, support, cast your ballot for, vote against, defeat, or reject) in their advertisements, they were not under the jurisdiction of FECA (Herrnson 2013, 10). Soft money expenditures and so-called issue ads, therefore, could not be regulated in the same way as traditional campaign

activities. This seemingly trivial legal distinction between express advocacy and indirect issue advocacy would eventually lay the groundwork for entrenched outside interest groups to have a permanent place in campaign advertising.

FECA was dealt a serious, though not fatal, blow by the successful legal challenge brought against it in the Supreme Court case *Buckley v. Valeo* (1976). With the exception of *Citizens United* (2010), *Buckley* is the most notable Supreme Court case regarding campaign finance law in the United States because it established the familiar framing of the campaign finance debate: freedom of speech versus fair and equal elections. The decision in *Buckley* not only overturned an essential component of FECA (expenditure limits), it also laid the foundation for all future Supreme Court decisions by asserting that campaign expenditures were protected free speech and thus could not be limited.

#### *Buckley v. Valeo* (1976)

Disapproval of the Court's decision in *Buckley* was (and still is) almost unanimous. Campaign finance reform advocates were disappointed that the Court declared the expenditure limits set in place by FECA unconstitutional on the grounds that campaign spending is free speech protected by the First Amendment. Campaign finance reform opponents were upset that the Court upheld FECA's limitations on contributions. Despite the widespread disdain of the *Buckley* decision, it continued to provide the precedence and foundation for all campaign finance cases at all levels of politics until *Citizens United* (2010).

The decision in *Buckley* (5-4) “treated expenditures [by candidates] as the highest form of campaign speech” (Briffault 2011, 177). The Court argued that candidates had the fundamental right to communicate their ideas to their constituents, and limiting the amount of money a candidate could spend on advertising was a violation of the First Amendment. Furthermore, the Court also eliminated “all limits on independent expenditures by individuals and PACs, holding that such limits would constitute an abridgment of free speech” (Rozell, Wilcox and Franz 2012, 63). By making such a broad decision that affected all political expenditures and not just those of candidates, *Buckley* opened the door for independent political actors to spend unlimited sums of money on independent political communications (if they could get the money).

The Court also narrowly defined the term “campaign communication” to ads or messages that “expressly advocated” for or against the election of a specific candidate (Farrar-Myers and Dwyre 2008, 17). This, in turn, led to the escalation and proliferation of issue ads by outside spending groups. To reiterate, so long as an ad does not “expressly advocate” for or against a candidate by using hot-button words like “vote for,” “re-elect,” “cast your ballot for,” etc., it is considered an independent expenditure and is not under the jurisdiction of existing campaign finance regulations. The *Buckley* decision not only tore down the limits on expenditures for candidates, it also opened the floodgates for outside PACs to make unlimited independent expenditures on issue ads that, while not expressly advocating for a candidate, could easily promote or undermine candidates by highlighting their position on an important or divisive issue. As John Pitney explains, “whatever the legal distinctions, ordinary voters see no difference between the two types of advertising” (2013, 174).

Monica Youn, explains that “*Buckley*’s legacy is a system in which money—and consequently, power—is pushed to the political fringes, special interests wield disproportionate power over candidates and elected officials, and voters can hold no one accountable” (2011a, 2). She points out that the outside groups “wielding monetary power cannot be voted in or out” of their position or held to any form of public accountability, while candidates being indirectly supported by these groups can easily “deny any responsibility for such outside spending” and advertising (Youn 2011a, 2). Outside groups have the unaccountable capacity to serve as the perfect “middle men,” or surrogates, for the somewhat-more-accountable official candidates.

In addition to concerns about the role of outside groups in advertising and spending post-*Buckley*, other critics lament the Court’s idealistic treatment of campaigns as “pure debating exercises, in an almost theoretical market of ideas...[that] ignores the real world context of politics, soft money, and the election of actual individuals” to serve in government (Alexander 2011, 159). In treating all campaign expenditures as essential and indispensable forms of free speech necessary for the survival and continuation of free elections, the Court overlooks the crucial and painfully obvious role that unlimited campaign expenditures, particularly by outside groups, have on the overall deliberative and representative aspects of campaigns. Mark Alexander notes that the “*Buckley* Court disregarded the way that large sums of money can effectively drown out smaller voices, and thus effectively remove the people from their politics and government” (2011, 158). Because the Court consistently accepts the free speech argument over the equality argument, outside spending groups are at liberty to spend as much money as they wish on their own issue campaigns (which are really just quasi-independent proxy campaigns for

candidates). In fact, the increasing role of outside political advertising has left traditional candidates and parties noticing that “their own campaign messages [are] being drowned out by competing advertising” (Farrar-Myers and Dwyre 2008, 17).

Another consequence of the *Buckley* decision was the affirmation that limits on contributions to candidates were constitutional on the grounds that campaign contributions could result in *quid pro quo* corruption, or at the very least in the appearance of corruption or undue influence (Issacharoff 2011, 121). Part of *Buckley*’s unpopularity is that it “confers differential status upon contributions and expenditures” (Youn 2011b, 98). As Richard Briffault explains, “The Court asserted that, unlike expenditures, a contribution does not entail an expression of political views” and is therefore not protected free speech (2011, 177). Of course, this differential status for contributions confused legal experts and constitutional scholars because political contributions to candidates or causes *were* (and still are) considered expressions of political support (as the Roberts Court would later confirm in *Citizens United*). Furthermore, critics have pointed out that independent expenditures by outside groups (that subtly aid or undermine a specific candidate) could create *quid pro quo* corruption or the appearance of it in the same way that contributions supposedly create corruption. Rozell, Wilcox and Franz (2012) explain the Court’s explanation for treating contributions and expenditures differently, and also the shortcomings of this rationale:

The rationale of the distinction is that a larger gift—of perhaps \$50,000—might corrupt the candidate but that a huge independent expenditure [by an outside group] would not. It seems likely, however, that an incumbent who has benefited from a massive independent spending campaign will be as grateful to the interests that financed that campaign as he or she would be to a group that gave the money directly to the campaign (63).

Perhaps the *Buckley* Court was so concerned with the possible corrupting influences of campaign contributions that they completely overlooked the equally corrupting potential of allowing special interests to run their own proxy campaigns to assist or defeat a candidate.

Finally, as a result of the contribution limits upheld in *Buckley*, candidates (presidential candidates in particular) are forced to devote more of their time to raising money in small amounts from many contributors (Briffault 2011, 178; Doherty 2012, 29). By upholding the constitutionality of contribution limits, the Supreme Court had “restricted the supply of money for campaigns but not the demand for it, thus encouraging both campaign fundraisers and spenders to look for loopholes in the law” (Farrar-Myers and Dwyre 2008, 16). The loophole that would change the game of campaign finance (at least for outside groups) was the rise of soft money contributions and independent-expenditure-only 527 PACs. Presidential candidates could rely on outside advertising campaigns to augment their own communications strategy, but in order to raise more and more money candidates were forced to engage in what has come to be called the “permanent campaign.”

Brendan Doherty (2012) points out that campaign finance rules intended to reduce the influence of money in politics by imposing limits on contributions have unintentionally “incentivized presidents [and presidential candidates] to begin...fundraising earlier...as they anticipate needing more time to hold a sufficient number of events to accumulate the [necessary] financial resources” needed to wage a competitive campaign ad war (31). Moreover, Doherty insists that when presidential

candidates, particularly incumbent presidents, spend most of their time fundraising, “one must ask what [they] might have done had [they] not been raising money” (2012, 153).

Campaign finance regimes shape and influence how candidates run their campaigns and fundraising efforts, and the existing campaign finance regime encourages presidential candidates to engage in a permanent fundraising and advertising campaign that seems never-ending. As Cronin and Genovese (2004) elucidate, “To become president takes...a master fundraiser, a person who is glib, dynamic, charming on television, and hazy on the issues,” but once in office “the person must be well rounded, careful in reasoning, clear and specific in communication, and not excessively ambitious” (24). Problematically, all the attributes and traits necessary for being a competitive presidential candidate (i.e., fundraiser) are not necessarily the same traits that are desirable in a president.

*Austin v. Michigan Chamber of Commerce* (1990)

The *Austin* case concerned the constitutionality of the state-based Michigan Campaign Finance Act’s prohibition on corporations using general treasury funds to support or oppose a candidate. The appellants in the case argued that prohibiting corporate money in elections violates the First and Fourteenth Amendment rights of corporations. The Court decided (6-3) that the government could prohibit corporate spending in elections because the state had a compelling interest in protecting against the “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to

the public's support for the corporation's political ideas" (*Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 1990).

The Court's decision in *Austin* is unique in two ways. First, it is one of the few Supreme Court campaign finance cases of the last thirty years in which the Court reaffirmed and even strengthened the campaign finance regime against the "distorting effects" of money in elections. Most of the notable campaign finance cases during the Rehnquist and Roberts Courts erode and weaken existing campaign finance laws in one way or another. The *Austin* case upheld the existing federal ban on corporate contributions first put in place by the Tillman Act (1907) as well as state prohibitions on corporate money. Second, the Court's opinion in *Austin* is the only case founded on the "distortion of electoral outcomes" argument. The *Austin* Court declared that corporations are *not* people and campaign finance laws should treat them differently because of their "unnatural ability...to amass wealth more readily than individuals" (Issacharoff 2011, 122). As Paul Herrnson explains, the *Austin* Court determined that "corporate money, aggregated with advantages that come from government, is not the same as people's money pooled together" (2013, 10). The Rehnquist Court clarified the need to separate and discriminate against the undue influence of corporate money in elections, a clarification the Roberts Court will overturn twenty years later in *Citizens United v. FEC* (2010).

#### *The Bipartisan Campaign Reform Act (BCRA) of 2002*

The BCRA (a.k.a. McCain-Feingold) was the most significant piece of campaign finance legislation since FECA in the early 1970s. Just as the Watergate scandal

compelled Congress to reexamine the laws governing money in elections, so, too, did the Enron scandal in the early years of the twenty-first century, which put “names and faces to questions about the influence of corporate contributions on government regulatory decisions” (Herrnson 2013, 11). The primary purpose of the BCRA was to: (i) prohibit national political parties from spending soft money (money not subject to FEC jurisdiction) in federal, state and local elections, (ii) define and properly regulate “electioneering communications,” or what are commonly called issues ads by interest groups, (iii) raise individual contribution limits, and (iv) require “all voter registration drives conducted during the last 120 days of a federal election that mention a federal candidate be financed with federally regulated” hard money (Herrnson 2013, 11). Express advocacy and issue ads paid for by soft money from political parties were no longer legal. By defining a new term, “electioneering communications,” Congress effectively banned corporations and non-profit 501(c) corporations from airing issue ads within 60 days of a general election.

The party-committee soft money bans coupled with the temporal restrictions on when interest groups can air ads seemed like a fitting policy solution to the rising role of outside spending groups in campaigns. The 60-day moratorium on outside campaign advertisements was intended to create a political-media environment wherein only the major candidates and their campaign organizations were producing television advertisements. This not only limited the corrupting influence of outside groups on campaigns, but also enabled candidates (particularly presidential candidates) to have more control over their own campaign communications without competing groups drowning out the official message.

Samuel Issacharoff commends the BCRA for creating “incentives for campaigns to solicit money from more sources” which may be “more effective at diminishing the distortive effects of money [in politics] than [proposals] that seek to limit the amount of money in the system” (2011, 133). The 2004 and 2008 presidential campaigns were the only campaigns to be held under the confines and conditions of the BCRA (though by 2008 many provisions of the BCRA had been overturned by the Supreme Court) and in each election cycle overall fundraising and spending levels exceeded all previous records. These two presidential campaigns demonstrated that even under modest FEC regulation and oversight, candidates could still raise and spend vast sums of money by appealing to millions of donors for small contributions as opposed to a few donors with millions of dollars.

But just as FECA and *Buckley* encouraged and incentivized presidential candidates to dedicate more and more of their time to fundraising, the BCRA further institutionalized and escalated the fundraising responsibilities of candidates. It seems that no matter how benevolent the intentions of campaign finance legislation, such regimes inevitably lead to presidential candidates needing to engage more heavily in the permanent campaign. As incumbent presidents and presidential candidates currently serving in elected office dedicate more of their time to fundraising and campaigning, they inevitably “devote less time to their official duties” (Alexander 2011, 160).

Ironically, while the BCRA successfully incapacitated the ability of national party committees to raise and spend unlimited amounts of soft money on issue ads, it also scared special interest money away from the traditional campaign actors (candidates and parties) and into the coffers of outside groups. If parties could not conduct soft money

campaigns, then groups that slipped through the loopholes of campaign finance law would fill the void. As always, any attempt to dam or divert the flow of campaign money to candidates invariably leads to the money finding another way into the campaign.

*McConnell v. Federal Election Commission* (2003)

Opponents of the BCRA threatened to file lawsuits against it before President George W. Bush even had the opportunity to sign the bill into law. Republican Senator Mitch McConnell, the most vocal opponent of the BCRA's corporate and soft money bans, was the lead plaintiff in the joint lawsuit against the BCRA. The complaint made in *McConnell* against the BCRA is that the law was far too broad in its regulatory scope and unnecessarily regulated campaign spending activities by outside groups that had never been shown to be the cause of corruption. The complainants also argued that the *Buckley* decision "drew a constitutional line affording all issue advocacy First Amendment protection" (Downie 2004, 934). The Supreme Court decided (5-4), however, that limiting the rights of outside groups and corporations from spending large amounts of soft money on campaign advertisements was justified on the ground that the federal government had a legitimate interest in preventing corruption or the appearance of corruption in elections.

The *McConnell* decision upheld most of the important provisions of the BCRA such as the ban on corporate soft money expenditures and the temporal restrictions on when outside groups could air issue ads prior to Election Day (Farrar-Myers and Dwyre 2008, 109; Herrnson 2013, 12). The *McConnell* Court abided by the decision made in *Austin v. Michigan Chamber of Commerce* (1990) wherein corporate money, combined

with the support given by government to corporations, constitutes an unfair and disproportionate advantage over ordinary individual contributions. The Court insisted that the restrictions on corporate freedom of speech were minimal and that the existence of traditional PACs regulated by the FEC gave corporations a “constitutionally sufficient” avenue for participating in elections (Clements 2012; Youn 2011, 3).

The decision in *McConnell* was interpreted as a major victory for campaign finance reform advocates. Not only did the case confirm the constitutionality of the soft money bans as well as the restrictions on issue ads, it also expanded “the constitutional parameters of the type of activity that may be subject to regulation” by the FEC (Holman and Claybrook 2004, 251). As part of the larger campaign finance reform efforts surrounding the BCRA, 527 independent-expenditure-only committees were brought under stricter disclosure and reporting requirements. Prior to *McConnell* and the BCRA, Congress nor the FEC had the ability to regulate the fundraising and expenditures of 527 committees as they were protected from FEC regulation by the express advocacy loophole. After *McConnell*, 527 committees lost some of the attractiveness that made them so popular after the *Buckley* decision in 1976. Of course, where there is a will, there is a loophole. 501(c) non-profit organizations, particularly the (c)(4) social welfare groups, became the most desirable alternative for “shadow groups” wishing to keep their financial contributions hidden (Holman and Claybrook 2004, 253). 501(c) organizations do not have to disclose the names of their contributors and they can use soft money to finance the administrative operations of PACs who can spend hard money on campaign advertisements (Holman and Claybrook 2004, 247).

While the *McConnell* decision and the survival of the BCRA was considered a victory for campaign finance reform advocates, many voices on both sides of the campaign finance debate had conflicting reactions to the *McConnell* outcome. The reaffirmation of the soft money bans and issue ad restrictions can easily be perceived as a victory for reform proponents, but the increased disclosure requirements for 527 committees were rather hollow and pointless because anonymous money could simply flow into 501(c) organizations instead. The BCRA was determined to stop the flow of soft money to national party committees and to prohibit soft money issue ads from the 60-day general election window, but in the end the soft money moved away from parties and into the accounts of newly-formed non-profit groups. The money did not stop flowing; it just moved to a different reservoir. For the more optimistic advocates, *McConnell* seemed like an important victory that had the potential to lead to more serious reform. The trajectory and momentum of the debate seemed like it was going in the direction of increased Congressional regulation. In the very least, the *McConnell* decision provided campaign finance reform advocates in Congress “all of the leeway they may need” to continue pushing their agenda (Downie 2004, 937).

The *McConnell* decision also seemed like a major defeat for the sacrosanct free speech argument. Critics of the Court’s decision argued that the campaign finance laws were “indeed intended to limit competition” and to “balance interests (expressly or not) in ways that squelch rigorous debate about political (including electoral) issues” (Hasen 2004, 72). Justice Thomas declared in his dissenting opinion that the *McConnell* decision upheld the “most significant abridgment of the freedoms of speech and association since the Civil War” (Holzer 2007, 81). For free speech absolutists, any attempt to limit or

prohibit political spending is akin to restricting freedom of speech for everyone. The Court's decision also seemed like a serious capitulation to Congressional authority on the issue: "The Court has replaced a general skepticism of campaign finance regulation with unprecedented deference to legislative determinations on both the need for regulation and the means best suited to achieve regulatory goals" (Hasen 2004, 34). While some want the Supreme Court to have complete supremacy in campaign finance determinations, reform proponents insist that campaign finance "ought to be dejudicialized so that courts play a lesser role in determining both the permissible goals of campaign finance law and the proper regulatory techniques" (Briffault 2011, 191).

Both sides of the campaign finance debate were unsatisfied with the Court's decision in *McConnell*. Proponents were glad that the Court confirmed the soft money bans and issue ad restrictions, but disappointed with the dismissal of a BCRA provision that prohibited coordinated and independent expenditures from party committees. Opponents feared that the Court had enabled Congress to pass stricter campaign finance laws that would further diminish freedom of speech. Whatever the different criticisms, both sides agreed that the BCFA and *McConnell* decision simply diverted the money through loopholes to unregulated non-profit issue advocacy groups. Justice Kennedy's dissent, joined by Chief Justice Roberts, lamented that the BCRA compelled "speakers to abandon their own preference for speaking through parties and organizations" and instead contribute their money to 527 and 501(c) organizations that were not subject to the FEC.

*Randall v. Sorrell* (2006)

After *McConnell*, the first significant Supreme Court case to deal with campaign finance was *Randall v. Sorrell*, a case regarding the constitutionality of Vermont Act 64, a state campaign finance law that placed the heavy restrictions on campaign expenditures and individual contributions. The legal counsel for the state of Vermont urged the Supreme Court to accept “the protection of elected officials’ time as a compelling interest” to limit campaign expenditures (Alexander 2011, 162). As Justice Stevens explained, “Without expenditure limits, fundraising devours the time and attention of political leaders, leaving them too busy to handle their public responsibilities effectively.” The justification for expenditure limits in *Randall* corresponds to the literature on the negative consequences of the permanent campaign, which argues that elected officials that spend all of their time fundraising and campaigning are not actually governing (Doherty 2012; Ornstein and Mann 2000; Heclo 2000; Jones 1998; King 1997).

The Vermont campaign finance law included contribution limits of only a few hundred dollars per person, so candidates would be forced to spend more time fundraising, not less. The Court struck down Vermont’s contribution limits “even though the Supreme Court had allowed limitations on contributions in *Buckley*” (Farrer-Myers and Dwyre 2008). The *Randall* decision honored the *Buckley* Court’s decision on the unconstitutionality of expenditure limits, but seemed to contradict *Buckley* by striking down contribution limits.

The Court argued that Vermont’s contribution limits were so low that they restricted contributor’s freedom of speech. The *Randall* decision did not overturn the

contribution limits protected by *Buckley*, but it did create a precedent for contribution limits being too low. The Court's decision in *Randall* (5-4) signaled a possible transition towards a "deregulationist" majority (or plurality) on the Supreme Court that preferred a more hands-off approach to state and federal government's role in campaign finance (Hasen 2006, 867). It is fairly evident that campaign finance laws have failed to limit the amount of money pouring into campaigns, so the deregulationist perspective may be more pragmatic than campaign finance reform advocates give it credit. While the objective of campaign finance reform has been to stem the flow of money into elections, candidates have been very successful at raising more money through small contributions (not to mention the pervasive influence of soft money). The contribution limits put in place by FECA and raised by the BCRA did not stop the flow of money into campaigns; therefore, the Court could have also argued in *Sorrell* that contribution limits have failed to protect against corruption or the appearance of corruption. Either way, *Sorrell* laid the foundation for the future unconstitutionality of contribution limits.

*Federal Election Commission v. Wisconsin Right to Life, Inc.* (2007)

For campaign finance reform opponents, the *McConnell* decision in 2003 seemed like a major defeat that would usher in an era of additional campaign finance and free speech restrictions built atop the BCRA. Four years later, after Justice O'Connor was replaced by Justice Alito, the Supreme Court heard *Wisconsin Right to Life, Inc. v. Federal Election Commission* (2006) (the initial lawsuit often referred to as *WRTL I*) (Briffault 2011, 176). The case concerned the desire of a 501(c)(4) advocacy organization, "Wisconsin Right to Life, Inc." (WRTL), to air issues ads within the

window 60 days prior to election day (which was prohibited by the BCRA and upheld in *McConnell*). The group was prohibited from airing the following ad:

[*Wedding scene*]

PASTOR: And who gives this woman to be married to this man?

BRIDE'S FATHER: Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up...

VOICE-OVER: Sometimes it's just not fair to delay an important decision. But in Washington, it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates don't get a chance to serve. It's politics at work, causing gridlock and backing up some of our courts to a state of emergency. Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

[Text on screen]: Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidates committee.<sup>3</sup>

The FEC argued in District Court and at the Supreme Court that the ad was express advocacy because it mentioned candidates in an election (Senator Russ Feingold, D-Wisconsin) with the intention of influencing the election outcome. Because the ad was "expressly advocating" against Russ Feingold and as a result of the BCRA prohibition on electioneering communications within 60 days of Election Day, the ad was not allowed to air.

The Supreme Court remanded the case to the District Court to determine if the group and the ad could receive an exemption from the BCRA 60-day provision. The District Court found that the WRTL ad was not express advocacy, and overturned the

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<sup>3</sup> Dimino, Michael, Bradley Smith and Michael Solimine. 2010. *Voting Rights and Election Law*. Lexis Nexis

lower court's ruling against WRTL. Disappointed at the District Court's decision, the FEC appealed the case to the Supreme Court in *Federal Election Commission v. Wisconsin Right to Life, Inc.* (2007) (often referred to as *WRTL II*). The Supreme Court affirmed the District Court's decision (5-4) that the WRTL ad was not an express advocacy ad because it did not specifically encourage the election or defeat of a candidate. The "magic words" test that was disregarded in the *McConnell* decision as irrelevant was the lynchpin of the plurality's decision in *WRTL II*. After the Court's decision in *WRTL II*, 527 committees and 501(c) organizations could run issue ads whenever they wanted regardless of election or primary dates, "but only if they avoided express advocacy of the candidate's defeat or election" (Pitney 2013, 174). Of course, the Court's interpretation of "express advocacy" explicitly required the use of the so-called magic words (i.e., "vote for") order to be considered in violation of BCRA and *Buckley*. With such a narrow definition of express advocacy, outside groups were free to run whatever ads they wanted so long as they avoided the magic words that rarely appear in campaign ads post-1980 anyways.

The Court's decision in *WRTL II* not only allowed outside groups to air ads within the 60-day election window, it also freed these groups to "broadcast these ads without disclosing their funding sources throughout the duration of an entire primary and general election cycle," all because these groups could now easily avoid the Court's very specific definition of "express advocacy" (Hernson 2013, 12). While the *WRTL II* decision did not entirely undermine the *McConnell* decision from four years prior, it did overturn *McConnell*'s affirmation of the prohibition of soft money ads 60 days prior to Election Day stipulated in the BCRA. The soft money had already flowed to the 527 committees

and 501(c) organizations; after *WRTL II*, these groups could spend that money without restriction.

It is safe to assume that had the Supreme Court never taken up *Citizens United v. FEC* (2010), the Court's decision in *WRTL II* would remain the most unpopular to campaign finance reform advocates. Like most Supreme Court cases concerning campaign finance laws, the Court in *WRTL II* "failed to bring a simple majority of the Court together behind a single rationale" (Farrar-Myers and Dwyre 2008, 113). A plurality of justices reached the decision in *WRTL II* with different perspectives on why outside groups should be able to run issue ads right up to Election Day, with four justices dissenting entirely. In fact, with the exception of *Austin v. Michigan Chamber of Commerce* (1990), every major campaign finance reform case that reached the Supreme Court was determined by a 5-4 decision, suggesting that even though campaign finance laws have taken a sharp turn towards deregulation, four members of the Court remained resolute in their belief that political spending and political communications by corporations, unions and the super wealthy have a corrupting influence on electoral outcomes.

#### *Citizens United v. Federal Election Commission* (2010)

The Court's decision in *WRTL II* inexorably led to the now infamous Supreme Court case known as *Citizens United*. A conservative Virginia non-profit organization named "Citizens United" filed suit against the FEC. Citizens United challenged the constitutionality of the expenditure restrictions and the ban on corporate contributions put in place by the BCRA and upheld in *McConnell* (2003). With the *WRTL* decision fresh

in everyone's mind, campaign finance reform opponents knew they could build on their victory. The specifics of the case concerned a documentary produced by Citizens United called *Hillary: The Movie*. Citizens United wished to televise the hour-long mini-documentary about Hillary Clinton's life during the Democratic primary campaign of 2008. The group was prohibited from doing so because (i) Citizens United was a 501(c)(4) corporation that was partially funded by contributions from for-profit corporations, and (ii) the BCRA prohibited express advocacy campaign advertisements funded with corporate money from the primary and general election windows (30-days from primary date and 60-days from general election date). Citizens United argued that its First Amendment rights were being violated because the law prohibited it from televising a campaign ad, whereas a group like Wisconsin Right to Life, Inc., was free to air their ad because they did not accept corporate money.

As Jeffrey Clements notes in his book *Corporations Are Not People* (2012), "the background of the case seemed to warrant concern about the government restrictions on the free ability of people to pool resources to advocate views" (9). That is certainly how Justice Kennedy and the other four justices in the majority viewed the merits of the case. *Citizens United* was, however, not simply a case about campaign finance or the role of money in elections, but a "corporate power case masquerading as a free speech case" (Clements 2012, 3). More nefarious still was the methodical legal strategy at-work behind the Citizens United lawsuit:

While *Hillary: The Movie* appeared to be simply just another salvo in the presidential campaign season, its production, timing, and planned release, in fact, were part of a coordinated and longstanding legal strategy to test the constitutional boundaries of federal campaign finance law, in particular the Bipartisan Campaign Reform Act (Youn 2011b, 3).

Realizing that the ideological balance on the Supreme Court pertaining to campaign finance had undoubtedly shifted during the Bush presidency, campaign finance opponents saw their perfect moment to strike against the BCRA.

The Roberts Court decided (5-4) to overrule two important campaign finance precedents. First, the *Citizens United* decision overturned the ban on corporate contributions put in place by FECA and upheld by the *Austin* (1990) decision. Second, it overturned the Rehnquist Court's *McConnell* decision, which upheld the corporate expenditure and express advocacy bans within 60-days of the general election. In his majority opinion, Justice Kennedy wrote, "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech" (as quoted in Liptak 2010a). The *Citizens United* decision did not overturn the existing bans on direct corporate contributions to candidates, instead maintaining that independent expenditures were a sufficient means for corporations and outside groups to express their opinions.

While the majority in *Citizens United* viewed independent expenditures as innocent free speech, the dissent insisted that independent expenditures were a disguised form of direct contributions. Justice Stevens argued that the "difference between selling a vote and selling access is a matter of degree, not kind...[a]nd selling access is not qualitatively different from giving special preference to those who spent money on one's behalf" (as quoted in Liptak 2010a). As was already mentioned, politicians will likely consider independent expenditures to be synonymous with direct contributions. What FECA banned for reasons of *quid pro quo* corruption, the Court's decision in *Citizens United* enabled through the independent-expenditure loophole. The Court upheld the

bans on direct contributions and contribution limits because giving money directly to a candidate demonstrates an act of corruption or the appearance of corruption. The majority adamantly insisted there is no sufficient evidence to prove that independent expenditures cause the same *quid pro quo* corruption (Youn 2011b, 111).

Justice Stevens, writing for the dissenters, was very emphatic in his disagreement with the majority, calling the decision in *Citizens United* a “radical departure from what has been settled First Amendment law” (Clements 2012, 12). Stevens continued his denunciation by arguing:

At bottom, the Court’s opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics (as quoted in Clements 2012, 12-13).

Justice Stevens and the dissenters were not alone in their condemnation of the Court’s decision in *Citizens United*. In the days after the decision was announced, President Obama declared it “a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans” (Liptak 2010a). Later, in his 2010 State of the Union address<sup>4</sup> with members of the Court sitting just feet from him, President Obama argued that *Citizens United* would “open the floodgates for special interests,” to which Justice Alito, a member of the majority in *Citizens United*, mouthed

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<sup>4</sup> Obama, Barack. 2010 January 27. “Address Before a Joint Session of the Congress on the State of the Union.” Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. UCSB

the words “that’s not true” while shaking his head (Herrnson 2013, 1). Justice Alito has not attended a State of the Union address since.

This case, once thought to be of no particular importance (at least not any more important than the *WRTL II* decision), had fundamentally changed the state of campaign finance regulation. Instead of deciding the case on narrow grounds, as most observers expected, the “Supreme Court vastly expanded the scope and consequences of the case by requesting expedited reargument on whether the Court’s precedents in *Austin* and *McConnell* should be overturned” (Youn 2011a, 4). The Court’s decision in *Citizens United* was thus a major surprise to those in the campaign finance community who were expecting a slight advance of the Court’s decision in *WRTL II* which overturned prohibitions on express advocacy independent expenditures within 60 days of the general election. Much to everyone’s surprise, “the Court erased a century or more of bipartisan law and two previous Court rulings that affirmed the right, if not the duty, of the people to regulate corporate political spending to preserve the integrity of American democracy (Clements 2012, 2).

*Citizens United* empowered corporations and non-profit interest groups to make unlimited independent expenditures (primarily on campaign advertisements and consultants to produce the ads) to expressly endorse or attack a specific candidate whenever they wanted regardless of primary or general election windows. While the *Austin* Court determined that corporations had an unfair monetary advantage over individuals which constituted a potential corrupting influence to elections, the majority in *Citizens United* argued that the ability of corporations to engage in free speech is no different than the right of individuals or interest groups to engage in free speech.

Treating corporations and individuals differently, therefore, represented discrimination. The Court explained that the First Amendment protections apply to individuals and “associations of individuals,” which includes corporations and unions. So, in the post-*Citizens United* world, former Republican presidential nominee Mitt Romney was not incorrect when he told a heckler in Iowa that “corporations are people, my friend” (Rucker 2011). Justice Kennedy did not overtly declare corporations to be people in his majority opinion, but the merits of the decision certainly make that implication.

Some campaign finance scholars have argued that *Citizens United* was inevitable. Samuel Issacharoff posits that the “restrictive aspect of the reform agenda is ultimately both its strength and its constitutional liability” (2011, 120). Since its inception, the objective of campaign finance reform has been to stop the ceaseless spending in campaigns. In attempting to restrict campaign expenditures, reform advocates gave the winning hand to campaign finance reform opponents who could easily hang their argument on the First Amendment protections afforded to candidates and their advocates. This is exactly what *Citizens United* did with their suit against the FEC. *Citizens United* was banking on the Court continuing the tradition of rejecting expenditure limits that began with *Buckley* and continued right on through *WRTL II*. Using the rationale set by *Buckley* and reinforced by *WRTL II*, the majority in *Citizens United* completely and absolutely undermined all expenditure limitations (with the exception being coordinated expenditures). The Supreme Court had finally rejected a compelling state interest in limiting the undue influence of money in politics (Issacharoff 2011, 123).

Starting from *Buckley*’s rejection of expenditure caps, the Court made a seemingly logical conclusion in *Citizens United*. Of course, the Court did need to

overturn *Austin* and *McConnell* to make their conclusion “logical.” Furthermore, it has been argued that the rejection of expenditure limits in *Buckley* was based on the “flawed premise” that spending money on political communications is identical to expressing political opinions (i.e., money is speech). *Citizens United* was not a logical conclusion of First Amendment law because it was the “faulty result” of poor legal argumentation stretching back to the 1970s (Alexander 2011, 159). The Court in *Citizens United* based their majority decision on the absolutist school of the First Amendment, while failing to “give adequate weight to the compelling interest of protecting the time of elected officials” who are “locked in an escalating cycle of fundraising” and campaign spending (Alexander 2011, 160).

The Supreme Court’s decision in *Citizens United* created a dramatic shift in the existing campaign finance regime. Direct contribution limits are still in place, including bans on direct contributions from corporations and unions to candidates. With the disintegration of *Austin* and *McConnell*, however, *Citizens United* has created a campaign finance environment wherein corporations and unions can make unlimited independent expenditures whenever they desire through sympathetic non-profits. While many are quick to blame *Citizens United* for opening Pandora’s Box and enabling millionaires and billionaires to unduly influence the outcomes of elections, the truth of the matter is that rich donors like “Sheldon Adelson didn’t need the *Citizens United* ruling to allow him to put as much money as he wanted into an independent organization” (Walter 2012).

Prior to *Citizens United*, wealthy individuals could form 527 independent-expenditure-only committees and spend as much as they wanted (so long as they did not solicit additional contributions in excess of the contribution limit for federally registered

PACs). Indeed, in 2008 Sheldon Adelson put \$30 million into a 527 group he founded called “Freedom’s Watch” (Walter 2012). The major difference in campaign finance post-*Citizens United* is that corporations and labor unions can also make unlimited independent expenditures from their general treasury funds. Of course, prior to *Citizens United*, wealthy corporate executives could transfer corporate funds into their personal accounts, pay income or capital gains taxes on the money, and then spend it on independent expenditures. After *Citizens United*, there is no need for the wealthy individual to be the launderer.

*SpeechNow.org v. Federal Election Commission* (2010)

It is a common misunderstanding that *Citizens United* is solely responsible for creating the phenomenon called “Super PACs.” It is true that *Citizens United* was a necessary precondition that led to the creation of these “Super” outside groups, but the true credit for their genesis belongs to the D.C. Court of Appeals’ unanimous (9-0) decision in *SpeechNow.org v. Federal Election Commission* (2010). In its decision, the D.C. Court “struck down limits on what individuals could give to groups that only made independent expenditures” (Pitney 2013, 171). The decision in *SpeechNow* was based entirely on the *Citizens United* decision. The 527 committee “Speech Now” wanted to solicit campaign contributions in order to produce campaign ads supporting candidates who strongly supported the First Amendment (particularly regarding campaign finance). Prior to the *SpeechNow* decision, 527 groups could not collect contributions from individuals in excess of the individual contribution limits imposed on federally-registered PACs (direct contribution PACs and independent-expenditure-only PACs). A billionaire

like Sheldon Adelson could form a 527 committee and use an unlimited amount of his own personal wealth to make independent expenditures, but that same 527 committee could not organize other millionaires to also contribute unlimited sums of money to Adelson's organization. The 527 group Speech Now sued the FEC for unconstitutionally limiting the amount of money that individuals could contribute to the organization.

The FEC argued that contribution limits to 527s and other PACs were necessary because such organizations would become the honeypots of soft and dark money if they were able to raise money without any individual contribution limits (candidates, parties, traditional PACs and 527 committees all had to abide by such limits; only 501(c) organizations had no contribution limits at this point). Additionally, the FEC argued that 527 committees with an unlimited supply of money from unimpeded contributors could gain unfair access to politicians. Chief Judge David Sentelle of the D.C. Court of Appeals explained that the FEC's arguments "plainly have no merit" after the *Citizens United* decision (Liptik 2010b). Because *Citizens United* determined that independent expenditures do not cause corruption, the D.C. Court of Appeals expanded on that argumentation by asserting that contributions to 527 groups also do not cause *quid pro quo* corruption since the contribution is not being made to a candidate. A lawyer for Speech Now welcomed the court's decision: "groups of passionate individuals, like billionaires—and corporations and unions after *Citizens United*—have the right to spend without limit to independently advocate for or against federal candidates" (Liptak 2010b).

Just to be safe, the 527 committee "Commonsense Ten," a Democratic advocacy group, asked the FEC for an advisory opinion regarding the consequences of the *SpeechNow* decision. Commonsense Ten wanted to make sure it was allowed to raise

unlimited contributions for the purpose of making independent expenditures in favor of candidates. The D.C. Court of Appeals had confirmed that 527 committees were allowed to do so, but it is customary for groups to ask the FEC for their interpretation of major changes in campaign finance policy. The FEC's Commonsense Ten advisory opinion reaffirmed the lower court's ruling that 527 committees could, in fact, raise unlimited sums of money without restrictions so long as that money was used only for independent expenditures that were not produced in coordination with an official candidate. After the Commonsense Ten advisory opinion, 527 groups began raising money in huge lump sums (a right previously reserved exclusively by 501(c) groups) never before seen in electoral politics. John Pitney explained that "[p]otential contributors to [527 groups] may have initially worried that a 527 could run into legal trouble, but now the new super PAC vehicle seemed to have the triple blessing of *Citizens [United]*, *SpeechNow*, and the Commonsense Ten advisory opinion" (2013, 176).

Hundreds of 527 Super PACs began forming after *SpeechNow* and Commonsense Ten, all with the intention of unleashing unprecedented sums of money on independent expenditures for express advocacy and attack ads (Barker 2012). While Super PACs were now free to raise as much money as they could, they were still prohibited from contributing money directly to candidates and from coordinating their activities with the candidates they supported. In December 2011, Republican presidential candidate Mitt Romney insisted that he was not communicating with anyone involved with "Restore Our Future," the pro-Romney Super PAC: "It's illegal, as you probably know. I'm not allowed to communicate with a Super PAC in any way, shape or form...My goodness, if we coordinate in any way whatsoever, we go to the Big House" (Marcus 2012). From

Romney's comments, it is evident that he was very sensitive to and aware of the non-coordination requirements. Still, the founders of the pro-Romney "Restore Our Future" Super PAC were leading campaign staff members for Romney's 2008 presidential run.

Of course, just like all campaign finance laws, enforcing the non-coordination rule depends on how "coordination" is defined. Former FEC commissioner Karl Sandstrom insists that it is "exceedingly difficult" to investigate claims of improper coordination between candidates and outside groups: "It requires evidence with respect to communications and conversations that took place, and usually those are not documented" (Marcus 2012). Even if the FEC were to prove illegal coordination, the worst that could happen is a small fine or possibly a civil sanction. Super PACs caught coordinating could simply use the money in their coffers to pay the fine.

### **The Sorry Status of the Campaign Finance Regime**

As Stephen Colbert and Jon Stewart, with the support of leading campaign finance lawyer and former FEC chairman, Trevor Potter, demonstrated on several 2012 episodes of *The Colbert Report*, it is virtually impossible for the FEC to determine when a candidate is illegally coordinating activities with a Super PAC (Wemple 2012). On national television, Stephen Colbert, then a candidate for president,<sup>5</sup> transferred authority of his 527 Super PAC "A Better Tomorrow, Tomorrow" (which had almost \$1 million in its coffers), to his business associate and executive producer Jon Stewart. The Super PAC changed its name to "The-definitely-not-coordinating-with Stephen-Colbert Super PAC" while under the management of Jon Stewart. Colbert and Stewart then proceeded

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<sup>5</sup> Colbert paid the registration fee and collected enough signatures to be placed on the ballot for president in the state of South Carolina. The South Carolina ballot commission later said he was ineligible for candidacy because he was not "actively campaigning."

to use Trevor Potter as an intermediary for “coordinating” the activities of the Super PAC, which Potter assured was perfectly legal because they (the candidate and the president of the Super PAC) were not directly or overtly coordinating their actions.

To shed additional comedic scrutiny on American campaign finance laws, Colbert formed a 501(c)(4) social welfare organization called “Americans for a Better Tomorrow, Tomorrow SHHH” in order to avoid having to disclose the names of campaign contributors (which 527s have to do, but 501(c)(4)s do not) (Robillard 2012). He transferred all of the money from his 527 Super PAC into the 501(c)(4) group (which would have been illegal prior to *Citizens United* and *SpeechNow*) by passing a check through a manila envelope with the bottom cut out. He continued to raise money for his 501(c)(4) without having to disclose the names of his contributors. Colbert was eventually honored with a Peabody Award “for excellence in the field of electronic media” because of his eye-opening episodes on campaign finance laws (Ryan 2012).

The Colbert Super PAC coverage is worth emphasizing not only for comic relief, but also because it was one of the best exposés on the loopholes and legally murky areas of the existing campaign finance regime. As Trevor Potter, president of the Campaign Legal Center, explained,

The Colbert Report coverage is so successful because it accurately describes a campaign finance world that seems too surreal to be true. A system that claims to require disclosure of money spent to elect or defeat candidates, but in fact provides so many ways around that requirement as to make disclosure optional; a system that says that “independent expenditures” cannot be limited as a matter of Constitutional law because they cannot corrupt because they are “totally independent” of candidates and parties (2012).

Disclosure requirements are the only compliance mechanism that Congress and the public have to try to limit the influence of money in elections. With the existence of 501(c)(4) social welfare non-profit corporations, disclosure is entirely undermined. Expenditure limits would be the best means to control campaign spending, but the Supreme Court has considered all expenditure limits to be unconstitutional. Any existing campaign finance laws that might restrict or prohibit unlimited spending by individuals, corporations or unions are quickly overcome by the soft money independent-expenditure loophole.

For campaign finance reform advocates, victory does not seem possible. Spending limits are unconstitutional, disclosure requirements are currently optional, and most incumbents favor the existing paradigm because it is their best reelection advantage. For the foreseeable future, campaign spending will likely increase in every successive election cycle and outside spending groups will continue to grow in power and influence as they prove to be the more expedient organizations for anonymous soft money. As outside groups begin to accumulate a more prominent role in the campaign process, they will undoubtedly acquire a larger presence in the campaign advertising market.

As the conclusion chapter will make abundantly clear, the long fight over campaign finance reform is far from over. The American public was able to witness the truly unparalleled amount of money spent in the 2012 presidential campaign, and public opinion polling indicated that the American people were disgusted that so much money could be spent on a single election. Still, even in the face of criticism and disapproval from the citizenry, the media and many members of Congress, the momentum of campaign finance reform is still moving in the direction of deregulation because of the

deregulationist majority on the Supreme Court. While it may be difficult to comprehend, Congress' inability to pass any of the campaign finance bills introduced in 2012 and 2013 coupled with the Supreme Court's potentially revolutionary decision in *McCutcheon v. Federal Election Commission* (2013) (to be discussed in greater detail in the conclusion chapter) could create a campaign finance environment that completely disregards more than one hundred years of American campaign finance law. The 2014 midterm and 2016 presidential campaign cycles will very likely see more money than the 2010 midterm and 2012 presidential campaigns.

## CHAPTER 3

# LIKE BREAKFAST CEREAL: PRESIDENTIAL CAMPAIGN ADVERTISING IN A TELEVISED WORLD

Several scholars have commented on or alluded to the similarities between presidential campaign advertising and consumer product marketing (Mesak and Calloway 1999; West 2005; Brader 2006; Wayne 2008; Trent, Friedenberg and Denton, Jr. 2011). Franz et al. (2008) explain that like “product advertising, political commercials are carefully tested and skillfully produced...Text, images, and music work to complement and reinforce each other” (4). Beginning in the 1950s and culminating in the campaign ads of the twenty-first century, political consultants and producers have improved upon the advertising techniques first laid down by the Madison Avenue experts who exploited and utilized television’s manipulative influences over the unassuming public. The audio and visual aspects of campaign ads “have the advantage of creating an emotional response

much more powerful than spoken word” (West 2005, 10) that can make ads “compelling by eliciting specific emotions and, in doing so, change the way viewers respond to the message of the ad” (Brader 2006, 4). Many ads attempt to evoke a positive emotional response from the viewer by promoting a candidate and appealing to emotions such as pride, hope and happiness. Other ads rely on negative emotions like fear, anger, disgust and distrust because these emotions have proven to be an effective means of getting voters to recall campaign messages.

Campaign advertisements have been widely disparaged by scholars, pundits, politicians and the public for many reasons. Often perceived as being unnecessarily harsh and exorbitantly negative, campaign ads have become the “favorite whipping boy of American politics” (Franz et al. 2008, 2). Critics lament that political advertising “trivializes the complexity of issues” and subverts “the ideal of rational voter choice” by manipulating viewers’ emotions instead of appealing to their reasoning minds (Laczniak and Caywood 1987, 19-20). Some, like the “Father of Advertising” David Ogilvy, have gone so far as to claim that in “a period when television commercials are often the decisive factor in deciding who shall be the next President of the United States, dishonest advertising is as evil as stuffing the ballot box” (Ogilvy 1983, 213).

Other scholars have come to the defense of campaign advertising, particularly its negative tone. As John Geer argued, “Without negativity, no nation can credibly think of itself as democratic” (2006, 10). For Geer, negative advertising can be perceived as a public good that informs voters of the shortcomings of candidates with 30-second spot ads as opposed to the high-minded wonkiness and rhetoric of debates that scare most voters into apathy and indifference (see Converse 1964; Popkin 1991; Zaller 2004).

As Lipsitz et al. (2005) explain, “Voters want to learn more about issues, but they want this information distilled... Voters want debates and town hall meetings, but not necessarily to engage in the kind of deliberative democracy that would make ancient Athenians proud” (350). Even though campaign ads are full of negative “exaggerations and hyperbole,” they still contain a bite-sized source of useful political information (Wayne 2008, 281). Freedman, Franz and Goldstein insist, “Campaign ads tend to be rich in informational content, and advertising conveys information in an efficient, easily digestible way.” They go on to quip that “campaign ads represent the multivitamins of American politics” (2004, 725). Americans want simplified political messages but they do not want to put in an effort to avail themselves of political information. Campaign advertisements, like multivitamins, provide that simplicity and convenience.

Aside from the content and tone of campaign ads, the core of the campaign advertising debate within political science often centers on whether or not ads are even successful at moving the electorate in the desired direction. While many scholars are convinced that campaign ads do indeed influence voting behavior and electoral outcomes (Ansolabehere and Iyengar 1995; Bartels 1993, 1996; Freedman and Goldstein 1999), others are not entirely convinced that the ads are worth the money that candidates are spending (Benoit, Leshner and Chattopadhyay 2007). Much ink has been spilled trying to determine whether or not campaign ads serve their purpose. The mixed bag of research on the efficacy of campaign advertising has produced the following answer: *it depends*. Whether it is the methodological discord or the electoral contexts that produce such a wide array of conclusions regarding the effectiveness of campaign ads, in either case the jury is still out on the ability of the primary political arsenal to persuade voters.

This chapter will briefly cover the history of campaign ads (with an emphasis on presidential campaign ads) since their inception in the early 1950s and follow their trajectory into the twenty-first century. While the history of ads is perhaps familiar to many, it is essential to comprehend how political ads began, how they evolved and where they seem to be going in the near future. Second, this chapter will explore the efficacy literature on campaign advertising (i.e., does it even work? ) as well as the literature on campaign negativity. Finally, this chapter will situate this dissertation within the existing literature on the content of campaign ads and elucidate its contribution to the study of campaign advertising.

### **A Brief History of Presidential Campaign Advertisements**

The data on presidential campaign advertisements tell an interesting story of transformation. The first presidential campaign advertisements were aired in the 1952 campaign between Dwight Eisenhower and Adlai Stevenson. Both candidates decided to bring in advertising consultants to produce television commercials that could be broadcast to every home with a television (Trent, Friedenberg and Denton, Jr. 2011, 355). It became evident that presidential candidates could be marketed to the public in the same way that private companies marketed consumer products, new TV programs or major motion pictures (Blumenthal 1980). Television provided the ideal medium for presidential candidates to promote their name, claim credit for past accomplishments, and articulate their vision for America.

Observers have noted that Adlai Stevenson's reluctance to embrace television advertising techniques to spread his message contributed to his defeat (Slaybaugh 1996).

Stevenson was disheartened by the changing nature of presidential campaigns, where instead of making long-winded rhetorical speeches candidates were expected to market themselves “for high office like breakfast cereal” (Stevenson 1976, 4). Most of Stevenson’s television ads during the 1952 presidential election amounted to brief lectures where he would talk into the camera about his positions. Eisenhower, on the other hand, was utilizing Madison Avenue consumer marketing techniques to publicize his candidacy. Eisenhower made strategic use of something novel in political campaigning: the spot ad. Spot ads are very short television commercials (usually 30- or 60- second ads) that are meant to be memorable, not informative.

For example, Eisenhower’s infamous “Ike for President” spot was an animated 60-second ad produced by Disney featuring the catchy jingle “You like Ike/ I like Ike/ Everybody likes Ike—for president/ Hang out the banners/ Beat the drums/ We’ll take Ike to Washington.” Studies from the 1952 election demonstrated that only 10 percent of the sample of voters could remember what Adlai Stevenson discussed in his mini-lectures, whereas “90 percent could recall content from Eisenhower spot announcements” (Atkin et al. 1973, 209). This was a revolutionary finding. Quality of content during ads did not resonate with voters, but repetition and a catchy jingle could gain their attention.

So-called “talking head” advertisements (i.e., talking directly into the camera) did not cease to exist simply because the Eisenhower campaign had success using jingles and animated cartoons. Talking head ads are still used in the twenty-first century. President Obama and Republican nominee Mitt Romney both employed talking head ads during the 2012 presidential campaign. Increasingly, however, the talking head format is being

relegated to online ads where candidates can explain in greater detail and use more time to specify their positions and agendas.

After the 1952 presidential election, many advertising consultants and producers attempted to emulate the successes of the Eisenhower campaigns non-traditional and unorthodox mixture of advertising techniques. While still incorporating traditional talking head informative ads, campaigns also began to use the latest production technology that allowed for music, imagery, text and image displays, and more impressive cinematography. In the 1960 presidential election, John F. Kennedy used cartoon animation, onscreen text, and a whole host of celebrity testimonials in his advertisements, including his wife Jackie Kennedy in the first Spanish-language presidential campaign ad. Richard Nixon, however, centered his advertising strategy on a talking-head-only approach. Coupled with his sweaty appearance in the infamous 1960 presidential debate, Nixon demonstrated that not all candidates were ready to embrace the mixture of television and national politics.

Both presidential candidates in the 1964 election seemed to learn some important lessons from the 1960 campaign. President Lyndon Johnson did not use talking head ads, instead using a diverse array of ads featuring symbolic imagery, different kinds of music and various special effects available at the time. Perhaps the most famous ad from the 1964 campaign is the “Daisy” ad, featuring an innocent young girl counting flower petals followed by the frightening countdown of a nuclear detonation. The ad ends with a large mushroom cloud, implying that the young girl has been nuked and that the hawkish foreign policy strategy of his Republican opponent, Barry Goldwater, is to blame. While this ad only aired once before it was pulled, the “Daisy” ad has since become the symbol

of the 1964 election. Beyond the “Daisy” ad, the Johnson campaign used images of children in several ads to discuss poverty and education. In an ad titled “Merely Another Weapon,” the Johnson campaign again employed a clip of a nuclear explosion to emphasize the stakes of the eras international relations status. Additionally, the Johnson campaign used a clip of a burning cross and Klu Klux Klan march to talk about racial issues as well as a map of the United States with the eastern seaboard being sawed off to visualize remarks made by Barry Goldwater suggesting that the United States would be better off if the entire (liberal) east coast sunk into the ocean. The only talking head ad used by the Johnson campaign featured a concerned Republican voter (lighting up and smoking a cigarette, by the way) lamenting the far-right radicalism of Barry Goldwater.

The Goldwater campaign continued to use talking head ads, but not nearly to the extent that Stevenson and Nixon used such ads. The Goldwater campaign also employed some well-known Republican actors in their ads: John Wayne and Ronald Reagan. Most of the Goldwater ads were 60-second mini-documentary ads, featuring prominent political elites and regular American voters, more advanced editing and cut-sequencing and even clips from a debate between Goldwater and Johnson. From Goldwater’s campaign ad diversity in 1964, it seemed as though the partisan gap in advertising production quality was closing.

The 1968 presidential campaign between Republican Richard Nixon and Democrat Hubert Humphrey contained ads featuring clips of young children, nuclear weapons and celebrity testimonials like Frank Sinatra (as had been seen in past campaigns). The 1968 campaign ads also showed scenes from bloody civil rights and anti-war demonstrations, as well as footage from American soldiers fighting in Vietnam.

The traditional talking head ad was barely used, and only then by celebrities. Hubert Humphrey does speak to a person slightly off camera in one of his ads, but he does not look directly into the camera. This slightly-off-camera talking head ad would become a common part of most successive campaigns, perhaps used best by Jimmy Carter in his 1976 autobiographical ads.

The 1972 presidential campaign between Richard Nixon and George McGovern signaled that Nixon learned some valuable lessons from his previous defeats. Instead of the traditional talking head ads that Nixon solely relied on during his 1960 presidential bid, the Nixon campaign opted for an advertising strategy full of cut-scenes, music, images of young people and soldiers, as well as the catchy “Nixon Now” jingle that easily could have been mistaken for a Mentos advertisement. Oddly enough, the “Nixon Now” ad opens with about a dozen still images of birds, butterflies, flowers and trees (probably trying to draw on subconscious emotions) and then transitions into several stills of young people at the beach or holding hands. The ad eventually features video clips of Nixon during his campaign, all while the “Nixon Now” music continues in the background. The ad was clearly an attempt to utilize all of the video-editing techniques of the day, but the ad can come off as awkward and headache-inducing to the modern television viewer.

The campaign ads from the 1976 presidential election were just beginning to resemble the average campaign ad from the late twentieth and early twenty-first centuries: a healthy mix of slightly-off-camera talking head ads, (auto)biographical ads, kissing babies, shaking hands, sleeves rolled up, testimonials by average Janes and Joes as well as famous icons of the day. Music, imagery, on-screen text, images of newspaper

headlines, and cutting-edge special effects were already norms by the 1976 campaign. Perhaps the most notable differences between campaign ads pre- and post-1976 were that ads after 1976 began to play heavier on emotion (via music, imagery and symbolism) and to focus more on the opposition than the sponsoring candidate. It seems that consultants had already made up their minds that emotion trumped substance and attacking trumped promoting.

Ronald Reagan's most memorable 1980 campaign ads barely contain any policy specifics at all. The infamous "Morning in America" ad was stuffed with imagery of white picket fences, families on picnics, white weddings, crowded city streets full of early morning commuters, and iconic American symbols and monuments. The ad is meant to play on people's emotions, hopes and dreams instead of appealing to their higher reasoning. Likewise, the 1984 Reagan ad titled "Bear" followed a grizzly bear through the woods with a voiced-over narrator enigmatically talking about standing up to the bear:

MALE NARRATOR: There is a bear in the woods. For some people, the bear is easy to see. Others don't see it at all. Some people say the bear is tame. Others say it's vicious and dangerous. Since no one can really be sure who's right, isn't it smart to be as strong as the bear? If there is a bear?

The ad is a metaphor about the US-Soviet relations during Cold War. Historically, Russia has often been symbolized by a bear much like the United States and China with bald eagles and dragons, respectively. Needless to say, the "Bear" ad left most Americans scratching their heads. If someone was unfamiliar with the Russia-Bear connection, the ad might have missed completely. In defense of the Reagan campaign, at least the ad was original. Still, the "Bear" ad epitomized the state of experimental

campaign advertising where many norms and orthodoxies of past decades were being challenged or refined.

By the 1988 presidential election between Vice President George H.W. Bush and Massachusetts Governor Michael Dukakis, campaign advertising had undergone another crucial development that would take it one step closer to the familiar ads of the contemporary era. Not only had campaign ads been shortened (on average) into the so-called 30-second “spot ads,” presidential campaign ads in the 1988 campaign and beyond had become increasingly negative in tone. It is certainly true that prior presidential campaigns had their fair share of attack ads and mudslinging, but the American public of the television era had never seen presidential campaign advertising as negative as the 1988 presidential campaign. The two most talked-about ads from 1988 were both attacks on Dukakis. The ad titled “Tank Ride” featured a video clip of a very awkward looking Dukakis in full military gear riding in an Abrams tank. It is safe to assume that Dukakis meant for the tank ride to be a photo-op that would help bolster the public’s perception of his foreign policy positions. The Bush campaign used the video clip to paint Dukakis as a fake, phony and artificial politician who was trying too hard to convince people he was something that he was not. The Dukakis campaign actually made a counter ad as a direct response to “Tank Ride.” The Dukakis ad titled “Counterpunch” featured Governor Dukakis standing next to a television with the Bush “Tank Ride” ad playing before going on to speak:

MICHAEL DUKAKIS: I’m fed up with it. Haven’t seen anything like it in twenty-five years of public life. George Bush’s negative TV ads, distorting my record, full of lies and he knows it...[T]his isn’t about defense issues. It’s about dragging the truth into the gutter. And I’m not going to let them do it. This campaign is too important. The stakes are too high for every American family.

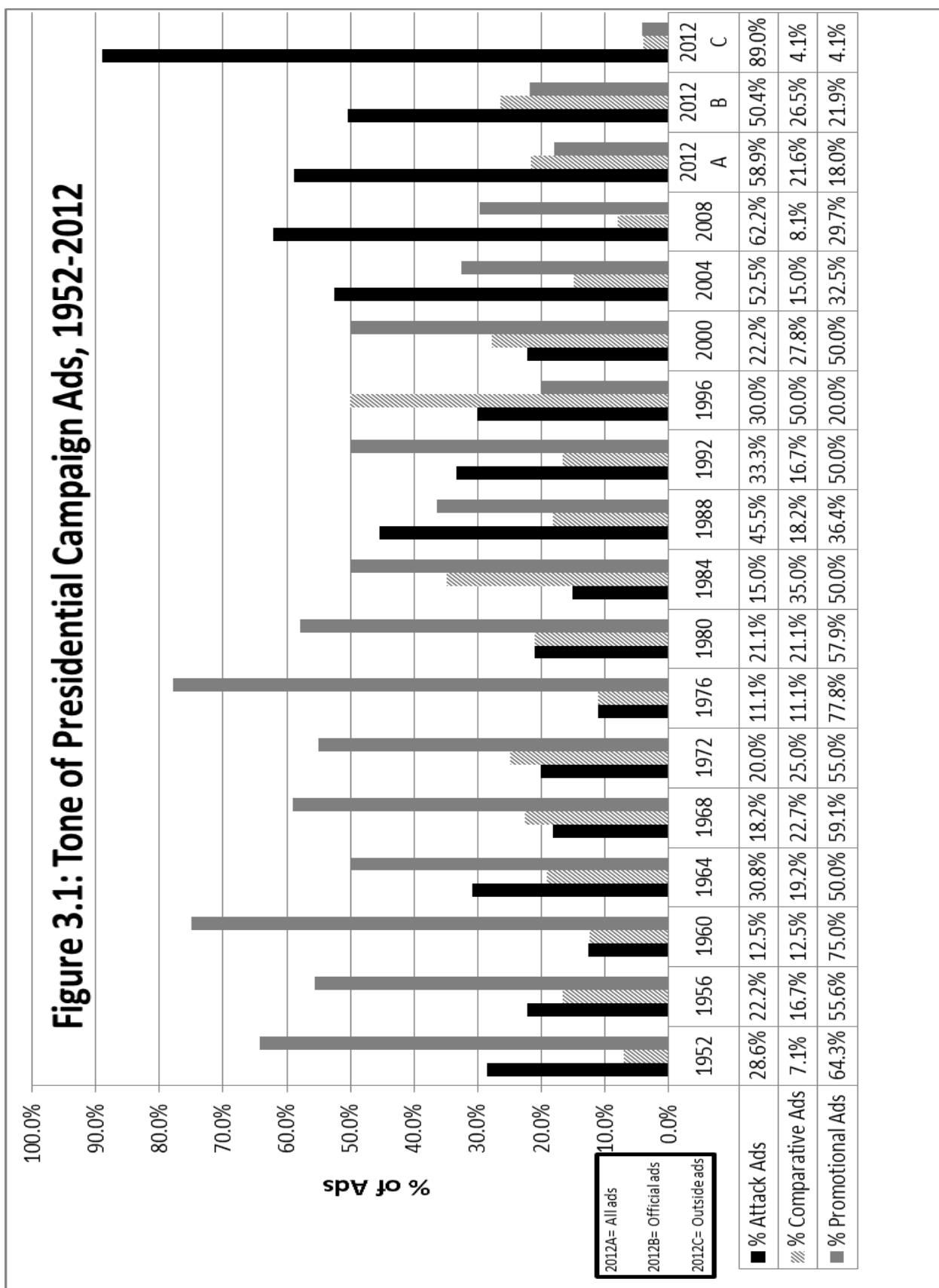
This was the first presidential campaign ad to have an opponent's campaign ad as its main subject. The campaign of 1988 had become so negative that the Dukakis campaign saw an opportunity to pin the highly negative advertising environment entirely on the Bush campaign.

The Bush ad "Tank Ride" was not even the most notable attack ad from that campaign. The 1988 presidential campaign has become defined by one ad: "Willie Horton." The ad concerned a Massachusetts inmate named William Horton. The ad referred to him as "Willie" instead of William to play up the racial undertones of the attack ad. The ad described how Willie Horton, a convicted murderer serving a life sentence, was given a weekend pass to leave prison. During one of his ten weekend releases, "Horton fled, kidnapped a young couple, stabbing the man and repeatedly raping his girlfriend." The ad featured on-screen text with the words "Kidnapping, Stabbing, Raping" as the narrator described the horrible incident. The ad all but said that Governor Dukakis was responsible for the brutal assault. What is most interesting about the "Willie Horton" ad is that it was not sponsored by the Bush-Quayle campaign. The ad was produced and paid for by an outside group known as National Security PAC. NSPAC spent more than \$8 million on attack ads against Michael Dukakis in the 1988 election. Despite being a group focused on national security issues, NSPAC's attacks on Dukakis were mostly about domestic policy issues.

From 1952 to 1984, presidential candidates used campaign ads primarily as a means of promoting themselves. Of course, negative attack ads and comparative ads have existed since 1952, but they were used modestly by candidates. Until the 1988 presidential election, negative attack ads never made up more than 31% of the total

number of ads in a given election (mean percent of negative ads 1952 to 1988 = 19.9%) (Figure 3.1 next page). The 1988 campaign between George H.W. Bush and Michael Dukakis was the first presidential campaign to contain more negative attack ads than promotional ads. Never before had a presidential campaign even come close to having an equal number of promotional and negative attack ads. Of the campaign ads from 1988, 45% were attack ads, 36% were promotional and 18% were comparative. Wayne (2008) explained that since “the 1988 election, the public has become more leery of the negative ads” because of the “exaggerations and hyperbole that are contained in shrill accusations” (281).

The presidential elections of 1992, 1996 and 2000 steadily decreased the total proportion of negative ads. Perhaps sensitive to the consequences of public backlash for being so overtly negative, candidates shifted back to promotional and comparative campaign advertising strategies. The 1996 election was more negative (30%) than promotional (20%), but 50% of the ads from that campaign were comparative; the highest proportion of comparative ads in the history of presidential campaign advertising. In 2000, 50% of the campaign ads were promotional, 28% were comparative while only 22% were negative. The George W. Bush



campaign seemed to have exhausted their use of negative advertising during the Republican presidential primary.

The campaign ads data from the 1990s and 2000 indicate that, overall, campaign ads were becoming less negative, more promotional and more comparative. From the vantage point of the 2000 presidential campaign, it would have been safe to predict that campaign ads would continue to be more promotional and comparative and less negative. The reality of the twenty-first century presidential campaigns, however, would signal its own dramatic shift in advertising strategy.

Consistent with findings from prior research on campaign advertisements, the data illustrated above indicate that ads in the twenty-first century have been more negative than in any previous period (West 2005; Geer 2006; Trent, Friedenberg and Denton, Jr. 2011). The presidential elections of 2004 (3<sup>rd</sup>), 2008 (1<sup>st</sup>) and 2012 (2<sup>nd</sup>) are the three most negative presidential advertising campaigns in history. These three elections also have the distinction of having more negative attack ads than promotional and comparative ads combined. The 2008 campaign was a never-ending barrage of negativity. The Obama campaign tried to paint Senator John McCain as a flip-flopping conservative who was just going to be a third George W. Bush presidential term, while the McCain campaign tried to portray Senator Barack Obama as a fashionable celebrity who was dangerously out of touch and politically inexperienced. The 2012 presidential campaign was also a relentless blitzkrieg of attack ads. The Obama campaign portrayed Mitt Romney as an out of touch Gordon Gekko financial shark who had no empathy.

The Romney campaign tried to pin all of the national economic woes on President Obama. Perhaps the most hyperbolic and ridiculous ad of the 2012 campaign was an ad attacking Mitt Romney and his former employer Bain Capital for laying off workers at a manufacturing plant. The ad titled “Understands” focused on Joe Soptic, one of the employees who lost his job when Mitt Romney bought out his company.

SOPTIC: When Mitt Romney and Bain closed the plant, I lost my healthcare. And my family lost their healthcare. And a short time after that, my wife became ill. I don’t know how long she was sick, and I think maybe she didn’t say anything because she knew that we couldn’t afford the insurance...and then one day she became ill and I took her up to the Jackson County hospital, and admitted her for pneumonia, and that’s when they found the cancer and by then it was Stage IV...there was nothing they could do for her, and she passed away in 22 days. I do not think Mitt Romney realizes what he’s done to anyone and furthermore I do not think Mitt Romney is concerned.

Much like the “Willie Horton” ad from the 1988 campaign, the “Understands” ad seems to imply that Mitt Romney is responsible for this man’s tragic loss. And just like the “Willie Horton” ad, “Understands” was produced and funded by another outside group, Priorities USA Action, a pro-Obama 527 Super PAC that was aligned with the pro-Obama 501(c)(4) organization Priorities USA. President Obama’s deputy campaign manager Stephanie Cutter and other Obama campaign officials claimed (on television) that the Obama campaign had no knowledge of Joe Soptic or Mitt Romney’s connection to him prior to the ads release, a statement that was later proven to be false (LoGiurato 2012).

It was clear that the Obama campaign passed Joe Soptic’s story along to Priorities USA, which then made the ad without support or coordination from official Obama campaign staff. In addition to the damage control and denial required by the Obama

campaign, the serious accusation hurled at Mitt Romney in the “Understands” ad turned out to be false. As PolitiFact reported:

“We believe Romney bears responsibility for the general practices of Bain Capital and the record is clear that in Kansas City, Bain profited while many people suffered. But there is little to support the ad’s innuendo that Bain is responsible for the early death of the steel worker’s wife...The ad uses innuendo for a serious allegation, but there’s no proof linking the death to Bain. We rate the claim False” (2012).

Evidently, Mrs. Soptic had health insurance through her own employer months after the Bain Capital leveraged buy-out which led to her husband losing his job. Several months after the Bain leveraged buy-out, Mrs. Soptic injured her shoulder, and, no longer able to perform her job, had to resign which led to her losing health coverage. Mitt Romney and Bain Capital certainly added to the stresses of the Soptic family at a very tragic point in their lives, but he is not responsible in any way for Mrs. Soptic’s cancer and untimely death.

Television, which originally was a medium of promotion in presidential campaigns, has become the primary instrument candidates use to destroy the character, agenda and credibility of the opposing candidate. This is the result of a fundamental transformation in how campaign advertisements are used. In the early days of campaign advertising, candidates used consumer advertising techniques to market themselves for office. Some candidates used talking head ads to promote themselves while more savvy candidates made use of catchy jingles, cartoon animation, state-of-the-art special effects and video-editing techniques and celebrity endorsers. As campaign advertising became increasingly professionalized throughout the 1980s and 1990s, candidates stopped trying to out-produce one another’s campaign advertisements, and instead began to use

campaign ads as a means to destroy the persona of the opposition candidate. This destructive mentality concerning campaign advertising was only exacerbated by the rise to prominence of outside spending groups who adopted the scorched-earth advertising strategy of traditional candidates and took the approach to the extreme.

### *The Influence of Campaign Ads*

There is no shortage of studies on the influence of campaign ads (particularly negative campaign ads) on voter turnout (Ansolabehere and Iyengar 2005; Lau and Pomper 2004; Martin 2004; Freedman and Goldstein 1999; Kahn and Kenney 1999; Wattenberg and Brians 1999; Finkel and Geer 1998) or advertising's effects on impressions of candidates (Zahedzadeh and Merolla 2012; Gilens, Vavreck and Cohen 2007; Garramone et al. 1990). Since the purpose of campaign ads is to help a candidate win an election, it is only natural that the majority of political science research on campaign ads would focus on voter turnout, electoral outcomes and public impressions of candidates.

Though the electoral influence of (negative) campaign ads has been given substantial attention, the literature on the subject sends contradictory messages. Some scholars argue that negative campaign advertising demobilizes the electorate and decreases voter turnout (Ansolabehere and Iyengar 1995), others that negative campaign ads *increase* voter turnout by riling up the electorate (Geer 2006; Martin 2004; Finkel and Geer 1998), and still others that advertising's influence on voter turnout is negligible, if it exists at all (Ridout and Franz 2011; Jackson, Mondak and Huckfeldt 2009; Krasno and Green 2008; Lau, Sigleman and Rovner 2007). As John Sides (2011b) explains, "ads

work, except when they don't.” To say the least, there is no scholarly consensus on whether or not campaign ads (negative or otherwise) have an effect on voter turnout or electoral outcomes, yet political consultants continue to proceed as though ads definitely influence elections.

Because of the inability to reach a consensus on the electoral outcomes question, many political communication scholars began to research the other impacts of campaign advertising. Most notably, researchers have examined the ability of campaign ads to educate and/or persuade voters. Several studies have suggested that citizens can learn from campaign ads (Freedman, Franz and Goldstein 2004; Granato and Wong 2004; Brians and Wattenberg 1996; Dalager 1996; Zhao and Chaffee 1995; Just, Crigler and Wallach 1990), while others have focused on the persuasive effects of ads on vote choice. As Huber and Arceneaux (2007) explain, “Campaign advertisements appear to have substantial persuasive effects” because ads are in essence “propaganda” designed to cause citizens to “shift their expressed preferences toward the sponsoring candidate” (974). They insist that their persuasive effects findings “may validate the fears of many campaign finance reform advocates that television advertising has the potential to distort the democratic process” (Huber and Arceneaux 2007, 976).

Other researchers agree that campaign ads have the power to persuade, but “the magnitude of that impact is not huge” (Ridout and Franz 2011, 151). Ridout and Franz argue that even though the scholarly work on persuasive effects of ads is inconclusive, political consultants seem to believe that ads are effective in persuading voters; else they would not spend millions of dollars on such ads. While this explanation is not entirely convincing in the face of empirical research, it does have a certain intuitive sense to it:

indeed, if campaign ads did not persuade undecided voters, then it sure would be foolish to continue spending billions of dollars every two years on such ads.

Perhaps the most comprehensive and compelling case against the persuasive power of campaign ads is the meta-analysis by Benoit, Leshner and Chattopadhyah. Using the discordant literature on campaign ad effectiveness, the authors analyzed all existing studies on the influence of campaign ads to determine aggregate effects sizes. The authors conclude that campaign advertising has significant effects on voter learning, voter perceptions of and attitudes towards candidate character, and interest in the campaign (Benoit, Leshner and Chattopadhyah 2007). Their meta-analysis did *not*, however, “indicate that political advertising has an effect on agenda-setting or turnout” (516). Of course, non-significant effects from a meta-analysis are to be expected given the inconsistent findings and breadth of research on this particular subject.

Disappointingly, the answer to the question “Do campaign ads work?” seems to be: “A little, sometimes, maybe, but we are not sure. Given the money being spent, they had better work!” As Diana Mutz explains, “There’s very little evidence that ads make much of a difference in a presidential campaign...Most people are shocked when they learned about what the likely effects are relative to the huge amount of campaign resources that get poured into advertising” (as quoted in Liasson 2012). John Sides argues that even though campaign ads can matter when the candidates are unfamiliar or when a candidate can outspend his/her opponent (Sides 2011a), “There is no secret sauce” to campaign advertising (2011b). Furthermore, Sides suggests caution and skepticism towards claims about the effectiveness of campaign ads:

“Be particularly skeptical when such claims are being peddled by the people who earn a commission on every ad they run, who naturally have

an incentive to overstate the effects of ads and thus their own contribution to the election's outcome" (Sides 2011b).

There is no empirical smoking gun that campaign ads actually accomplish their purpose, but that does not mean that candidates and outside spending groups will be deterred from spending vast sums of money on ads, just in case.

### **Content of Campaign Ads**

While most of the research conducted on campaign advertising tends to focus on the effects of ads or the tone (attack/comparison/promotional) of ads, many scholars have conducted content analyses of campaign ads to determine what ads contain (Geer 2006; West 2005; Vavreck 2001; Jamieson 1996; Jamieson, Waldman and Sheer 2000; Goldstein and Freedman 2002; Benoit 1999; Kaid and Johnston 2000). Studies have coded campaign ads for the issues they address, types of music, symbolic imagery, race and ethnic presence, presentation of evidence, appearance of candidate, graphic images (war, poverty, crime, etc.), tone, emotional content, production techniques, length, credit claiming, position taking, and many other variables that are too numerous to list. Not all scholars agree that studying the content of campaign ads is worthwhile. John Sides, for example, argues that "[a]ll of this fretting over the subtleties of ads presumes that there is some magical combination of ingredients—a secret sauce—that render them persuasive" (2011b). Instead, scholars like Sides prefer to study the frequency with which ads were televised (quantity, not quality). Of course, the purpose of content analyses does not always have to focus on the persuasiveness or effective aspects of campaign ads. Campaign ads are more than just their effects. Knowing more about the content of

campaign advertisements is essential to understanding how advertising producers try to appeal to potential voters.

Ted Brader (2006) analyzed campaign advertisements to understand the emotional content of ads. He explains that the music, images and symbolism within ads “accomplish something more than merely enhancing the pleasure of the viewing experience...[t]hey made the ad compelling by eliciting specific emotions and, in doing so, change the way viewers respond to the message of the ad” (Brader 2006, 4). Central to Brader’s analysis is the use of “feel-good” and “fear” ads: “appeals to enthusiasm and fear are staples of political advertising” (2006, 174). Ads can elicit positive emotions, like enthusiasm, to encourage support and excitement for a candidate. Ads can also utilize negative emotions, like fear, “to awaken or fuel the anxieties of the viewing public” (2006, 6). The use of emotionally rich messaging is considered by some to be “unethical” because such appeals to emotion “discourage reasoning, promote superficiality, and manipulate the public” (Brader 2006, 37). Nevertheless, appealing to emotions has become an essential feature in campaign advertising, and, therefore, deserves to be appreciated and needs to be better understood.

In addition to studying the tone of campaign ads, John Geer (2006) also measured for the perspective of campaign advertisements. Campaign ads can focus on different temporal contexts and/or appeals. For example, a candidate who runs for office on his or her past successes will likely choose to highlight past achievements in public service, the military or the private sector. Or perhaps, a candidate decides to attack his or her opponent on past misfortunes or blunders. These candidates would be employing a past-oriented perspective known as *retrospective* orientation. By engaging in retrospection,

candidates want voters to evaluate the past and infer that past successes or failures are indicative of what may happen in the future.

Candidates can also use a *prospective* orientation that encourages voters to either be optimistic or pessimistic about the future. A candidate who lays out a plan for the future, for example, is utilizing a prospective, forward-looking approach. The candidate is promising the voters what the world could be like with low unemployment, more job creation, more take-home pay, better schools, better roads, better everything. Candidates can also use prospective appeals to paint a dark, gloomy and hopeless future intended to raise anxieties about the prospects of the opposing candidate winning. Geer finds that negative attack ads tend to “focus on the past, not the future” because such ads typically attack the opposition’s political history (2006, 154). This does not mean that all attack ads are retrospective and all promotional ads are prospective. If a candidate attacks an opponent’s past record, then by default the focus is on the past. Likewise, if a candidate paints a bleak portrait of the future should the opposition win, then he or she by default is using a prospective orientation. Attack ads and promotional advertisements can be retrospective, prospective or even both.

Furthermore, not every ad has a past- or forward-oriented temporal perspective. The 2012 Obama ad titled “Don’t Be Late” is a talking-head ad featuring famous fashion mogul and *Vogue* magazine editor Anna Wintour (the inspiration for Meryl Streep’s character in the film *The Devil Wear’s Prada*) talking about all of the wonderful women she has met around the country while traveling with Michelle Obama during the 2012 presidential campaign. The ad is intended to appeal to female voters by using a powerful female celebrity figure and associating her with the Obama for America campaign. The

ad, however, does not focus on the past or the future, but the present (though the ad does display some unemployment statistics for women and it could be argued that displaying any type of statistics might imply retrospection). The 2012 Obama ad featuring hip-hop icon Jay-Z titled “Our Voice” concerns the hope and the enthusiasm of the African American community for the first black president. The ad is intended to inspire people to get involved in the campaign to support Barack Obama’s reelection, but it does not strongly appeal to the past or the future.

Campaign ads can also utilize both a retrospective and prospective orientation. The 2012 Romney ad “America Can Do Better” appeals to the greatness of America’s history, the recent failures of the U.S. economy, and the hope, optimism and possible solutions to overcome these problems. This ad uses the past to highlight what America used to be, what ruined it, and how America can be restored to its former greatness (which was really the primary message of the Romney campaign). The 2012 American Crossroads/Crossroads GPS ad titled “Cancer” also focuses on the past, present and future. The ad is a response to the Priorities USA Action ad that featured widower Joe Soptic. The “Cancer” ad features clips of then Senator Obama in 2008 calling for an end to negative rhetoric, then shows a clip from the Priorities USA Joe Soptic ad, and then insinuates that Obama and his campaign are illegally coordinating their affairs with the pro-Obama group Priorities USA Action. The Crossroads ad then features a very awkward clip of Obama’s deputy campaign manager Stephanie Cutter nervously denying those allegations. It was very reminiscent of Karl Rove’s 2004 denial of coordination with Swift Boat Veterans for Truth. The implication being made by the ad is that the

Obama administration has become corrupt since 2008 and it will only get worse in the future.

### **Research on Negativity in Campaign Ads**

Scholars have also examined the tone and content of ads without focusing specifically on the effects or outcomes of advertising. The most notable study on the content of negative advertisements is John Geer's (2006) *In Defense of Negativity: Attack Ads in Presidential Campaigns*. Unlike most scholars of campaign advertising and political rhetoric, Geer's research does not bemoan the levels of negativity in contemporary elections. He argues "that the practice of democracy *requires* negativity by candidates" (Geer 2006, 6). Additionally, he makes the bolder claim that "negativity can advance and improve the prospects for democracy" by giving voters more information about the available candidates (10). Geer hypothesized that negative campaign ads, or attack ads, contained more policy-specific information than positive promotional ads because of the normative political expectations placed on negative and promotional ads, respectively:

"A candidate cannot... simply assert that their opposition favors a tax increase. They must provide some evidence for that claim or it does not work and may in fact backfire on the sponsor of the attack. By contrast, that same candidate can claim he or she favors a tax cut, with far less documentation" (2006, 6).

As a result of candidates supporting their attack ads with substantiation more than promotional ads, higher levels of campaign negativity create a "richer information environment than if candidates just talked about their plans for government" (Geer 2006, 13).

Geer finds that as overall levels of negativity in campaign advertising increase, so, too, does the use of evidence in campaign ads. It almost seems counter-intuitive given the widespread dislike of attacks ads that they would provide an unexpected benefit to the political environment. Furthermore, while Geer's data support the results from prior analyses that campaign ads are becoming more negative in tone, such negativity is not concomitant with harsh personal attacks against the opposition: "despite all the common assumptions that modern campaigns are increasingly fueled by harsh personal criticism, the evidence simply does not support such a view" (2006, 18). Without looking at the data, political observers can easily be misled into believing the common media narrative that political campaigns are nothing more than name-calling and personal attacks on candidates' private lives, when, in fact, negative campaign ads are primarily concerned with attacking the opposition's issue positions and overall agenda.

While many scholars have expressed their concerns that negative campaign advertising has a deleterious effect on people's attitudes towards the political process (Buchanan 1991; Ansolabehere and Iyengar 1995; Fenno 1996; Orstein and Mann 2000; Hollihan 2001), important studies like Geer's (2006) or Jackson, Mondak and Huckfeldt's (2009) should give political scientists good reason to pause and reevaluate preexisting opinions about the supposed corrosive effects of negative ads on the American public. Jackson, Mondak and Huckfeldt conclude that there is no empirical support "for the case against negative ads" (2009, 63). They argue that "the accumulation of null findings across multiple studies using multiple data sets and methods casts very serious doubt on the case against negative ads" (66). Scholars seeking to measure the effects (positive or negative) of attack ads on voter turnout,

election outcomes or public attitudes towards the political process will be disappointed to discover that the rather healthy consensus is that campaign advertisements (and particularly negative attack ads) simply do not have much of an effect.

Studying campaign advertising is, however, important beyond the cause-and-effect questions of past research. Regardless of the null findings, campaign advertising and the increasing use of negative attack ads play a prominent role in campaigns. Additionally, there are persisting normative questions about why consultants and candidates continue to increase their use of negativity (or television advertising in general, for that matter) even when most of the empirical research suggests that such advertisements rarely, if ever, have any impact on election outcomes. The most common explanation for why negative attack ads are on the rise election after election is that attack advertising works and is more effective than promotional messages. Lau, Sigelman and Rovner explain, perhaps sarcastically, that “the politicians who approve of negative ads and the consultants who recommend and produce them have too much at stake and are paid too much to be mistaken” about the effectiveness of negative ads to produce the desired end result (2007, 1177).

Their meta-analysis on the effects of negative campaigning, however, suggests that consultants and candidates are, indeed, mistaken about the effects of negative campaign ads. According to their findings, attack advertising is “not an effective way to bolster one’s own image relative to that of one’s opponent” (Lau, Sigelman and Rovner 2007, 1183), nor is there “consistent evidence” that attack advertising works in any way (1185). So, given the null status of negative advertising’s efficacy within the political science literature, why do political professionals continue to defer to the seemingly

incorrect conventional wisdom that negative attack ads work? As Mark Penn, former political adviser to Bill and Hillary Clinton, explained, “When reality and research differ, it is the research that is wrong” (Penn 2008). He argued that even though the media narrative despises negative advertising and the American people consistently claim that such ads do not sway their votes, “the reality is that a clever negative ad can be devastatingly effective” (Penn 2008). He singles out ads like Lyndon Johnson’s “Daisy” ad, Mondale’s “Red Phone” ad, Hillary Clinton’s “3 a.m.” primary ad, and John McCain’s “Paris Hilton” ad as being particularly effective at crystallizing certain perceptions in the minds of voters.

Perhaps the discrepancy between the research and the “reality” is more a function of level of analysis than anything else. Political consultants like Penn are usually the apologetic voices of negative advertising who insist that “attack ads work,” yet the only evidence that experts have for such claims is that it worked for them at some point in the past. Furthermore, scholars and consultants seem to be operationalizing the verb “works” differently. For scholars, electoral outcomes are the dependent variable of interest. For consultants, an ad “works” if a focus group respondent still remembers the negative message of the ad three weeks after first seeing it. While there is little reason to doubt the ability of the “Daisy” ad or the “Willie Horton” ad to resonate with voters, it is a stretch to extrapolate the success of the notoriously memorable negative campaign ads onto *all* negative campaign ads. Despite anecdotal evidence from political professionals, the data do not support the conclusion that campaign ads, positive or negative, *work*.

Surprisingly, there does seem to be a consensus concerning the potential consequences of negative campaign advertising. Commonly referred to as *backlash*,

negative campaign ads can backfire against the sponsoring candidate and actually cause unintended political harm (Garramone 1984). Backlash may occur if a negative ad is discovered to be untrue (e.g., Romney 2012 “Jeep to China”), if an ad is overly hyperbolic or insensitive, or if the voters are annoyed or bothered by the campaign rhetoric (Phillips, Urbany and Reynolds 2008, 803). Far from being a rare and unforeseeable externality, backlash is a commonly observed phenomenon in political ads research. According to a meta-analysis on the effects of negative campaign ads, “33 of [the 40 reported findings on backlash] are negative [in effect], indicating a decrease in affect for attackers” and suggesting that the risk of negative attack ads might not outweigh the potential benefits (Lau, Sigelman and Rovner 2007, 1182). While the existing literature indicates a net backlash for attacking candidates, “it does not do so decisively enough to support the conclusion that attacks exact a significantly greater toll on attackers than on their targets” (1183).

Though it is obvious that the overwhelming use of negative attack ads in recent presidential campaigns is common practice, candidates and their strategists are aware of and sensitive to the possible consequences of such a negative approach. While it is clear that presidential candidates and their strategists believe that negative attack ads are more effective than promotional or comparative ads,<sup>6</sup> the fear of backlash influences and possibly mitigates the overall level of negativity (Garamone 1984; West 2005; Phillips, Urbany and Reynolds 2008; Ridout and Franz 2011; Trent, Friedenberg and Denton 2011). The purpose of negative attack ads is to hurt your opponent’s approval ratings and/or polling numbers. If the public has a bad response to a barrage of negative attack

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<sup>6</sup> This project operationalizes the *tone* of a campaign ad in the following way: *attack* ads focus entirely on the opposition candidate, *promotional* ads focus entirely on the sponsoring or endorsed candidate, and *comparative* ads focus on both candidates.

ads, the candidate sponsoring the attack ads might be the recipient of a diminished position in the polls.

As the overall tone of presidential campaigns has become increasingly negative, candidates and their strategists had to adapt to the real consequences of backlash. As Darrell West (2005) explains, “campaigners have developed a number of blame-game strategies designed to insulate themselves from voter dissatisfaction [backlash] with campaign discourse” (153). One such method for evading backlash from negative attack ads is to have surrogate groups, like 527 committees or 501(c)(4) non-profits, deliver such messages on behalf of an official candidate. According to Herrnson (2009), “The evidence suggests the evolution of campaign finance regulations and party rules has encouraged a de facto division of labor between formal party organizations” and outside groups (1209). Perhaps included in this de facto division of labor is the outsourcing of negative attack ads to outside groups in order to protect the reputation of the official candidate from backlash.

While no evidence was ever presented to suggest that George W. Bush’s campaign was *directly* responsible for the 2004 Swift Boat attack ads against John Kerry (FEC 2006), the ads fulfilled the Bush campaign’s objectives of attacking Kerry’s military service and making it a liability instead of an asset. When the public reacted with ire to the hyperbole and indignity of the Swift Boat ads, John Kerry tried to pin the backlash on the Bush campaign. While the Bush campaign denied any connection to or responsibility for the SBVT ads, John Kerry accused the group of being a “front for the Bush campaign” and further claimed that President Bush “wants [SBVT] to do his dirty work” (James and Pearson 2004; Fournier 2004).

Brooks and Murov (2012), also building off of the concepts of backlash and surrogacy, used an experimental design to determine if there were any differences in the effectiveness of an ad if it was sponsored by an official candidate or an independent group. They concluded that an “attack ad sponsored by an unknown independent group is more effective than an identical ad sponsored by a candidate in the eyes of the public overall” (Brooks and Murov 2012, 402). Outside groups can be more effective with negative attack ads because the backlash inflicted upon outside groups is less than the backlash inflicted upon official candidates for the exact same ad. Furthermore, Brooks and Murov argue that the data suggests

that candidates have every reason to hope for an unofficial division of labor, in which independent groups that are unaccountable to voters will do the dirty work of running these kinds of harsh attack ads that the candidates would rather not do themselves (2012, 405).

Official candidates can protect themselves from the potential backlash while still reaping the benefits of a particularly harsh negative attack ad.

Using the Swift Boat episode as the most relevant precedent, it should be expected that outside groups in the 2012 election performed a similar role in protecting official candidates from backlash. Outside groups are not accountable to the public or the media in the same way that an official candidate is accountable and sensitive to what the public perceives. As Nicholas Confessore (2012) explained, “Decisions about attack ads and negative campaigning that once weighed on candidates are now made by consultants and donors with little or no accountability to the public.” Outside groups do not need to worry about backlash. While backlash from outside groups could have a negative effect on the official candidate (Herrnson 2009, 1213), the strategists running the outside groups are not as connected to or affected by the consequences of backlash as those in the

official candidates' inner circles. As a result of this dynamic, it is reasonable to expect that outside groups will release a higher proportion of negative attack ads than official candidates because they have different motivations, incentives and constraints. Likewise, if official candidates are indeed using outside groups as surrogates for negative attack ads, we can expect that official candidates are outsourcing the responsibility of attack ads to outside groups and focusing more on the traditional campaign strategies of promotional and comparative advertising.

### **Original Contribution to the Literature**

This dissertation builds upon the existing literature on the content of advertisements and introduces a comparison of the content of ads from official campaigns and outside groups. Most, if not all, of the research on the tone, emotional content and temporal perspective of presidential campaign advertisements has focused solely on the ads produced by the Democratic and Republican candidates for president (and perhaps ads released by the DNC and RNC in previous elections). With the recent emergence of outside groups as major power players in the campaign advertising market, it is important to understand the differences between official campaign ads and outside group ads. If outside groups are, indeed, here to stay in the wake of *Citizens United* and *SpeechNow*, then scholars must begin to comprehend the role of outside groups in the overall campaign advertising market and the influence of such outside groups on the operations and strategy of official campaigns.

The following chapter will provide a comparative assessment of the campaign ads produced by outside groups and official candidates in the 2012 presidential election in

order to observe whether or not outside groups produce ads that are measurably different from official campaigns, and to determine if official campaigns in 2012 adapted their advertising strategies to the sudden and unexpected rise of outside groups in the presidential campaign advertising market.

## **CHAPTER 4**

# **OUTSIDE GROUPS IN THE 2012 PRESIDENTIAL CAMPAIGN: SURROGATES OR FREELANCERS?**

So far, this dissertation has explored the legislation and judicial decisions that created the existing presidential campaign finance regime, the history of presidential campaign advertising, and the relevant political science literature concerning campaign advertising research. Such background information is necessary to establish the foundation for the analyses of this project. Specifically, this chapter examines presidential campaign advertisements from both official campaign organizations and outside groups and addresses the following question: “Are outside groups acting as negativity surrogates for official campaigns?”

The purpose and original contribution of this dissertation to the political science literature are (i) to ascertain whether or not the advertisements of outside groups are

significantly different from traditional campaign ads produced by candidates, and (i) to determine if the official ads from the 2012 presidential campaign were different (in tone, emotional content and perspective) from ads in previous cycles (particularly the 2004 and 2008 presidential elections). If official campaigns are, in fact, sensitive to the pressures of backlash from attack advertising while outside groups are not, then it is theoretically possible that the rise of outside groups in the campaign advertising market has altered the advertising strategies of presidential candidates. Official campaigns might become more promotional in their advertising tone and allow outside groups to take over the negative attack component of the campaign.

The objectives of this analysis are two-fold. First, I will observe and measure whether or not presidential campaign advertisements from outside groups are different from ads produced by the official campaigns by comparing a comprehensive sample of all available presidential campaign ads from the 2012 election. Since outside groups have played a relatively minor role in previous presidential elections, this examination will focus primarily on the 2012 presidential election, the first such presidential election cycle after outside groups were empowered by the *Citizens United* and *SpeechNow* decisions of 2010. Political science's understanding of the role of outside groups in campaign advertising is limited by the very sudden and unexpected rise of such groups. Groups like Swift Boat Veterans for Truth and MoveOn.org produced a few of their own campaign ads in the 2004 election, but outside groups never played more than a limited role in the campaign advertising market prior to 2012. Therefore, it is important to lay a foundation that can be used to compare the role of outside groups in future presidential campaigns.

The second objective of the analysis is to compare the advertisements of official presidential campaigns from 2012 to previous presidential campaigns (mostly 2000, 2004 and 2008) to determine whether or not the official campaigns in 2012 adapted their advertising strategies to the newfound prominence of outside groups. Either the official campaigns shifted their advertising strategies in some way given the emergence of outside groups or they did not, instead maintaining a very predictable and familiar arsenal of campaign advertisements.

The data suggest that over time presidential campaign ads vary wildly with no obvious explanations (Figure 3.1). There are few, if any, linear trends for any variables throughout the last half century. Presidential campaign ads are very much about the context in which they exist: the most important issues, the narratives and characters of the candidates, the closeness of the race, and all sorts of external factors that cannot be controlled by candidates (like the emergence of outside groups as major campaign players).

As a result, most statistical analyses of presidential campaign ads over time result in null findings. John Geer (2006) concluded that over the last half of the twentieth century campaign negativity in presidential elections rose on average by 2.7 % in every election cycle, thus illustrating an “upward trend” (35). But this statistic is slightly misleading. From 1988 to 2000, overall campaign negativity actually decreased in each successive election cycle. From 2000 to 2012, however, overall campaign negativity increased dramatically. Overall, then, John Geer is correct that campaign negativity has increased since 1952, but the truth is that this increase has not been slow and subtle over the years. It has been a rollercoaster ride with serious ups and downs.

Furthermore, the rapid rise of television and internet communications technology has significantly changed the game of presidential campaign advertising. From black and white to color picture, from static-laced to digital audio, to the ease with which texts and images can now be displayed on screen, campaign ads throughout history became more differentiated as technology increased the available production and editing techniques. Most factory-issued video-editing software on twenty-first-century personal PCs and Macs would be like advanced alien technology to the Madison Avenue advertising consultants of the 1952 Eisenhower and Stevenson campaigns.

Even though the objectives of campaign ads in 1952 were the same as ads in 2012, the technology gap begins to make the relationship between ads from the 1950s and the 2000s resemble apples and oranges. As a result of this technological division of ads into distinct eras, coupled with the dynamic ups and downs of campaign advertising tactics throughout the last seventy years, the best comparisons for 2012 campaign ads are the ads from three preceding campaigns in 2000, 2004 and 2008. The *Citizens United* and *SpeechNow* decisions were made in-between presidential election cycles, so there should be a noticeable difference between the 2008 and 2012 presidential campaign ads. While video-editing technology has certainly advanced since 2000, professional campaign ad makers from 2000 to 2012 have essentially had the exact same capabilities, thus providing a baseline for comparison. For these reasons, most of the comparisons for the 2012 campaign will be with other twenty-first century presidential campaigns

## Hypotheses

The hypotheses being tested are based on two presumptions. First, it is evident from the literature on campaign advertising (and advertising in general) that candidates and their campaign advisors are sensitive to the possibilities of backlash from the public (Garamone 1984; West 2005; Phillips, Urbany and Reynolds 2008; Ridout and Franz 2011; Trent, Friedenbergr and Denton 2011). Voters may recall the messages of attack ads more easily than promotional ads (as consultants attest), but the public still expresses serious disapproval of the overly negative tone of campaign ads. Recent public opinion data indicate that a majority of the American people clearly do not like the tone of campaigns and really do not enjoy presidential campaign ads. According to a 2012 Pew poll, 68% of the voters perceived the 2012 presidential campaign to be more negative than previous elections and 72% claimed that campaign ads “were not too or not at all helpful” (Pew 2012). Official campaigns have good reason to distance themselves from the possible backlash of overly negative attack ads and outside groups provide them with the perfect surrogates.

Second, outside groups in previous presidential campaigns were responsible for some of the most overt, exaggerated, and controversial negative attack ads. In 1988, the conservative group National Security PAC released the now infamous “Willie Horton” ad in an attempt to accuse Michael Dukakis of enabling a furloughed prisoner to rape and torture a woman. In 2004, the liberal group MoveOn.org used a series of advertisements to suggest that George W. Bush evaded military service in Vietnam by using his father’s political connections; the ads all but said that Bush was a draft dodger. Also in 2004, the conservative group Swift Boat Veterans for Truth aired four ads accusing Vietnam swift

boat veteran John Kerry of cowardice and betrayal. The 2012 presidential campaign had several outrageous ads produced by outside groups. As was discussed in Chapter 3, the Priorities USA Action Joe Sotnick ad definitely stands out as one of the most hyperbolic attack ads of 2012.

In all four of these examples, the allied candidate had to aggressively deny any coordination or involvement with the groups that produced the scandalous ads. Even though these controversial ads by outside groups were mostly false and required defensive public relations tactics from the official campaigns, such ads still had a devastating effect (perhaps only in the short-term) on the opposition candidate. It is impossible to know for certain if the backlash would have been worse if the Bush Sr. campaign had released the “Willie Horton” ad or if the Obama campaign had released the Joe Sotnick ad instead of their auxiliary outside groups, but it is safe to posit that outside groups took at least some of the flak away from the official campaigns.<sup>7</sup> And in a game of inches, any amount of flak that can be deflected from the official campaign is a rational move. Therefore, based on the aforementioned presumptions, the first hypothesis is as follows:

H<sub>1</sub> : Outside groups are more likely to use attack ads than official candidates

Outside groups have no incentive to minimize their use of attack ads. The conventional wisdom of campaign professionals is that attack advertising works even if voters dislike it, and outside groups are run entirely by campaign professionals. There is no candidate at the center of a Super PAC holding consultants accountable.

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<sup>7</sup> Brooks and Murov (2012) used an experimental research design to see if subjects would perceive attack ads differently depending on the sponsor of the ad. They found that harsh attack ads sponsored by unknown outside groups were more effective and caused less backlash than the same ad sponsored by an official candidate.

The historical examples of outside groups releasing particularly negative attack ads have another important trait in common: the attacks were personal in nature. The National Security PAC attack on Governor Dukakis was technically a policy-oriented ad (Massachusetts prison-work-furlough program), but it still placed the onus of responsibility for a sexual assault on the Governor (which seems personal). Attacking George W. Bush for not serving in Vietnam and attacking John Kerry's service in Vietnam were both personal attacks on the honor, courage and integrity of each candidate. While Geer (2006) observes that personal attack ads in presidential campaigns are *not* on the rise, he did not specifically look at the ads from outside groups nor was he able to include the 2012 election in his sample. Outside groups have a reputation for memorable personal character attacks, and the second hypothesis examines the use of such ads:

H<sub>2</sub> : Outside groups are more likely to use character attacks than official candidates

In addition to studying tone and types of attacks, the existing literature on campaign advertising (and political communication in general) has also looked at the use of emotional appeals and temporal orientation in campaign ads. Emotional appeals and retrospective/prospective orientations can be signifiers of the tone of an ad, but they do not necessarily correlate. Not all attack ads use negative emotions and/or retrospection, and not all promotional ads use positive emotions and/or prospection. The emotional content and orientation of the ad are indeed separate elements from the overall tone of the message, although tone, emotion and perspective have the potential to complement one another very well.

Since both of the major contemporary studies dealing with the emotional content of campaign messaging were conducted prior to the *Citizens United* and *SpeechNow* rulings in 2010 (i.e., Brader 2006; Geer 2006), neither study was able to take into account the role of outside groups. Geer (2006) did observe, however, that negative attack ads were more likely to contain negative emotions and a retrospective orientation (154). Building off of the first hypothesis that outside groups would use a higher proportion of attack ads than official campaigns, the third and fourth hypotheses have the following expectations:

H<sub>3</sub> : Outside groups are more likely to use ads with negative emotions than official candidates

H<sub>4</sub> : Outside groups are more likely to use retrospective ads than official candidates

If official campaigns are, in fact, content to outsource negative campaign advertising, negative emotional appeals and retrospective orientations to outside groups in order to avoid backlash, then it is logical to assume that official campaign advertising in 2012 was noticeably different from official campaign advertising in previous presidential election cycles. In 2004 and 2008, for example, outside groups played a very minor role and could not act as capable surrogates for the negative communications of the official campaigns; therefore, official campaigns in 2004 and 2008 would need to do more of the heavy-lifting of negative campaigning themselves. With the abundance of outside groups in the 2012 campaign market, however, official campaigns had many capable surrogates at their disposal to handle the inglorious duty of mudslinging. As a result, official campaign advertising from 2012 should be different from official campaign advertising in previous elections. The following hypotheses examine the

differences in tone, emotional content and orientation between official campaign advertising in 2012 and recent elections:

- H<sub>5</sub> : Official candidates are more likely to use promotional and comparative ads when outside groups play a major role in the campaign than when they are minor actors
- H<sub>6</sub> : Official candidates are more likely to use ads with positive emotions when outside groups play a major role in the campaign than when they are minor actors
- H<sub>7</sub> : Official candidates are more likely to use prospective ads when outside groups play a major role in the campaign than when they are minor actors

If official candidates are using outside groups as surrogates for protection against backlash, then these hypotheses should be correct. Of course, it is also possible that either outside groups, official candidates, or both will not react in a manner that is consistent with existing theory. Outside ads might be more promotional or comparative than the official ads. It is also possible that outside groups and official candidate ads are equally negative. If outside and official candidate ads are indiscernible from one another, then outside groups are simply compounding the existing campaign advertising norms with more ads and money. Additionally, it is possible that official candidate ads from 2012 are no different than official candidate ads from previous elections. Perhaps official candidates in 2012 did not adapt their campaign advertising strategies to the ascendance of outside groups. Even if some or all of these hypotheses are incorrect, the results will still provide an interesting account of the influence of outside groups in presidential campaigns.

The seven hypotheses all focus in some way on presidential campaign advertisements in the 2012 election cycle, but they also fall into two groups that construct

two separate research narratives for this dissertation: (1) campaigns ads produced by outside groups are measurably different than ads produced by official candidates, and (2) the emergent role of outside groups in campaign advertising has caused official candidates to change their advertising strategies.

### **Data Collection**

To test these hypotheses I will use content analysis data of 333 unique ads from the 2012 presidential campaign, as well as 327 campaign advertisements from 1952-2008. The first data set focused exclusively on the 2012 presidential campaign. Ads were collected from the websites and YouTube accounts of the official Obama and Romney campaigns, the sites and accounts of major outside groups, as well as various online newspapers and campaign-watch websites.<sup>8</sup> Most campaign organizations (official and outside groups) conveniently posted and catalogued all of their campaign ads online. This not only made collecting a comprehensive sample of ads less difficult, it also illustrated the clear trend towards the preeminence of Internet advertising in future campaigns. It is only a matter of time until Americans are seeing more campaign ads on their smartphones and Google Glasses® than on their televisions.

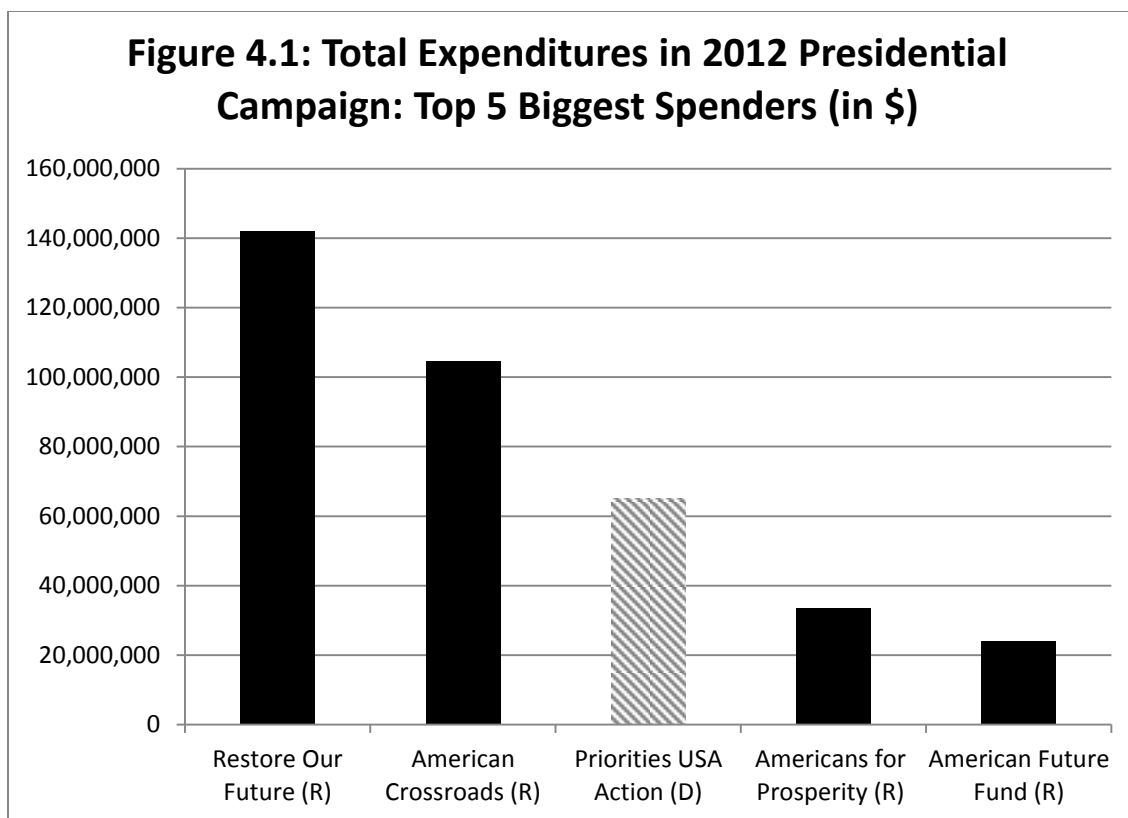
Of the nearly 400 televised and internet advertisements first collected from the 2012 general election, the final sample excluded Spanish-language ads that did not provide English subtitles, duplicates (ads with different titles but identical content) and all advertisements over five minutes in length to avoid skewing the results (a five minute

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<sup>8</sup> There are reputable campaign advertising data bases already in existence like the Wesleyan Media Project and the Wisconsin Campaign Media Analysis Group, but neither group has published their updated data sets from the 2012 campaigns as of the writing of this dissertation. These groups give their founders and researchers exclusive access to the data for several years before making the data publicly available. Additionally, and more importantly, access to such data would require grant money.

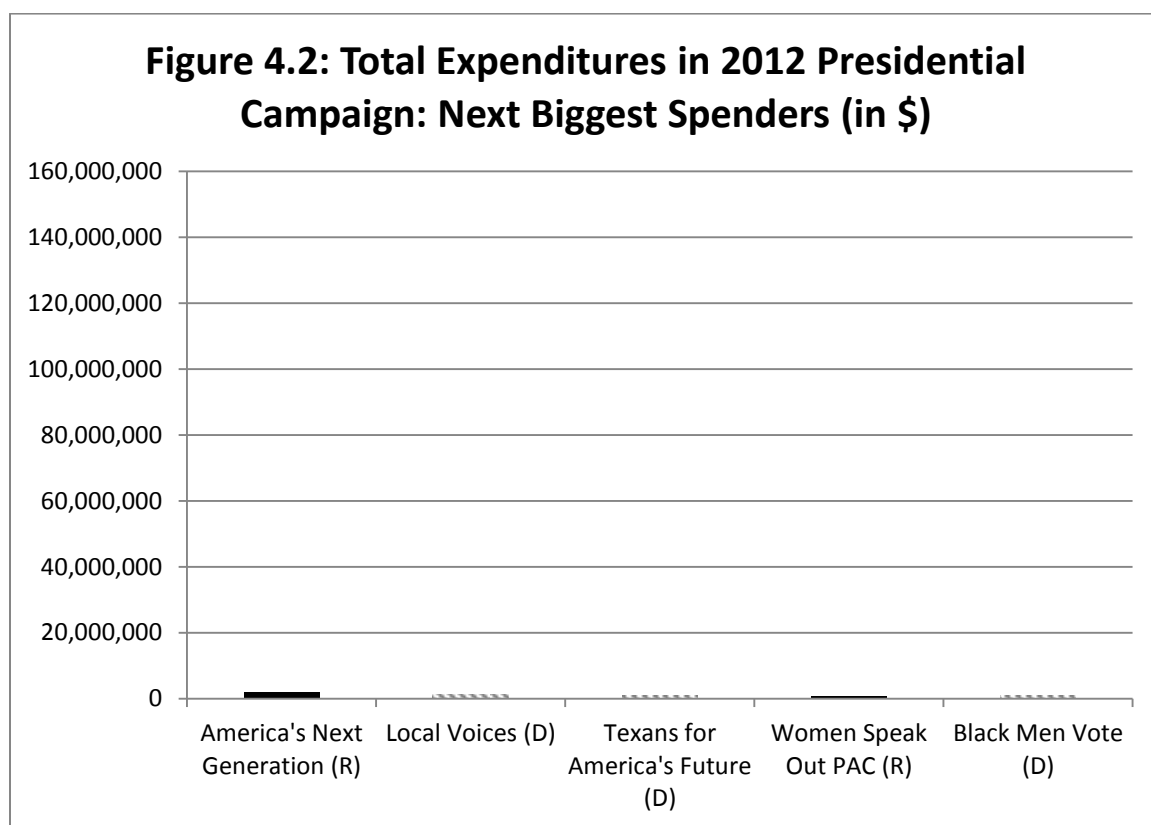
campaign ad is equivalent to ten average-length campaign ads). In total, the final 2012 sample consisted of 146 pro-Obama ads (130 official Obama/DNC ads; 16 outside ads) and 187 pro-Romney ads (130 official Romney/RNC ads; 57 outside ads). The ratio of pro-Romney to pro-Obama unique outside ads is nearly four to one, which was expected given that four of the five top spending outside groups were pro-Romney.

Although many different outside groups ran presidential campaign advertisements in 2012, the vast majority of these groups only aired one or two unique ads, and sometimes only in one media market (Haberman 2012). Thus, to limit the analysis to outside groups responsible for the overwhelming majority of advertisements, this sample includes ads from organizations that spent more than \$20 million on the presidential campaign, including: American Crossroads/Crossroads GPS (Republican), Restore Our Future (Republican), Americans for Prosperity (Republican), American Future Fund (Republican), and Priorities USA/Action (Democrat) (OpenSecrets.org 2012).



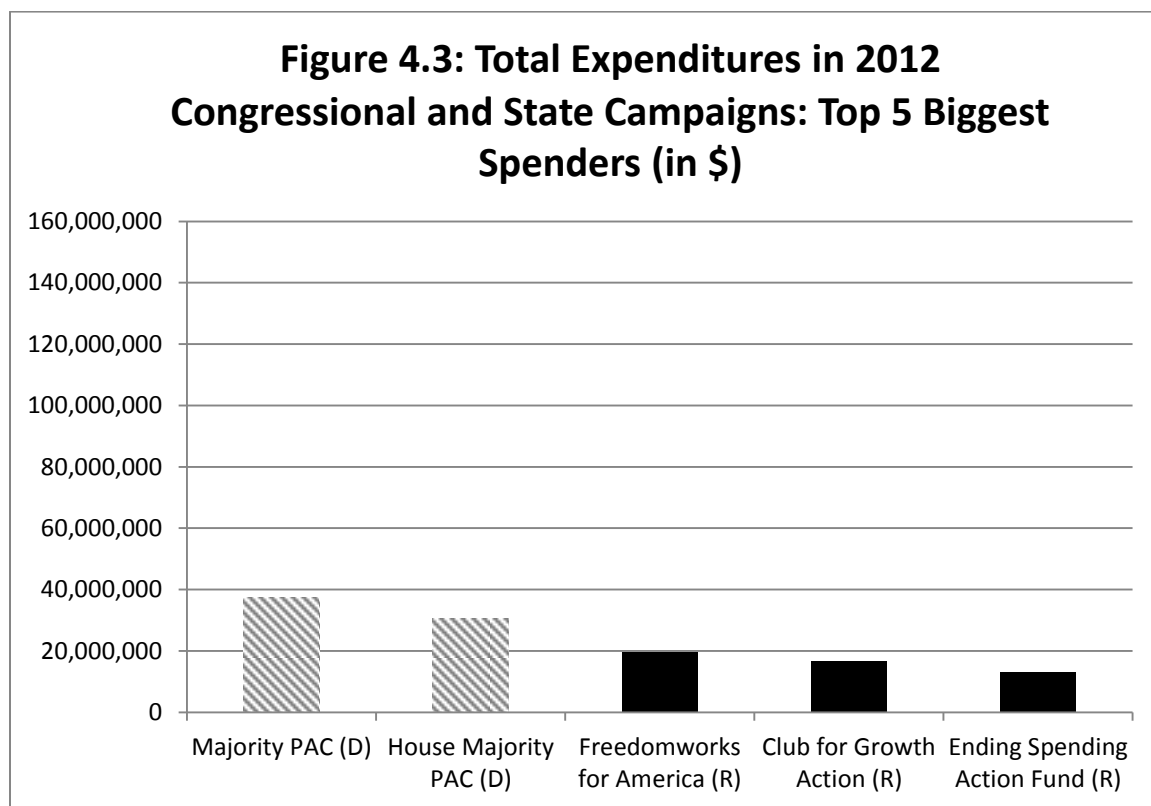
As a consequence of only focusing on the most-well-funded and influential outside groups in the presidential campaign market, the findings will not take into full account the role of all the less noticeable outside groups. While I understand that small outside groups can have an influence on the overall campaign advertising market, so, too, can independent candidates for president. The Libertarian Party presidential candidate Gary Johnson and Green Party candidate Jill Stein each produced several campaign advertisements in the 2012 election that were excluded from this dissertation's final sample. Ads from independent candidates like George Wallace (1968), John Anderson (1980), and Ross Perot (1992) were also excluded from the historical data set. Independent candidates, like small outside groups, can have an influence on the major party candidates, but considering the strength and importance of the two-party system in American politics, ads from independent candidates were excluded. Likewise, small

outside groups do contribute to the overall advertising market, but do not wield the influence of a larger well-financed outside group. For example, the top five biggest outside spenders each made more than \$20 million in independent expenditures during the presidential election (Figure 4.1), while the next five each spent less than \$2 million (Figure 4.2). In the world of presidential 527s and 501(c)s there are big spenders and small spenders, but no medium spenders (\$2 million to \$20 million).



Several outside groups spent more than \$20 million during the Republican presidential primary, and still other groups spent more than \$20 million in the 2012 congressional campaigns. There were pro-Democratic 527 groups that spent more than \$20 million during the 2012 campaign cycle, but not specifically on the presidential race (Figure 4.3). For example, pro-Democratic groups like Majority PAC and House Majority PAC spent tens of millions of dollars (\$37,398,819 and \$30,600,164,

respectively) in congressional and state campaigns, but neither spent more than \$20 million on the presidential campaign (Singer-Vine 2012) (also, OpenSecrets.org). Of the \$500 million spent by outside groups in the 2012 election cycle, nearly \$400 million was spent on the presidential campaign. Outside groups spend their money up and down the ballot, but the serious money in outside spending dedicated their efforts almost entirely to the presidential race.



Furthermore, coding decisions had to be made about how to categorize “alliances” of “separate” interest groups within the outside group advertising market. To use a real-world example that simultaneously clarifies the selection strategy and exemplifies the convoluted state of campaign finance law, consider conservative political operative Karl Rove and his role in the 2012 elections (to say nothing of his prominent role during the 2012 Republican primaries). American Crossroads, the 527 independent-expenditure-

only committee that proved so effective in the 2010 midterms, is only one wing of Rove's political machine. Rove also formed a 501(c)(4) social welfare non-profit organization, Crossroads GPS, to produce campaign ads in the 2012 election cycle. Although chartered as two separate organizations, American Crossroads and Crossroads GPS have the same goal (supporting Republican candidates with independent-expenditure campaign ads) and the same personnel directing their operations.

The only real difference between the two organizations is that American Crossroads has to disclose its donors (above \$250) and Crossroads GPS does not. Not surprisingly, Crossroads GPS outspent American Crossroads by a significant margin (perhaps as high as 6:1) (Barker 2012). When the media report on outside group spending, however, American Crossroads is usually credited with all of the spending associated with Rove's allied organizations (e.g., Stanage, 2012), even though other reports indicate that Rove's 501(c)(4) Crossroads GPS organization far outspent his 527 American Crossroads Super PAC. Because clear and consistent monetary figures for how much Rove's organizations individually spent on the presidential election are not available or are contradictory, I had to combine both of Rove's political organizations into one group for the data analyses. Likewise the same consideration was made for the pro-Obama 501(c)(4) Priorities USA and 527 Priorities USA Action.

The second data set, which I refer to as the historical data set, contains 327 presidential advertisements from general election campaigns between 1952 and 2008.<sup>9</sup> These ads were collected via the *Living Room Candidate*, an online repository managed by the Museum of the Moving Image. While this is not an exhaustive catalogue or

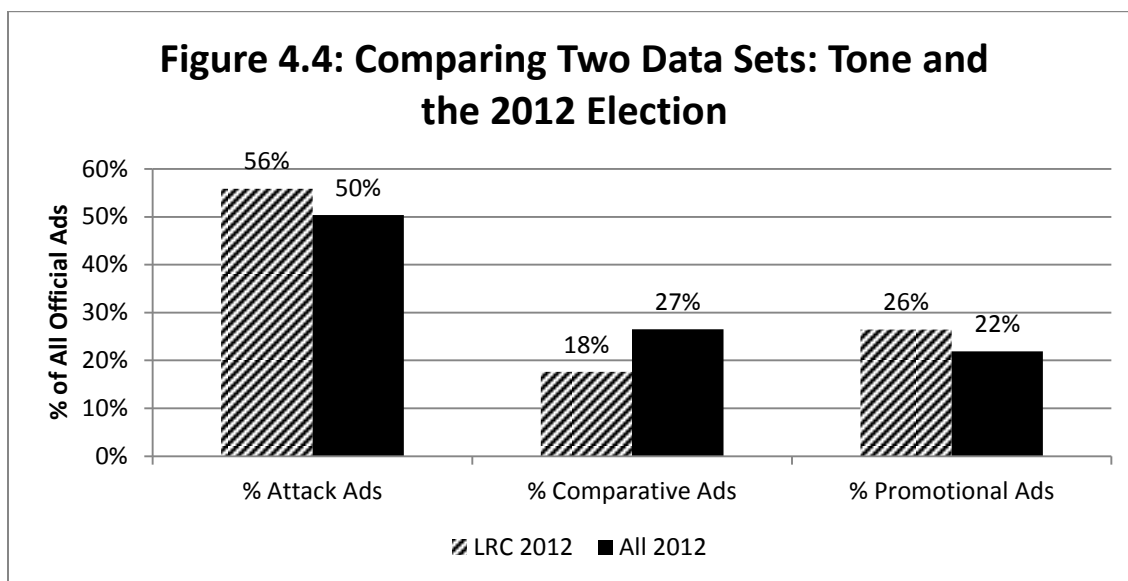
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<sup>9</sup> The number of ads from each election is as follows: 1952 (14); 1956 (18); 1960 (16); 1964 (26); 1968 (20); 1972 (20); 1976 (18); 1980 (18); 1984 (20); 1988 (22); 1992 (20); 1996 (20); 2000 (18); 2004 (40); and 2008 (37).

random sample of all presidential campaign advertisements, it is an extensive collection of the more prominent, memorable and influential campaign advertisements that provide points of comparison for the 2012 campaign. Presidential campaign advertisements from mid-twentieth-century elections are notoriously difficult to acquire because many campaign organizations neglected to preserve copies of their ads. Many of the advertisements that are available from the 1950s, 1960s and 1970s are secured in private data bases run by presidential libraries, historical societies and academic data compilations.

John Geer (2006, 25) observes that it is not possible to reconstruct the full set of advertisements created by the candidates “because record keeping by campaigns has been inconsistent.” Nevertheless, Geer insists that of the various studies conducted with different sample sizes, “the results all appear quite comparable” (2006, 25). The *Living Room Candidate* also contains advertisements from the 2012 campaign which were already integrated into the primary 2012 data set. This historical data set allows me to measure longitudinal trends in presidential campaign advertising and provides a richer context for comparative assessment of the 2012 campaign. The representativeness issues with the historical data set are not dire, particularly since none of the hypotheses involving the historical data set require regression analyses. When I contrasted the *Living Room Candidate* data from 2012 to my own data from 2012, the results were quite similar. As illustrated in Figure 4.4 below, the two data sets produce very comparable ratios of advertising tone. Only the percentage of comparative ads from official candidates produces noticeable differences between the two data sets (9% disparity). To

reiterate, the purpose of the historical data set is to put the 2012 presidential campaign in its historical context.



Once the two sets of advertisements were compiled, two coders independently analyzed the content of the campaign ads across thirty-seven variables. The content analysis resulted in an intercoder agreement rate of 95% for the 2012 advertisements, and 91% for the historical data set.<sup>10</sup> The intercoder agreement scores were calculated by dividing the number of agreed upon coding values by the total number of coded values. All coding discrepancies were subsequently resolved based on group consensus by the University of Nebraska Campaign Ads Project (UNeCAP). The majority of the variables were designed to reflect the presence of tone, type of attack, emotion and perspective.

The two nominal variables, *Tone* and *Perspective* were broken down into separate indicator variables. *Tone* was divided into dichotomous *Promotional*, *Comparative* and *Attack* variables. An ad was considered an *Attack* ad if it was entirely devoted to the

<sup>10</sup> The historical data set was originally coded in 2011 as a separate research endeavor using more than 70 variables. The slightly lower intercoder agreement rate was the result of some tricky variables like “attractive male or female in ad” that did not make it into this dissertation’s analysis.

faults, positions and/or record of the opposition candidate. Priorities USA Action's "Understands" ad is a good example of an attack ad because it focuses entirely on the damage caused by Mitt Romney and Bain Capital on the lives of ordinary Americans. *Attack* ads could not feature the sponsoring candidate. Likewise, *Promotional* ads could not feature the opposition candidate. *Promotional* ads must be entirely dedicated to promoting the sponsoring candidate. If the ad featured both the sponsoring candidate and the opposition candidate (either in reference or presence), it was classified as *Comparative*.

To measure the type of attacks used in ads, I used two indicator variables: *Character Attack* and *Policy Attack*. If an ad criticized a past policy position, current policy stance, or future policy proposal of a candidate, the ad was coded as a *Policy Attack*. Any ads that hurled negative criticism against the personal character of the opponent (greedy, naïve, ignorant, out-of-touch, idealistic or unrealistic) were coded as *Character Attacks*. Some ads contained both policy and character attacks. Character and policy attacks are used in *Comparative* and *Attack* ads, but not in *Promotional* ads.

*Perspective* was separated into *Retrospective*, *Prospective* and *Combined* dummy variables. Ads were coded *Retrospective* if they focused exclusively on the past. *Retrospective* ads focused on the pasts of the sponsoring candidate, opposition candidate, both, or just the past in general ("the good ol' days"). *Prospective* ads were forward-looking ("A Better Tomorrow", "A Bright Future", etc.). *Prospective* ads focus on what will happen or what could happen ("My promise is to...", "My opponent will ruin this country if...", etc.). Oftentimes ads contained both *Retrospective* and *Prospective* perspectives. Whenever this was the case, I coded the ad as *Both*. Very few of the ads

had no forward- or backward-looking perspective whatsoever, instead focusing on the present moment without making any retrospective or prospective judgments.

The emotional indicator variables were condensed into two broad categorical variables. The individual emotional variables *Pride*, *Hope*, *Humor* and *Compassion* were combined into an aggregate variable labeled *Positive Emotions* to make the analysis easier to interpret. Likewise, the emotional variables *Fear*, *Anger*, *Disgust* and *Sadness* were folded into the overall category *Negative Emotions*. Sometimes the actual words “pride” or “anger” were explicitly used in the ad, making the coding of that particular ad easy. Other times, however, ads were implicit or subtle with their use of emotion. For instance, a black and white image of young children sleeping at a homeless shelter with somber music elicited a *Sadness* code. The ad did not have to explicitly say the word “sad” or “sadness.” The coders recorded their emotional reactions to the ad or perceived emotional intent of the ad.

It was not always easy to code ads for their emotional content because sometimes the intent of the ad was unclear. It was also difficult to draw clear lines of distinction between *Anger* and *Disgust*, or *Pride* and *Hope*. The two coders had the most difficulty consistently coding *Anger* and *Disgust*. The differences between *Anger* and *Disgust* can be very subjective. What makes one person upset or angry might be disgusting to another person. Because the research group was splitting hairs trying to decide what qualified as *Anger* or *Disgust*, we decided to combine the separate indicator variables into two groups: *Positive Emotions* and *Negative Emotions*. While all of the ads were coded for the individual emotional variables during the data collection phase, all data analysis was conducted using *Positive Emotions* and *Negative Emotions*.

Advertisements were coded as singular units to determine the general themes within an advertisement rather than count the instances of each individual reference. For example, in the 2012 advertisement from the Romney campaign entitled “Bigger, Better America,” the nominee lists a series of comparisons between himself and President Obama:

He [Obama] says it *has* to be this way. I [Romney] say it *can't* stay this way. He is offering excuses. I've got a plan. I can't wait for us to get started. He's hoping we will settle. Americans don't settle.

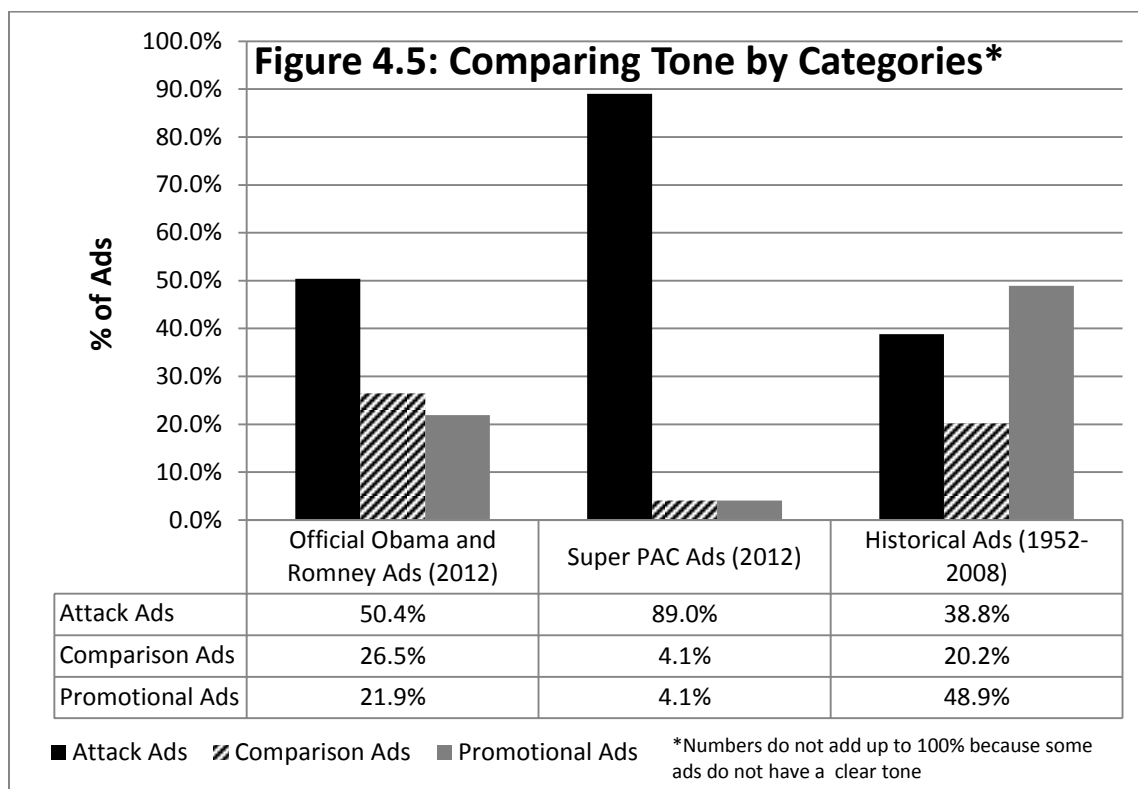
The discourse of this advertisement was not coded as three separate comparisons, but yielded an overall classification of *Comparative* in the category for tone. This ad was also coded as *Prospective* because of Romney's references to his “plan” and his inability to “wait...to get started.” Finally, this ad contained *Positive Emotions* because of Romney's appeals to *Pride* (“Americans don't settle”) and *Hope* (“I've got a plan”). Coders were instructed to focus on *explicit* indicators (word choice) and also *implicit* indicators (music, sound effects, images) in the ads to code each ad. Once all of the variables were properly sorted, descriptive statistics and two-proportion chi-square tests were used to analyze the hypotheses.

## Results

### *Official Campaigns and Outside Groups, 2012*

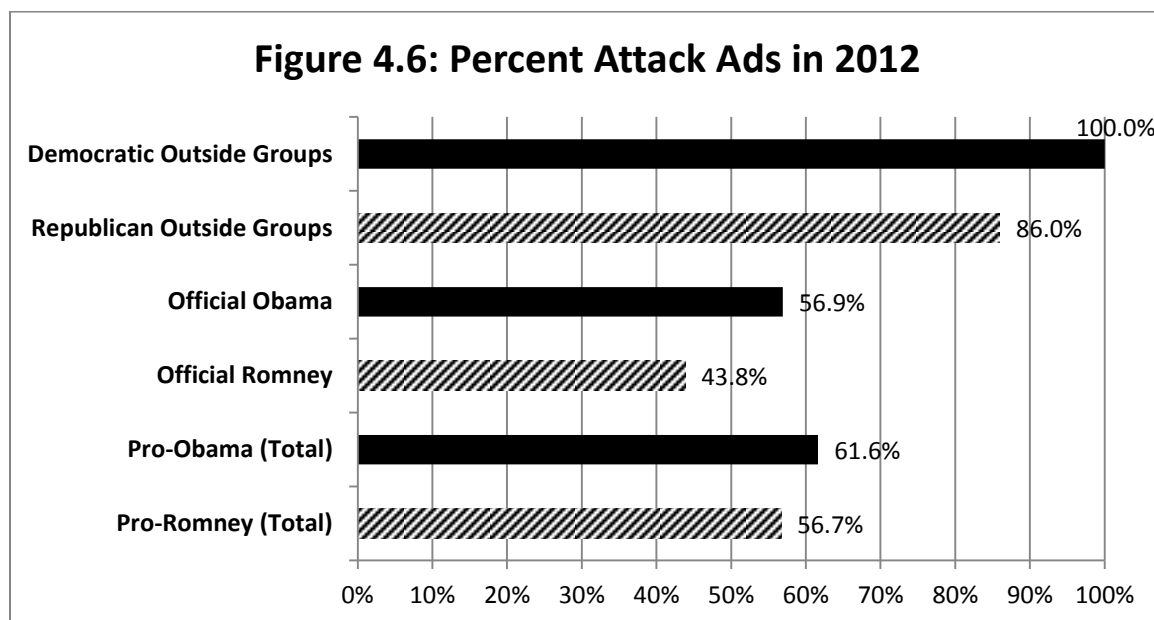
For the first hypothesis ( $H_1$ ), I predicted that outside groups would produce a higher proportion of attack ads than official candidates because outside groups are not as sensitive to the risks of public backlash. The results lend empirical weight to the conclusion that advertisements from outside groups are significantly more negative than

official candidate ads (Figure 4.5). Of all the outside group advertisements in the sample, 89% were attack advertisements, and the correlation coefficient between outside advertisements and attack ads is strong ( $0.325$ ;  $p < .001$ ). Official campaigns certainly used attack ads (50.4% of all official ads in 2012), but not nearly to the extent that outside groups relied on attack ads. There is indeed a considerable difference between official campaigns and outside groups in their use of attack ads ( $\chi^2=35.2$ ;  $df=1$ ;  $p < .001$ ).



Surprisingly, pro-Obama campaign ads were slightly more negative than pro-Romney ads (Figure 4.6). It would make sense for the Republican opposition to be more negative towards an incumbent Democratic president, but the data did not suggest this was the case. The results show that there was not a statistically significant difference between the combined (official plus outside groups) pro-Obama and pro-Romney ads (61.6% and 56.7%, respectively) ( $\chi^2=.833$ ;  $df=1$ ;  $p < .361$ ), nor was there a significant

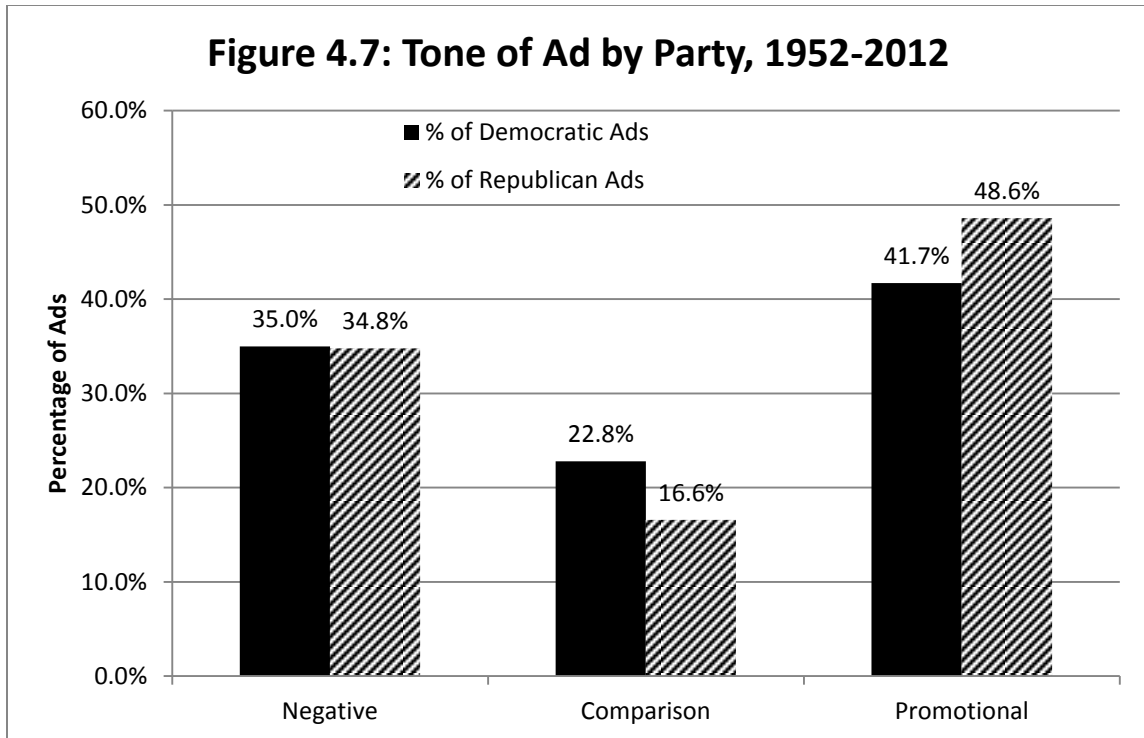
difference between pro-Obama outside groups and pro-Romney outside groups (100% and 86%, respectively) ( $\chi^2=2.52$ ;  $df=1$ ;  $p < .112$ ). There was, however, a significant difference in the use of attack ads between the official Obama campaign (56.9%) and the official Romney campaign (43.8%) ( $\chi^2=4.45$ ;  $df=1$ ;  $p < .035$ ). This result is contrary to the conventional wisdom that the opposition candidate is better positioned to attack the incumbent.



One possible explanation for why the official Obama campaign was more negative than official Romney campaign is that Romney had to do a lot of rebranding and redefining after the punishing Republican primary. Mitt Romney was already portrayed as an out-of-touch plutocratic “vulture capitalist” by his Republican challengers in early 2012 during the New Hampshire primary (Rucker and Nakamura 2012; McQuaid 2012). It would have been prudent for the Romney campaign to go on a promotional offensive during the general election to clean up the image of their candidate. Conversely, the official Obama campaign and the sole pro-Obama outside group were successfully able to get their message across by constantly attacking Mitt Romney and congressional

Republicans throughout the general election. Pro-Romney outside groups also dedicated 4.1% of their campaign ads to promote Mitt Romney while Priorities USA/Action did not release any promotional ads in favor of Barack Obama. It seems that even Republican outside groups saw the need to do some polishing of Mitt Romney's mud-covered public image.

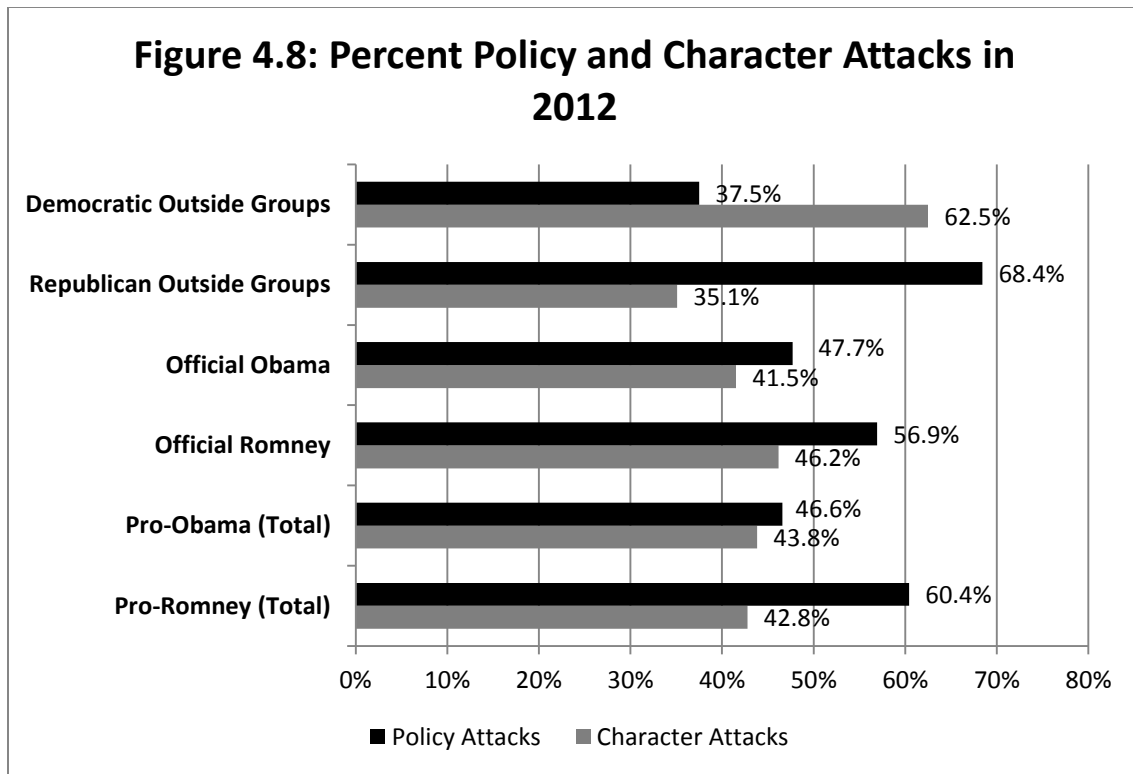
From the historical data, it is clear that attack ads have increased steadily since the 2000 presidential election (Figure 3.1). Without the assistance of outside group advertisements, the 2012 campaign would be the third most negative campaign in history with 50.4% of the advertisements being attacks. However, when the outside group advertisements are included, the 2012 election becomes the second most negative presidential campaign in history with overall negativity of 58.9%. Across presidential races the results reveal no partisan differences in the use of attack ( $\chi^2=.001$ ;  $df=1$ ;  $p <.969$ ), promotional ( $\chi^2=1.76$ ;  $df=1$ ;  $p <.184$ ) or comparative ( $\chi^2=2.20$ ;  $df=1$ ;  $p <.138$ ) advertising (Figure 4.7). Variance exists within every election year, but over time the parties seem to attack, promote, and compare relatively equally.



The second hypothesis ( $H_2$ ), that outside groups would use a higher proportion of character attacks than official candidates in 2012, was not supported by the data. In total, neither outside groups nor official candidates used character attacks more than policy attacks. Outside groups used character attacks in 41.1% of their ads and used policy attacks in 61.6% of their ads (percentages add up to more than 100 because an ad could use both a character and policy attack). Likewise, official candidates also only used character attacks in 43.8% of their ads while using policy attacks in 61.6% of their ads. The difference between outside groups (41.1%) and official campaigns (43.8%) in their use of character attacks was not statistically significant ( $\chi^2=.176$ ;  $df=1$ ;  $p < .675$ ). The official Obama and official Romney campaigns used character attacks in 41.5% and 46.2% of their ads, respectively. The difference was not statistically significant ( $\chi^2=.562$ ;  $df=1$ ;  $p < .453$ ). Likewise, there was not a significant difference between the official

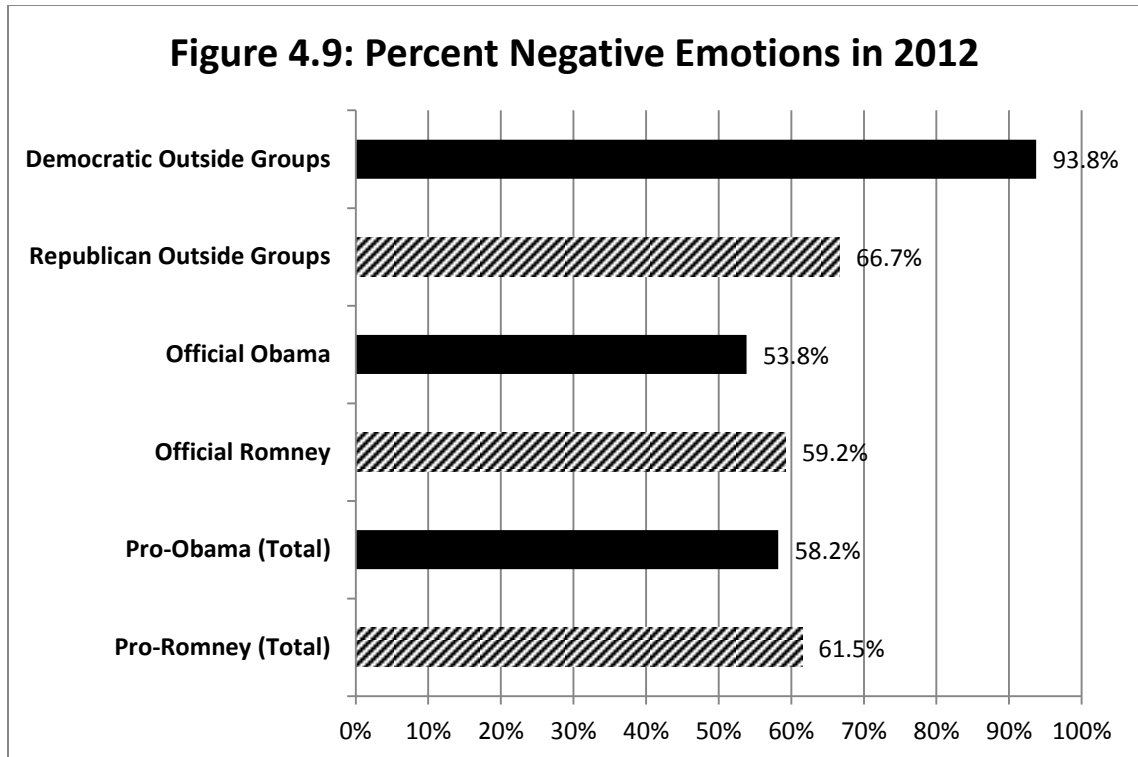
Obama (47.7%) and Romney (56.9%) campaigns in their use of policy attacks either ( $\chi^2=2.22$ ;  $df=1$ ;  $p < .136$ ).

There were, however, some interesting statistically significant differences between pro-Obama and pro-Romney outside groups in their use of character and policy attacks (Figure 4.8). Priorities USA/Action used personal character attacks in 62.5% of their ads while pro-Romney outside groups only used character attacks in 35.1% of their ads ( $\chi^2=3.88$ ;  $df=1$ ;  $p < .049$ ). Conversely, pro-Romney outside groups used policy attacks in 68.4% of their ads while Priorities USA/Action only used policy attacks in 37.5% of their ads ( $\chi^2=5.05$ ;  $df=1$ ;  $p < .025$ ). Given the context of the 2012 presidential campaign, these differences make sense. Attacks against Mitt Romney almost certainly revolved around his time at Bain Capital or his offhand remarks about the 47% of Americans who will not take care of themselves (Cillizza 2013). Attacking Romney for his private equity connections or his beliefs about Americans who do not pay taxes would both qualify as character attacks. Attacking President Obama for the Affordable Care Act, the unemployment rate, the recession, or government spending would all qualify as policy attacks.



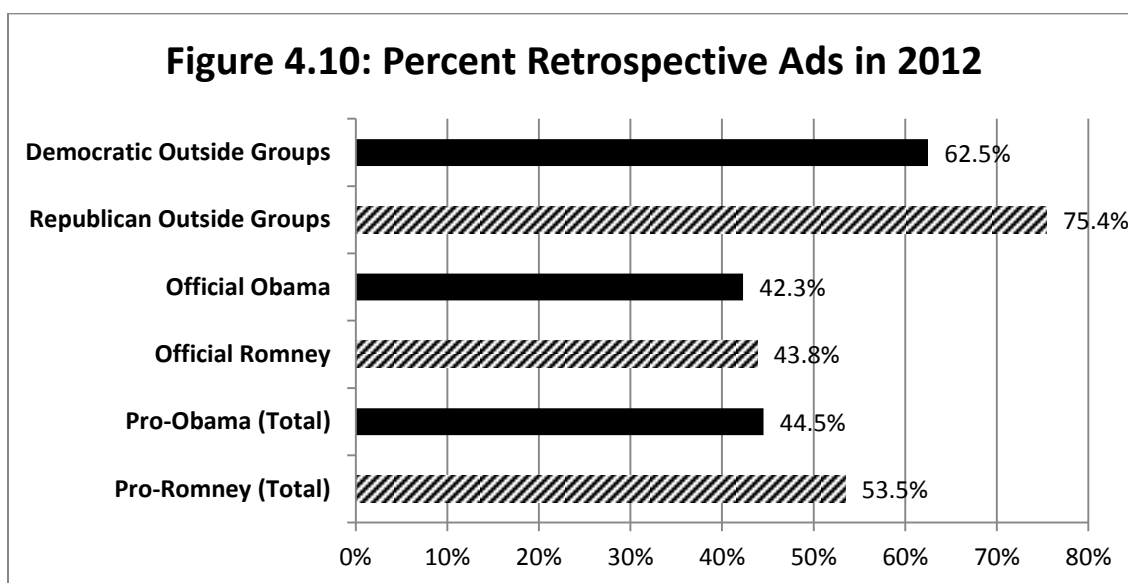
The third hypothesis ( $H_3$ ), that outside groups would evoke negative emotions more than official campaigns, is supported ( $\chi^2=6.1$ ;  $df=1$ ;  $p < .013$ ). Outside groups evoked negative emotions in 72.6% of their ads while the official campaigns in 2012 evoked negative emotions in 56.5% of their ads (a difference of 16.1%). There were no statistically significant differences between combined (official and outside) pro-Romney ads (61.5%) and pro-Obama ads (58.2%) regarding negative emotions ( $\chi^2=.767$ ;  $df=1$ ;  $p < .381$ ) (Figure 4.9). Official Romney ads (59.2%) and official Obama ads (53.8%) were not significantly different either, but pro-Obama outside group ads were significantly more negative (93.8%) in their emotional content than pro-Romney outside group ads (66.7%) ( $\chi^2=9.3$ ;  $df=1$ ;  $p < .002$ ). One possible explanation for the difference between pro-Obama and pro-Romney groups in their use of negative emotions might be the types of attacks that each group launches against their opposing candidate. Priorities

USA/Action used emotionally charged ads to attack Mitt Romney's professional career, while pro-Romney groups attacked the unpopularity (among conservatives) of President Obama's signature policy accomplishments. Attacking ObamaCare does not necessary elicit an emotional response; attacking Romney's lack of empathy elicits negative emotions by default.



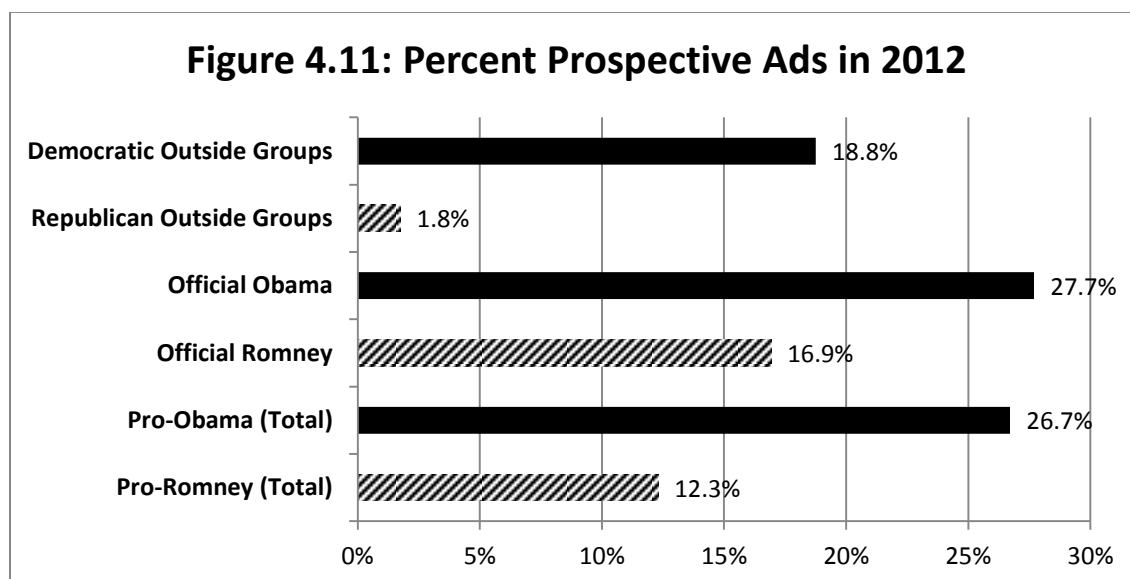
The fourth hypothesis ( $H_4$ ), that outside groups would use more retrospective appeals than official ads in 2012, was also supported by the data. Consistent with John Geer's (2006) observation that retrospective appeals are correlated with negative attack ads, outside groups in 2012 (who were far more negative than official campaigns) made greater use of retrospection than official campaigns (outside, 72.6% of ads; official, 43.1% of ads) ( $\chi^2=19.9$ ;  $df=1$ ;  $p < .001$ ). The official Obama and Romney campaigns used retrospective appeals in 42.3% and 43.8% of their ads, respectively ( $\chi^2=.063$ ;  $df=1$ ;  $p < .802$ ) (Figure 4.10). There was a bigger difference between pro-Obama outside

groups (62.5%) and pro-Romney outside groups (75.4%), but this was not statistically significant ( $\chi^2=1.05$ ;  $df=1$ ;  $p < .305$ ). Likewise, there was a noticeable difference between pro-Obama outside ads (62.5%) and the official Obama ads (42.3%), but this difference was also not significant ( $\chi^2=2.35$ ;  $df=1$ ;  $p < .125$ ). There was, however, a statistically significant difference between pro-Romney outside ads (75.4%) and the official Romney ads (43.8%) in their use of retrospective appeals ( $\chi^2=15.9$ ;  $df=1$ ;  $p < .001$ ). Pro-Romney outside groups focused so intensely on ObamaCare and the economic and budgetary shortcomings of President Obama's first term that more than three quarters of all pro-Romney outside ads were retrospective.



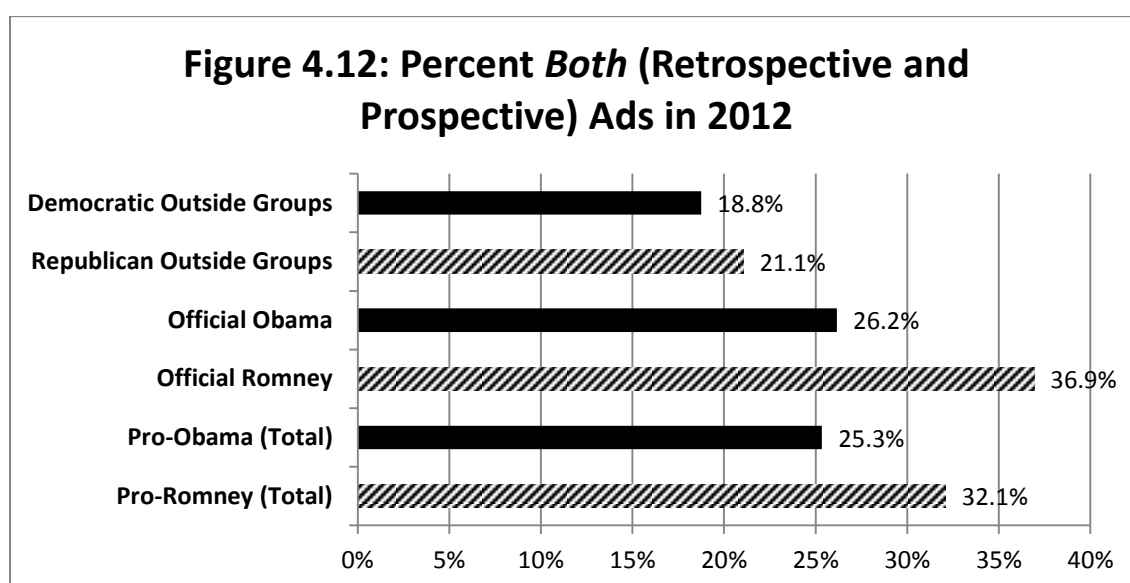
Outside groups utilized very few prospective appeals while official campaigns used a prospective-only orientation in about one quarter of their ads (outside, 5.5%; official 22.3%) ( $\chi^2=10.6$ ;  $df=1$ ;  $p < .001$ ). The official Romney campaign (16.9%) used prospective appeals more than pro-Romney outside groups (1.8%) ( $\chi^2=8.45$ ;  $df=1$ ;  $p < .004$ ). The Romney campaign used more promotional ads than pro-Romney outside groups, and promotional ads tend to be associated with a prospective orientation. The

difference between the official Obama ads (27.7%) and pro-Obama outside ads (18.8%) was not significant ( $\chi^2=.582$ ;  $df=1$ ;  $p < .446$ ). There was a statistically significant difference between official Obama ads (27.7%) and official Romney ads (16.9%) ( $\chi^2=4.35$ ;  $df=1$ ;  $p < .037$ ). The difference between pro-Obama outside ads (18.8%) and pro-Romney outside ads (1.8%) was also statistically significant ( $\chi^2=6.97$ ;  $df=1$ ;  $p < .008$ ). The difference between pro-Obama and pro-Romney outside groups is particularly intriguing. Recall that all pro-Obama outside ads were attack ads. Typically, attack ads are retrospective in orientation, but almost one-fifth of all pro-Obama outside ads have a prospective orientation. It seems that pro-Obama outside ads were able to use a hypothetical political future under President Romney to attack Mitt Romney.



Since many campaign ads use retrospective *and* prospective appeals in the same ads, it was necessary to create a unified category called *Both*. There was a modest statistically significant difference between outside groups (20.5%) and official campaigns (31.5%) in their use of both appeals at the more lenient 0.10 significance level ( $\chi^2=3.33$ ;  $df=1$ ;  $p < .068$ ). The difference between official Romney ads (36.9%) and pro-Romney

outside ads (21.1%) was statistically significant ( $\chi^2=4.58$ ;  $df=1$ ;  $p < .032$ ). Pro-Obama outside ads (18.8%) were not significantly different from official Obama ads (26.2%) ( $\chi^2=.413$ ;  $df=1$ ;  $p < .521$ ). Pro-Obama (18.8%) and pro-Romney outside ads (21.1%) were very comparable in their use of both retrospective and prospective appeals within a single ad ( $\chi^2=.041$ ;  $df=1$ ;  $p < .840$ ). There was a modest significant difference between the official Romney campaign (36.9%) and the official Obama campaign at the .10 significant level (26.2%) ( $\chi^2=3.49$ ;  $df=1$ ;  $p < .062$ ).



### Official Campaigns in Historical Perspective

The fifth hypothesis ( $H_5$ ) predicted official campaigns would increase their use of promotional and comparative ads as a result of the onslaught of attacks by outside groups. This hypothesis was partially correct. As Figure 3.1 illustrates, official campaigns in 2012 used fewer attack ads than in the 2008 election (50.4% to 62.2%, respectively), used more comparative ads than 2004 and 2008 (2012: 26.5%; 2008: 8.1%; 2004: 15%), but used fewer promotional ads than any presidential race since 2000 (2012:

21.9%; 2008: 29.7%; 2004: 32.5%; 2000: 50%;). Since official candidates are concerned about the backlash of negative campaigning (Garamone, 1984; Ridout & Franz, 2011; Trent, Friedenbergl & Denton, 2011; West, 2005), I hypothesized that attack advertisements would be “outsourced” to outside groups, and that such outsourcing of negativity would lead to increased proportions of promotional and comparative advertisements by official candidates. Although the 2012 advertisements by official campaigns were more comparative than those in 2004 and 2008, the 2012 advertisements were less promotional than in recent elections. Thus, the fifth hypothesis that official campaigns would become more comparative *and* promotional was only partially confirmed. Official ads from 2012 were more promotional ( $\chi^2=12.2$ ;  $df=1$ ;  $p < .001$ ) and comparative ( $\chi^2=16.9$ ;  $df=1$ ;  $p < .001$ ) than outside group ads from 2012, but official ads from 2012 were *not* more promotional than official ads from prior elections.

When I compared the proportion of attack, promotional and comparative advertisements from the 2012 election to the 1952-2008 campaigns, I discovered several important differences. Figure 4.5 compares the tone of official campaign advertisements (1952-2008 and 2012) with outside group ads (2012). It is clear that the 2012 presidential campaign was more negative than the mean negativity from 1952 to 2008.<sup>11</sup> Official candidate ads from the 2012 election were about 22% more negative than their historical average (2012, 50.4%; historical, 28.3%). The historical aggregate data demonstrates that previous presidential campaign ads were primarily promotional (~50% of ads). Several

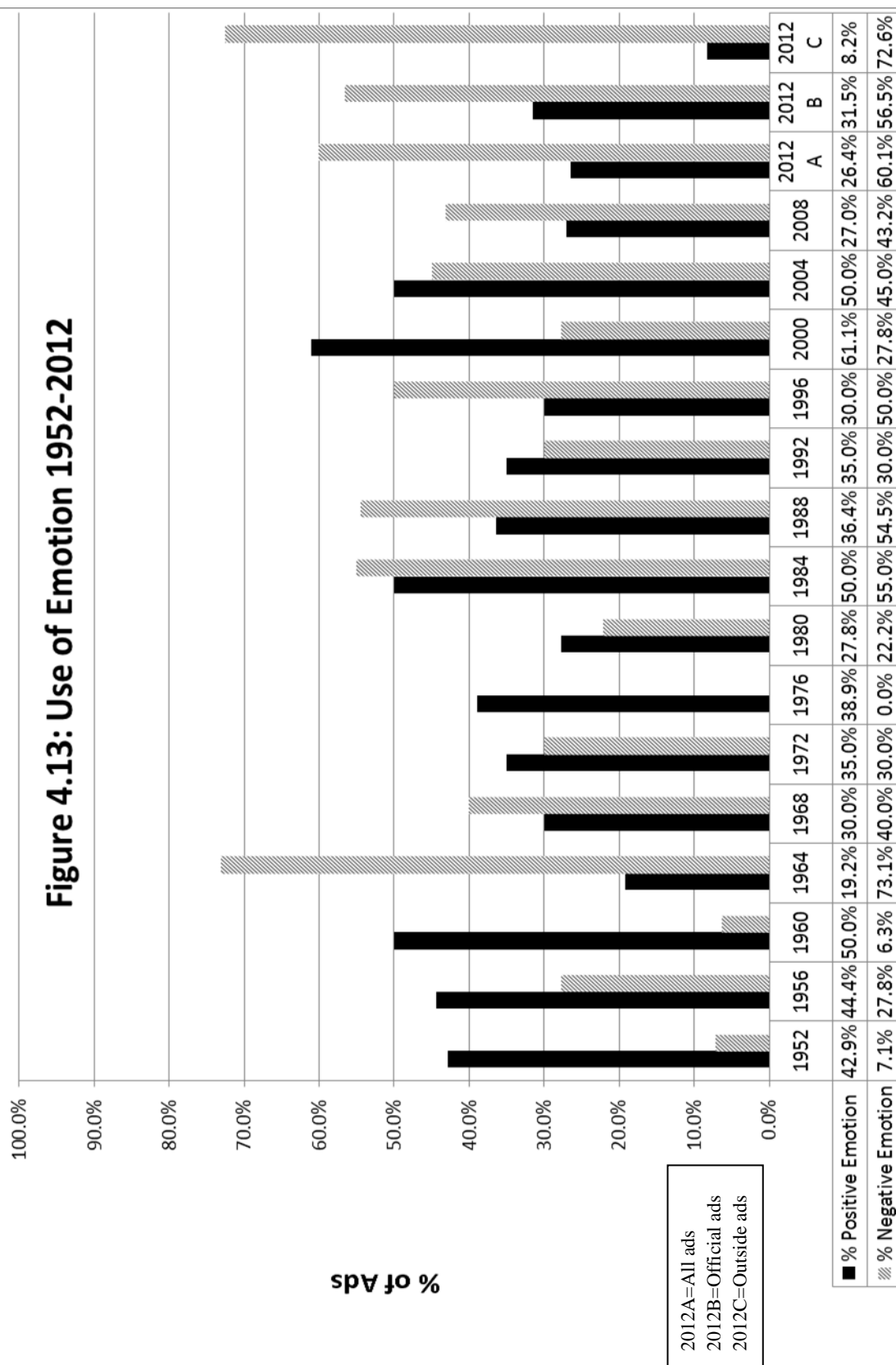
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<sup>11</sup> Most of the cross-election analyses in this dissertation focus on the differences between the 2012 presidential campaign and more recent elections like 2000, 2004 and 2008. As I explained, the technological capabilities of presidential campaigns in the twenty-first century are relatively equal, while presidential campaigns going back much further than twenty years begin to lose their comparability. Sometimes, however, it is useful to compare presidential campaign advertising data across the decades to comprehend how much campaigning has changed since the 1950s.

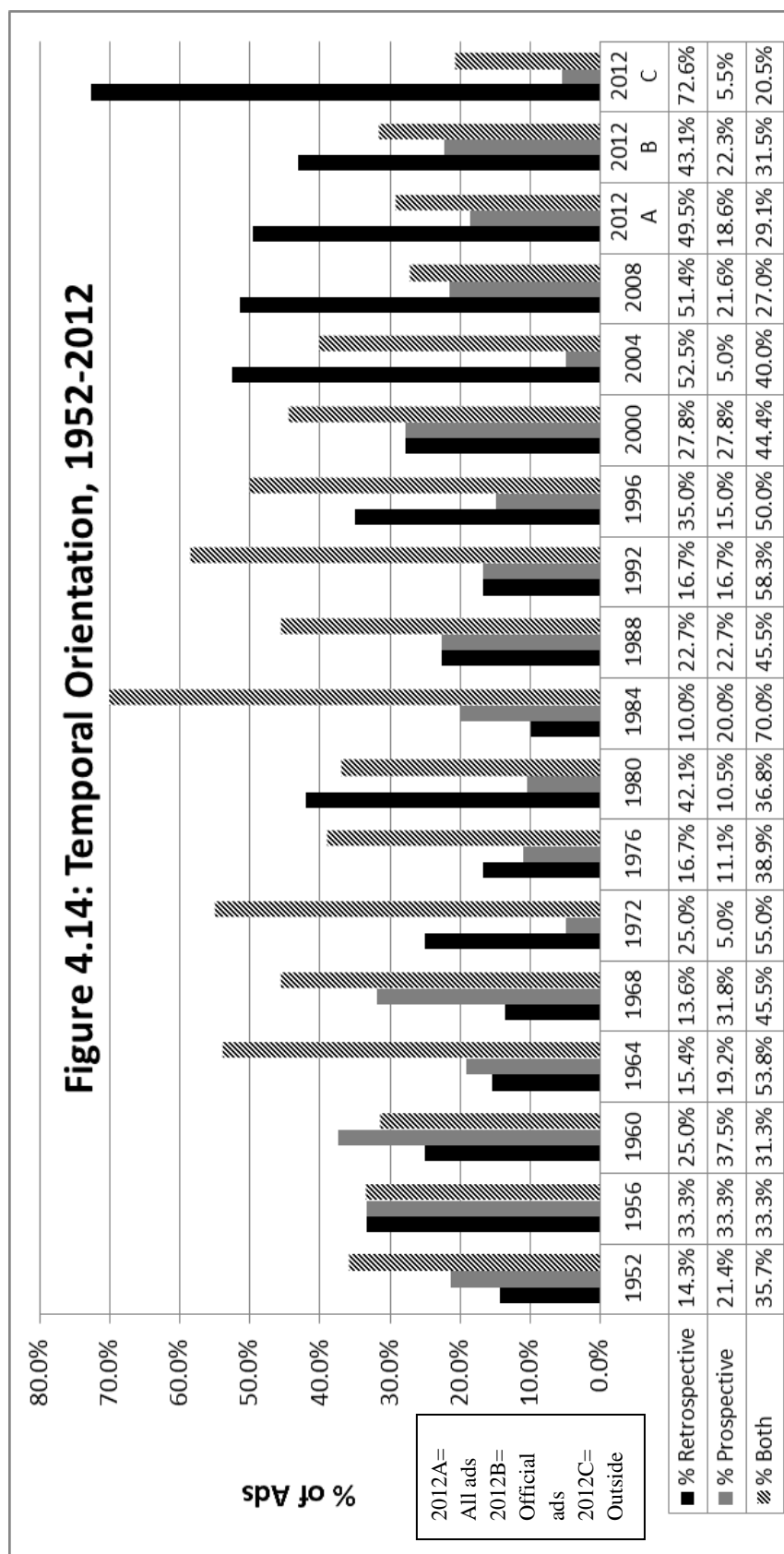
studies on campaign advertising have also concluded that roughly half of all campaign advertisements over time are promotional (i.e., Benoit, 2007; Geer, 2006). However, in the 2012 election attacking outpaced both promotion and comparison.

The sixth hypothesis ( $H_6$ ), that official campaign ads in 2012 would evoke more positive emotions than official ads from recent campaigns was not fully supported by the data. While official campaigns ads from 2012 utilized positive emotions more than official ads from 2008 (31.5% and 27%, respectively), ads from 2000 and 2004 were filled with substantially more positive emotions (61.1% and 50%, respectively) (Figure 4.13). The partisan differences were significant at the more lenient 0.10 significance level: pro-Obama 21.9%, pro-Romney 29.9% ( $\chi^2=2.72$ ;  $df=1$ ;  $p < .099$ ). Priorities USA/Action did not invoke positive emotions in any of their ads and pro-Romney groups invoked positive emotions in only 10.5% of their ads. There was a statistically significant difference between the official Obama and Romney campaigns (24.6% and 38.5%, respectively) ( $\chi^2=5.77$ ;  $df=1$ ;  $p < .016$ ). While official campaign advertisements in 2012 used positive emotions more frequently than outside groups, they still overwhelmingly used negative emotions over positive emotions. The sixth hypothesis is partially correct: official campaign advertisements from 2012 did contain more positive emotions than official ads from 2008, but were dwarfed in comparison to the use of positive emotions in 2000 and 2004.

**Figure 4.13: Use of Emotion 1952-2012**



The seventh hypothesis (H<sub>7</sub>), that official candidates in 2012 would use more prospective appeals than official candidates in previous recent elections, was partially supported by the data. Official candidates in 2012 did use exclusively-prospective appeals more than official candidates in 2008 and 2004 (2012: 22.3%; 2008: 21.6%; 2004: 5%). The official 2012 ads were particularly more prospective than the 2004 ads, but only slightly more prospective than the official ads from 2008. Additionally, official candidates in 2012 used a combination of retrospective and prospective appeals (coded as *Both*) more than official candidates in the previous presidential election (2012: 31.5%; 2008: 27%), but not more than 2000 or 2004 (44.4% and 40%, respectively).



## Discussion

### *Official Campaigns and Outside Groups, 2012*

By a significant margin (89% to 50%), outside groups produced a much higher proportion of negative attack ads than official campaigns. Although this study only has one election to analyze, it seems quite clear that outside groups are not afraid of the potential backlash of negativity that still makes official campaigns cautious. As mentioned in the previous section, the “pro-Obama” outside group Priorities USA/Action did not make a single promotional ad for President Obama. Not one. It begs the question as to whether or not outside groups in 2012 should be referred to as “pro-Obama” or “pro-Romney.” In the case of Priorities USA/Action, it would be more accurate to refer to the group as “anti-Romney” because their *entire* advertising strategy was about tarnishing the character of and raising anxiety about Mitt Romney. According to the *Wall Street Journal*, all of the \$64,799,242 spent by Priorities USA/Action was for anti-Romney attack ads (Singer-Vine 2012).

Restore Our Future, the largest pro-Romney Super PAC (527 committee), and Karl Rove’s American/Crossroads GPS (527 and 501c4) were also overwhelmingly attack-oriented, dedicating very few ads and little money to promoting Mitt Romney. Of the 57 ads produced by pro-Romney outside groups, only three were promotional ads. Restore Our Future spent \$142,097,462 on the 2012 presidential campaign: \$13,919,922 supporting Mitt Romney; \$88,572,359 attacking Barack Obama (another \$40 million attacking Rick Santorum and Newt Gingrich in the primaries). American Crossroads (only the 527 committee; the 501c4 GPS did not have to disclose its expenditures) spent

about \$48 million on the presidential race: \$3,945,025 supporting Mitt Romney; \$44,318,615 attacking Barack Obama (OpenSecrets.org).

This dissertation did not make any specific predictions or hypotheses regarding party differences because the literature did not suggest that Republicans or Democrats (official candidates or outside groups) were more negative than the other. In all three categories (official, outside and combined), however, pro-Obama campaign ads were more negative than pro-Romney ads (though some of these differences were not statistically significant). The official Obama campaign used a significantly higher proportion of attack ads than the Romney campaign, which ran counter to the expectations for incumbents and opposition candidates. Attack ads made up 56.9% of all official Obama ads while only 43.8% of official Romney ads attacked President Obama. In the 2012 presidential campaign, then, it was the incumbent president who relied more heavily than the opposition on attacking. It seems as though the challenger would be in a better position to attack the president's record while the incumbent president would be in a better position to lay out a plan for the next four years. Whatever intuition might suggest, the Obama campaign and its allies were far harsher on Mitt Romney than Romney and his allies were on the President (at least in terms of proportion of attack ads).

The official Romney campaign and the pro-Romney outside groups felt the need to run promotional ads in favor of Mitt Romney while pro-Obama outside groups did not feel a similar imperative. Mitt Romney suffered some very negative attacks from fellow Republicans in the 2012 Republican presidential primary. As the clear frontrunner for much of the primary, Mitt Romney was subject to attacks from every competitive GOP

candidate trying to reduce Romney's lead. While Newt Gingrich, Rick Perry, Rick Santorum, Tim Pawlenty, Jon Huntsman, Herman Cain, Michelle Bachmann and Ron Paul were all slinging mud at Mitt Romney during the primaries in the hopes of loosening his hold on the lead, they were in fact damaging Mitt Romney's brand name among Republican and independent voters and hurting his general election prospects.

Barack Obama was in a similar position after the 2008 Democratic presidential primary competition against Hillary Clinton and John Edwards. After Edwards left the race, Obama and Clinton viciously sparred with one another creating a noticeable rift within the Democratic Party. There was even talk of disenchanted Clinton supporters withholding their support for Obama in the general election against John McCain because of the bad-blood developed during the primary. This supposed divide within the Democratic base even led to the McCain campaign trying to poach female Clinton supporters by choosing Sarah Palin as McCain's vice presidential running mate; a plan that did not work.

As a result of the repeated body punches Romney endured during the primary, his campaign and pro-Romney outside groups were forced to repair Romney's public image by producing promotional ads when they would have preferred to simply begin their own offensive attack against President Obama. In the post-2012 election Republican autopsy titled "Growth & Opportunity Project," RNC strategists lamented the damage done to the party and the eventual candidate during the very long primary season. As a recommendation for the 2016 Republican primary, the RNC autopsy suggests that it would be "better for the Party to have a nominee selected earlier in the 2012 election

cycle rather than later” and advantageous for the Party to “move quickly into the general election phase of the campaign” (Barbour et al. 2013, 72).

The official Obama campaign did not have to deal with primary damages and was swiftly able to begin attacks on Mitt Romney while he licked his wounds. Priorities USA/Action was also able to immediately begin their attack campaign against Mitt Romney without having to do damage control for their allied candidate. Moreover, both the official Obama campaign and Priorities USA/Action were able to coopt the attack strategy laid out by Mitt Romney’s Republican primary challengers. For future studies on the tone of presidential campaign advertising in general elections, scholars should give extra attention to the primary contexts. Primary campaigns take their toll on presidential candidates and the nature of the primaries has an influence on how candidates campaign in the general election.

The results of the second hypothesis were surprising. Given the high proportion of attack ads in the 2012 election, it seemed rather evident that character attacks would be more prolific than policy attacks. Additionally, since outside groups are not sensitive to the threat of backlash like official campaigns, it seemed logical that outside groups would engage in a much higher proportion of character attacks than official campaigns. As it turned out, however, character attacks were not more common than policy attacks, and outside groups did not use a significantly higher proportion of character attacks than official campaigns.

Policy attacks made up the majority or plurality of attacks from almost all political actors in the 2012 presidential campaign. The official Romney campaign (56.9%) and pro-Romney outside groups (68.4%) relied heavily on policy attacks. The

official Obama campaign also used more policy attacks (47.7%) than character attacks (41.5%). Priorities USA/Action, however, was the only political actor to use more character attacks (62.5%) than policy attacks (37.5%) (Figure 4.8). The official Romney and Obama campaigns and pro-Romney outside groups all used character attacks in their ads, but nothing near the extent of Priorities USA/Action. It is clear from the data that the sole pro-Obama outside group was committed to undermining Mitt Romney's character more than his policy positions.

The results for the second hypothesis also reflect the issues that President Obama and Governor Romney emphasized in their campaigns. Mitt Romney campaigned on the unpopularity (amongst conservatives) of President Obama's policy accomplishments like the auto-bailouts, the economic stimulus package, and especially the Affordable Care Act. Mitt Romney and his allied outside groups also tried to place the blame for low rates of economic growth and high rates of unemployment on the President. President Obama's personal character was not a dominant theme of the pro-Romney campaign because conservatives could not possibly dislike Barack Obama's character any more than they loathed his policies (though it is entirely possible that they dislike both equally). Furthermore, many conservatives claim that criticizing President Obama's character could be misconstrued by the liberal media as racism (Clayton 2013). While it may seem like a ridiculous supposition, it might partially account for why the official Romney campaign and pro-Romney outside groups relied more on policy attacks. The most likely explanation, however, is that policy attacks against President Obama were more than sufficient to raise the anxieties of Republican voters.

The official Obama campaign certainly attacked Mitt Romney's personal character (as Romney attacked Obama's character), but policy attacks against the Republican presidential nominee made up the plurality of attacks coming from the official Obama campaign. A common talking point in President Obama's campaign was then-Governor Romney's implementation of an individual-mandate-based health care program in Massachusetts. The President criticized Mitt Romney for opposing the Affordable Care Act when he had just ten years earlier supported such legislation in his home state. This criticism was also a common theme during the Republican presidential primary. Former Minnesota Governor Tim Pawlenty is credited with coining the term "ObamneyCare" in an attempt to link the unpopularity of ObamaCare with Mitt Romney's state-based plan (Trinko 2011). Additionally, President Obama partially embraced the 99% narrative inspired by the Occupy Wall Street movement, even though he kept his rhetoric policy-oriented, resisting the temptation to bash Romney's wealth as a personal vice. President Obama routinely talked about Republicans and Mitt Romney pushing for policies that only help the richest 1% of Americans, while the bottom 99% continue to suffer in an economy rigged for the super-rich. The official Obama campaign, like the official Romney campaign, demonstrated a preference for policy attacks over character attacks.

Priorities USA/Action, on the other hand, was completely content to make character attacks the signature feature of their campaign against Mitt Romney. The pro-Obama outside group used character attacks in 67.5% of their ads and policy attacks in only 37.5% of their ads (a stark contrast to every other relevant player in the 2012 presidential campaign advertising market). Priorities USA/Action attacked Mitt

Romney's character by portraying him as an out-of-touch country-clubber that could not possibly empathize with the American people. In 2008 and 2012, Mitt Romney campaigned for president by constantly using his success in private equity as an example of the expertise he could bring to the White House. As a result of the 2008 crisis in the financial sector, the bailouts of Wall Street banks and major auto-manufacturers, the stagnant national economy, the growing income inequality between the rich and the poor, and the limited success of the Occupy Wall Street movement (success defined as influencing discourse), Mitt Romney's claim to fame as a titan of finance actually worked against him rather than for him. The American people (even conservatives) were beginning to perceive professional financiers and bankers to be suspect members of a self-interested plutocracy; not as the cherished heroes of capitalist mythology.

Mitt Romney's career at Bain Capital was absolutely the primary narrative of Priorities USA/Action's campaign against the Republican nominee. The Priorities USA/Action ad "Briefcase" takes Romney's successful record in private equity and makes it a liability:

MALE NARRATOR: Mitt Romney the businessman. Take a look at his record. Romney bought companies, drowned them in debt, many went bankrupt, thousands of workers lost jobs, benefits and pensions. But for every company he drove into the ground, Romney averaged a ninety-two million dollar profit. Now he says his business experience would make him a good president. If Romney wins, the middle class loses.

Ten years ago Mitt Romney's record in the private sector would have made him an admirable and respected member of the Republican Party elite. After the 2008 financial crisis and the rise of anti-corporate libertarianism within the Tea Party, Mitt Romney's professional career became a political vulnerability (even within his own party).

Priorities USA/Action was relentless in its assault on Romney's years with Bain Capital.

In the Priorities USA/Action ad “Donnie,” viewers are shown firsthand the ‘creative destruction’ left behind after a Bain Capital buyout:

DONNIE BOX (former manufacturing employee in front of his shuttered plant): Romney and Bain Capital shut this place down. They shut down entire livelihoods. They promised us health care packages, they promised to maintain our retirement program, and those were the first two things that disappeared. This was a booming place. Mitt Romney and Bain Capital turned it into a junkyard. Just making money and leaving. They don’t live in this neighborhood. They don’t live in this part of the world. [TEXT] If Mitt Romney wins, the middle class loses.

The “Donnie” ad was a sister ad to “Understands,” the ad featuring Joe Sopic. These two ads played over and over again in Ohio, Michigan, Pennsylvania and Wisconsin: all swing states, all rust-belt states directly affected by the outsourcing of manufacturing jobs. Priorities USA/Action wanted voters to connect the dots that Mitt Romney and people like him are personally responsible for the recession, unemployment rates and long-term trends of deindustrialization.

Ads by outside groups were also filled with more negative emotional appeals and retrospective appeals than ads by official campaigns. All combined, there was no difference between pro-Obama and pro-Romney ads in their use of negative emotions. Likewise, there were no significant differences between the official Obama and Romney ads. The only significant difference regarding the use of negative emotions was between pro-Obama (93.8%) and pro-Romney outside groups (66.7%) (Figure 4.9). Pro-Romney outside groups used more negative emotions than the official Obama and Romney campaigns, so it is not as though the significant difference is due to a surprisingly low proportion of negative-emotion-eliciting attack ads coming from pro-Romney outside groups. Evidently, the consultants producing the ads for Priorities USA/Action had a much stronger opinion than the pro-Romney groups on the effectiveness of negative

emotions in campaign advertising. It is evident that Priorities USA/Action ads are built upon anger and disgust. “Understands,” “Briefcase” and “Donnie” all elicit negative emotions over the business practices of Mitt Romney and Bain Capital. The character attack that Priorities USA/Action was consistently using against Romney was laced with emotional imagery and emotional testimonies designed to make viewers angry with Mitt Romney.

Outside ads were also significantly more retrospective in orientation (72.6% to 43.1%). Outside groups vigorously attack the opposition, use negative emotions to make the messages of their ads stick, and also focus overwhelmingly on the past. If presidential elections are supposed to be forward-looking exercises that elevate the candidate with the better vision of the future, then ads by outside groups are working against this ideal-type election by counter-intuitively focusing on the bad things that have already happened (mostly the bad things that the opposition has done). It is unlikely that ad consultants for outside groups are explicitly deciding to concentrate on the past rather than the future. Instead, by deciding to focus their efforts on attacking the opposition, outside groups were focusing on the past by default. As Geer (2006) observed, there seems to be a direct correlation between attacking and retrospection. It is more difficult to attack your opposition for what they have not yet done. It is far easier to point out the blemishes and blunders of the opposition’s past.

While Priorities USA/Action made a surprising amount of negative emotional appeals and pro-Romney outside groups made a much higher proportion of retrospective appeals, it is likely that none of the groups consciously made the decision to use an inordinate amount of emotion or retrospection. Negative emotions and retrospection

correspond with the specific types of attacks that Priorities USA/Action and pro-Romney outside groups were utilizing. Negative emotions are very useful when making character attacks against Mitt Romney, as are retrospective appeals when making evaluative judgments of President Obama's first four years.

Furthermore, it was surprising that the official Obama campaign and Priorities USA/Action were both more prospective in their ads than either the official Romney campaign and pro-Romney outside groups. Given that Priorities USA/Action issued more attack ads than pro-Romney groups, it seemed as though pro-Romney groups would have far more prospective ads. It seems as though prospective appeals do not correspond to promotional ads in the same way that retrospective appeals correspond to attack ads. Prospective appeals can just as easily be used as an instrument of attack (i.e., imagine how horrible the future will be if candidate X is elected).

### *Official Campaigns in Historical Perspective*

As expected, official campaigns in 2012 used a lower proportion of attack ads than in 2008. It is unclear if this was the result of the surrogacy of outside groups or if this was simply the natural fluctuation in tone that is observed throughout the history of campaign advertising. Official campaigns also used more comparative ads than official campaigns in 2008 and 2004, perhaps as a result of using fewer attack ads. Official candidates in 2012, however, used fewer promotional ads than every presidential election since 2000. It was my prediction that official campaigns would use more promotional ads as outside groups began to handle the burden of negative attack advertising. Much to my surprise and dismay, official campaigns in 2012 continued their downward trend of

decreasing the proportion of promotional ads (2012: 21.9%; 2008: 29.7%; 2004: 32.5%; 2000: 50%). In theory, the rise of outside groups provided official campaigns with the perfect opportunity to outsource negative attack ads while simultaneously increasing the proportion of promotional ads. Official campaigns in 2012 did increase the proportion of comparative ads, which is in itself a small victory for opponents of negative campaign rhetoric. But the fact that promotional ads continued to decline in 2012 is indicative of an increasingly opponent-centric presidential campaigning strategy that is concerning to those hoping for a more civil political discourse.

The use of emotions in ads, in general, is not necessarily on the rise. While negative emotions are increasing in popularity, the use of positive emotions is not keeping pace. Official campaign ads from 2012 did use a higher proportion of ads with positive emotions compared to the 2008 presidential election (31.5% to 27%), which might seem like a good sign of civility and good days to come at first glance. Compared to the 2000 and 2004 campaigns, however, it becomes very clear that official campaign ads in 2012 are substantially lacking in positive emotions. In the 2000 and 2004 elections, 50% or more of the official campaign ads evoked positive emotions. These two presidential campaigns are not exactly remembered for their cheery nature. The major swing from positive emotions to negative emotions in the last twelve years is a very interesting development in the use of emotional communicative strategies. Hope, pride, humor and compassion are typically considered the more enjoyable and pleasant emotions, but it seems that fear, anger, disgust and sadness are more effective instruments of persuasion and learning.

The pro-Romney ads of 2012 were slightly more positive than the pro-Obama ads (29.9% to 21.9), but this difference was not statistically significant. Pro-Romney ads were less negative in emotion and tone than pro-Obama ads, so it makes sense that pro-Romney ads would be 9% more positive than pro-Obama ads. Pro-Romney outside ads used positive emotions in 10.5% of their ads, primarily within the few promotional and comparative ads they produced. While the majority of presidential elections since 1952 have been full of positive emotion, the trend in the twenty-first century is moving towards less positive emotions and more negative emotions. Voters are still experiencing some campaign ads that evoke hope and pride, but mostly ads are an attempt to scare people into voting against something, not for something. If consumer advertising trends are any indicator of what campaign advertising might try next, it is possible that positive emotions could find their way back into campaign ads in the form of humor. Republican presidential candidate Herman Cain's primary campaign contained several humorous ads.

It is clear that if voters want a political vision for the future, official campaign ads are their best bet. Official campaign ads from 2012 were slightly more prospective than official ads from 2008 (22.3% to 21.6%), and overwhelmingly more prospective than the official ads from 2004 (22.3% to 5%). This is not to say, necessarily, that the elections of 2008 and 2004 were less forward-looking. The ads from the 2004 presidential election, for instance, used a combination of prospective and retrospective in 40% of their ads, compared to just 32% in 2012 and 28% in 2008. From 1984 to 2000, the combination of prospective and retrospective orientations in campaign ads was the norm. In each of the presidential elections during this time period, the combination of past and future orientations was the plurality or majority perspective (1984: 70%; 1988: 45%; 1992:

58%; 1996: 50%; 2000: 43%). By combining temporal perspectives within an individual ad, viewers are asked to compare the past with their desired or feared vision for the future. Here is what the past was like (good ol' days, or dark days past), and here is what the future could be (bright and shiny, or grim and depressing).

Given the emotions involved in comparing the past and the future, it is interesting that the combined prospective and retrospective orientation is not always the most common appeal. Perhaps the explanation is contextual. Some campaigns are about the past (2004: September 11<sup>th</sup> and the invasion of Iraq), some are about the future (1960: civil rights, the cold war, the space race), and some are about comparing and contrasting the past with the hopes for the future (1984: past economic recession and future economic growth). In the twenty-first century, looking backwards and pointing fingers seems to be the dominant theme of presidential campaigns. Very few campaign ads in the twenty-first century give Americans the shining-city-on-a-hill hope for the future. Instead, campaign ads lay all of the nation's problems at the feet of the opposition's past mistakes and poor decisions. Official campaign ads were already following the escalating retrospective trend before the emergence of outside groups. With the proliferation of outside groups in presidential campaigns, this trend will predictably continue.

## **Conclusion**

This dissertation essentially sought to answer one question: Are outside groups acting as negativity surrogates for official campaigns? Put another way: Are official campaigns outsourcing their attack ads, negative emotional appeals and retrospective orientations to outside groups that are free from the constraints of backlash? The answer:

not really. Outside groups are definitely living up to their end of the informal and non-coordinated bargain. Outside groups are the most negative and backwards-looking actors in the game, by far. Official campaigns, however, did not show any noticeable signs of adaptation to the emergence of outside groups in the presidential campaign market. Official campaigns in 2012 did not seem to alter their approach to tone, emotion or perspective in campaign ads from the Republican and Democratic presidential campaigns from 2000, 2004 and 2008.

My assumption was that the threat of backlash from the public was a potent force that made official campaigns tread very lightly in their use of negative attack ads. The rise of outside groups in campaign advertising seemed like the perfect opportunity for official campaigns to reduce their exposure to potential backlash by allowing outside groups to be extremely negative and retrospective (proportionately) while they became more promotional, comparative, positive and/or prospective. This was not the case in 2012.

Negative campaign communications have their place in electoral politics. Voters should be informed of the shortcomings and wrongdoings of all candidates in a race. One could argue that candidates in an election have a responsibility to shine a light on the opposition's record and platform. Getting those negative campaign messages to stick in the minds of voters has recently meant hyperbolic and outlandish accusations that are memorable even to the politically indifferent. While exaggerated and emotionally-charged messages are capable of successfully priming voters, such ads also create vulnerability for the official campaign that produces the message. It would be rational for official campaigns to use outside groups as negativity surrogates because such groups

are not vulnerable to public opinion or electoral accountability. Furthermore, the negative campaign tactics of outside groups can still create a negative opponent-centric message that resonates with voters.

The data suggest that official campaigns did not adjust their campaign messaging game-plan to accommodate the new role of outside groups. Apparently, minimizing potential political risk is not worth losing control of the official campaign message. Official campaigns could become more promotional, positive and prospective, but they are choosing to continue utilizing a negative opponent-centric campaign strategy that allows them to manipulate public perceptions of the opposition. Again, outside groups are fully capable of performing this task on their own, but official campaign strategists evidently consider control of the negative communications to be essential to victory.

I incorrectly presumed that a sort of campaign-tone equilibrium existed that balanced the amount of attacks, negative emotions and retrospective appeals with promotion/comparison, positive emotions and prospective appeals. It seems clear that no such equilibrium exists. Official campaigns did not feel compelled to balance or complement the communications of outside groups. In fact, official campaigns in 2012 presented very comparable messages to official campaigns in 2008. The appearance of outside groups did not have much an effect on the behavior of official campaigns.

So what role do outside groups play in the overall campaign advertising market if they are not fulfilling the role of negativity surrogates? Outside groups are agents of negativity: they are freelancers that attack the opposition, appeal to negative emotions and focus on the past with a greater intensity than official campaigns. If the presidential campaign of 2008 (the most negative campaign on record) can be characterized as

hundreds of millions of dollars all shouting negative obscenities through megaphones, the 2012 presidential campaign simply added billions of dollars, more megaphones and new voices.

Official campaigns and outside groups have several things in common: both have to furiously raise money, hire consultants to produce and poll-test campaign communications, and efficiently spend their limited resources to maximize their market gains. Additionally, and more importantly, the individuals behind the scenes of official campaigns and outside groups are the same. Pro-Romney outside group Restore Our Future is staffed and managed by personnel from Mitt Romney's 2008 presidential campaign. American Crossroads/GPS is staffed and managed by Karl Rove and many others from the George W. Bush campaign team. Even pro-Obama outside group Priorities USA/Action is run by personnel from Barack Obama's 2008 campaign. It should not be a surprise, then, that outside groups and official campaigns both prioritize the same campaign strategies. Outside groups just take the opponent-centric approach of official campaigns to its logical extreme.

The analyses in this chapter enable me to make the empirical statement that official campaigns in the 2012 presidential election did not adjust or alter the content or tone of their campaign ads to accommodate the emergence of outside groups. The theoretical component of this paper empowers me to make the normative statement that official campaigns *should* adjust their advertising strategy to the influence of outside groups in future campaigns. Just because official campaign in 2012 failed to exploit the surrogacy possibilities of outside groups in 2012 does not mean that they will neglect the opportunity in the future. Perhaps a practice campaign was necessary for official

campaign professionals to comprehend the role that outside groups would play in a presidential election. Now that outside groups have demonstrated their full potential, campaign strategists in 2016 and beyond should reconsider their own official advertising strategies to reflect the new role for outside groups.

## CHAPTER 5

# OUTSIDE GROUPS BEYOND 2012: ENDANGERED SPECIES OR PROVEN WARRIORS?

As the second chapter made clear, the history of campaign finance in the United States has been a rollercoaster ride of ups and downs, ebbs and flows, one step forward and two steps back. From the earliest efforts in the late nineteenth and early twentieth centuries that sought to prohibit banks, unions and corporations from buying the loyalties of elected officials to the Bipartisan Campaign Reform Act of 2002 that sought to balance the power of wealthy contributors with a more robust public financing regime and limitations on outside group spending, advocates for free and fair elections have experienced moments of triumph where it looked as though the amount of money in elections was going to start declining after more than a century of constant growth. For

all the campaign finance reform victories achieved legislatively, however, there seems to be at least twice as many Supreme Court cases that strip away provisions from campaign finance laws that make it easier for more and more money to continue flowing into elections. The Supreme Court's decision in *Citizens United* (2010) and the D.C. Court of Appeals' decision in *SpeechNow* (2010) are but the latest campaign finance developments that opened the floodgates to billions of additional dollars into campaigns, mostly through outside groups.

The 2010 court decisions unleashed outside groups to wage their own independent advertising campaigns in the 2012 presidential election with unprecedented amounts of money that would make official candidates from just eight years earlier look on with envious eyes and jealous hearts. Never before had the world of presidential campaign advertising experienced such an intense and potent presence from outside groups. To say the least, this sudden influx of outside group money and influence was not anticipated by political professionals or the niche of political science scholars who study campaign advertising. Political professionals perhaps half expected a kind of Swift Boat Veterans for Truth on steroids, but certainly not the comprehensive and impressive campaign advertising arsenals released by outside groups. As the third chapter illustrated, political science did not have a thorough understanding of the role outside groups could potentially play in a presidential campaign. Political scientists had never before observed a presidential campaign wherein outside groups were even capable of producing more than a few ads. The existing literature on campaign advertising, however, did provide some clues as to what to expect from outside groups. These clues and expectations were provided by the few examples of outside groups throughout

history combined with the existing knowledge of how official candidates behave in accordance with the incentives and constraints placed upon them by the electorate and the court of public opinion.

Just as they were in previous presidential campaigns, outside groups were clearly agents of negativity in the 2012 presidential election. As one prominent Democratic donor explained, “Super PACs are the drone missiles of the political scene. Their mission is a destructive one, by definition” (Freedlander 2012). It was clear that the primary objective of outside groups in 2012 was attacking the opposing candidate, which was not a surprise given the tone of outside groups in past campaigns. Based on previous examples of outside groups advertising within presidential campaigns, I predicted that outside groups would be more negative in tone and emotional appeals and more retrospective in orientation than official campaign ads in 2012. The results reported in chapter four demonstrate that outside groups were considerably more negative and retrospective than official campaigns. While the hypotheses concerning outside groups were all correct, the hypotheses concerning how official campaigns would adjust to the sudden prominence of outside groups were all rejected. Given the threats of backlash and the public’s growing distaste for attack advertising, I fully expected official campaigns to outsource their negative campaign messaging to outside groups that are not susceptible to backlash from the public. I predicted that outside groups would act as negativity surrogates for official campaigns, but this turned out not to be the case. Outside groups were acting as freelancers, not surrogates. Official candidates did not seem to change much at all from 2008 to 2012. Official presidential campaign ads were just as negative and retrospective as 2004 and 2008.

After one election post-*Citizens United*, it is safe to say that outside groups are predictably and measurably negative in their approach to advertising. Perhaps outside groups believe that negative ads are more effective in moving poll numbers (even though the research suggests it is not so simple), and they want to make the most efficient use of their resources. Maybe outside groups are reluctant to produce promotional or comparative advertisements because they do not want to give the appearance of coordination with official campaigns (even though the FEC made no such ruling). It is also conceivable that the negative opponent-centric advertisements from outside groups are the result of a negative opponent-centric approach to soliciting campaign contributions. Wealthy political contributors to outside groups might be more motivated to part with their own money if they truly despise the opposing candidate (which is not very hard to imagine after the 2012 campaign).

The purpose of this dissertation was not to seek the precise explanation for *why* outside groups were so overwhelmingly negative in their first presidential election post-*Citizens United*, but a very interesting follow-up study could use qualitative methods to explore the question more thoroughly. Interviews with outside group personnel (particularly the advertising consultants) would be most enlightening. A strong explanatory argument can be made, however, that outside groups are operating under different regulatory conditions and political constraints than official campaigns, and this can partially account for why outside groups are so different in their approach to campaign advertising. Outside groups and official candidates are all playing the same game, but the consequences, pay-offs, risks and rules of the game are different for each.

Continuing to study outside groups and their influence on official campaigns and election outcomes is a worthwhile research endeavor that will expand the scholarly understanding of campaign advertising and its wide variety of consequences, pay-offs, risks and rules. Unfortunately, the continuing existence and future utility of outside groups in presidential elections is far from certain. Studying outside groups in future elections and learning more about how regulatory dynamics influence campaign advertising strategies (of outside groups and official candidates) might not be possible. Several developments since the 2012 election threaten the very foundation on which outside groups are built. In addition to the great disappointment felt by conservative donors towards conservative outside groups for failing to deliver a victory, several political institutions are poised to impose major alterations to the campaign finance arena that could render outside groups obsolete.

After examining the seemingly null effects of outside groups in the 2012 election outcome and the post-election activities of outside groups, this final chapter discusses the possible ramifications of (i) increased bureaucratic oversight over outside groups following the IRS “scandal,” (ii) the introduction of campaign finance amendment proposals and legislation from states and Congress, and, perhaps most importantly, (iii) a Supreme Court ruling on contribution limits that all have the potential to make outside groups less attractive contribution vehicles through increased regulation, transparency and disclosure.

The IRS scandal brought the labyrinth of campaign finance regulation to the top of the national political agenda for several weeks in 2013 (though not for the right reasons). The scandal initiated a bipartisan discussion about how the IRS is supposed to

regulate the political activities of 501(c)4 social welfare organizations if they do not have the authority to enforce existing law. While no changes have been made to existing IRS regulations of 501(c)4 organizations, the additional scrutiny and awareness surrounding these groups will likely make them less attractive intermediaries for political contributors wishing to remain anonymous (that is, after all, the only benefit of such groups). Should the IRS or FEC be tasked with regulating 501(c)4s just like 527s, the capabilities of outside groups to raise unlimited anonymous money would be severely diminished. Additional regulation of outside groups could change the campaign advertising landscape for future elections, and, therefore, jeopardize scholars' ability to easily compare and contrast outside group advertising across elections.

Many state governments have already passed resolutions calling for an amendment to the U.S. Constitution that would end corporate personhood and clarify the legal definition of free speech to exclude protections for campaign contributions and expenditures for both official candidates and outside groups. Several amendment proposals have also been presented in both the House and the Senate that call for measures that would overturn the *Citizens United* decision. While constitutional amendments are obviously very difficult to ratify, there does seem to be enough early momentum from both parties at the state and national level to at least create a serious national discussion about the possibility of amending the Constitution to limit the influence of outside groups in campaigns. This is definitely a long shot, but if it were successful outside groups would no longer be able to raise and spend money on campaign advertising like they did in 2012. The phenomenon of outside groups in presidential

campaigns would be relegated to historical footnotes and campaign advertising would return to pre-*Citizens United* expectations.

Legislation has also been introduced in both states and Washington, D.C. that would increase disclosure requirements on 527 committees and establish disclosure requirements for 501(c)4s. Disclosure requirements for 501(c)s would likely divert a lot of money back to 527 committees and chase anonymous dark money out of campaign finance altogether. Without the ability to collect anonymous contributions, 501(c)4 groups would become useless actors in campaign politics. Furthermore, without 501(c)4 groups, 527 committees would be unable to tap into the reserves of dark money that 501(c)4s currently launder. While states are likely to have more success than Congress in passing campaign finance legislation to mitigate the fundraising abilities of 501(c)4s, such state-based laws would only have an influence on outside group activity within specific state media markets.

Finally, the Supreme Court's hearing of oral arguments in *McCutcheon v. Federal Election Commission* (2013) regarding the constitutionality of individual aggregate contribution limits is by far the biggest source of uncertainty for the future existence of outside groups. The Supreme Court's decision in *McCutcheon* has the potential to be as revolutionary as *Citizens United*. If the Supreme Court strikes down aggregate contribution limits, more money will flow into the coffers of official candidates and, by default, less money will flow into outside groups. There is even some speculation that the Supreme Court could get really aggressive in its decision and completely overturn all contribution limits. Should the former scenario turn out to be true, outside groups will lose a lot of their appeal and will become less influential in future elections. If the latter

scenario turns out to be true, outside groups might disappear altogether as official candidates would be able to collect contributions without limit from the wealthy individuals who are currently compelled to donate their excess political money to outside groups. Either way, the fate of outside groups hangs in the balance of the Supreme Court's *McCutcheon* decision.

Any of these developments has the potential to completely change the campaign advertising market in future elections. If 501(c)4s are required to disclose their contributors, then alliances of outside groups like American Crossroads and Crossroads GPS will no longer be necessary or useful because 501(c)4s will no longer be providing a valuable service. If contribution limits are expanded to include outside groups or eliminated altogether, outside groups will very likely cease to exist and the electioneering professionals operating outside groups will return to their former jobs as consultants and strategists for official campaigns. I wish I could simply extrapolate the trends of outside group advertising from 2012 into expectations for the 2016 campaign cycle, but alas, several plausible scenarios exist wherein enhanced regulatory efforts could remove outside groups from the presidential campaign advertising market. If that is the case, then the study of outside groups in presidential campaigns will be limited to just the 2012 election. If, however, outside groups somehow slip through the gauntlet of political and judicial developments currently standing in their path, then the story of outside groups in future elections will be all the more interesting.

## **Money Well Spent?**

Outside groups raised unprecedented sums of campaign cash in 2012 (much of it anonymous and untraceable) and used it to finance their own proxy campaigns, complete with consultants, pollsters, fundraisers, advertising producers, and thousands of ad spots in swing states. Political operatives like Karl Rove and political financiers like the Koch brothers bet big that outside groups would be the deciding factor in securing election victories for Mitt Romney and Republican congressional candidates, and in the process become the new game-changers in American politics. Instead, Super PACs and political non-profit groups came up empty on election night. The outcome of the 2012 election cycle kept President Obama in the White House, the Republicans in control of the House (minus six seats), and the Democrats in control of the Senate (plus two seats). After \$6 billion was raised and spent (more than \$2.5 billion on the presidential election alone), the division of power remained unchanged.

Aside from the barrage of attack ads that were unleashed, outside groups seemed to have a null effect on the 2012 election results. In the days leading up to the election, many were uncertain of the future of outside groups in future elections. Conservatives were somewhat convinced that Super PACs played a “key role in keeping the presidential race relatively close, especially during periods when Romney’s campaign was financially constrained” (Stanage 2012). If outside groups are incapable of winning the election for a candidate, perhaps they can be depended upon to act as a crutch in order to maintain a competitive balance in a tight race. A Democratic strategist and pollster expressed concern over the staggering amount of money that was spent by outside groups and the utility of such spending: “[Y]ou wonder about the law of diminishing returns. Potential

voters are bombarded with so many ads that it becomes hard to break through” (Weber 2012). Maybe adding more fuel to the fire does not increase advertising effectiveness, but instead causes a much bigger flame that pushes people away from the campaign. Or, in the very least, perhaps the extra influence of outside group advertising simply falls on deaf ears.

The 2012 election results and the role of outside groups in the campaign left observers with more questions than answers. Was it worth all that money? Will outside groups be back in 2014 and 2016? Was their defeat in 2012 their death knell? What does this mean for campaign finance reform? Will every election continue to cost more and more with little to no noticeable effect? These are all good questions whose answers will likely be known in the next two to four years when outside groups begin producing ads for the next midterm and presidential campaigns.

What is more interesting, however, is that outside groups are already proving to be more than just campaign actors in the year after the 2012 election. In the months following the 2012 elections, outside groups began staking out a post-election position; the regulation and transparency of outside groups (specifically 501c4s) came under serious scrutiny during the IRS “scandal” of 2013; and campaign finance reform advocates from both sides prepared for the next big bout. Each of these developments contributes important information that enables scholars to speculate on the future prospects for outside groups in campaigns.

## **Outside Groups after the 2012 Election**

In the days following the campaign, political journalists churned out headlines like “Money Can’t Buy Happiness, or an Election” (Marcus and Dunbar 2012), “Karl Rove’s Election Debacle, Super PAC’s Spending Was Nearly for Naught” (Isikoff 2012), and “Super PACs, Outside Money Influenced, but Didn’t Buy the 2012 Election” (Blumenthal 2012a). There was serious speculation that outside spending in 2012 was an experiment in futility. Maybe outside groups were a fashionable fluke that would not return in 2014 or 2016. On the contrary, outside groups set about immediately after the 2012 elections to consolidate their position, take account of their assets, and plot their post-election purpose.

Smaller and relatively unknown outside groups that focus on congressional and state campaigns or a specific policy issue have been waging a continuous advertising war against elected officials aimed at publicizing the elected officials’ undesirable votes on proposed legislation. In May 2013, for example, two 501(c)4 groups, “Mayors Against Illegal Guns” (Michael Bloomberg’s group) and “Americans for Responsible Solutions” (Gabrielle Giffords’ group), launched a series of attack advertisements in New Hampshire against first term Republican Senator Kelly Ayotte for her nay vote on the Manchin-Toomey gun control bill. Conservative 501(c)4 American Future Fund (Koch brothers), a presidential campaign heavyweight, came to Senator Ayotte’s defense with a \$250,000 ad buy in New Hampshire which casts her as strong on crime and pro-Second Amendment (Jaffe 2013). Nick Ryan, president of American Future Fund (AFF) explained that:

AFF will stand up for conservative principles and we are prepared to go toe-to-toe with extreme liberal groups that want to mislead voters and

pollute the airwaves about good conservatives like Senator Ayotte. She is a public servant that votes on her principles—even in the face of an onslaught of slimy ads run and funded by liberals in New York City and Washington, D.C. (Burns 2013b).

What is most interesting about this example is that New Hampshire airwaves were full of pro- and anti-Ayotte ads produced by outside groups, yet Senator Ayotte is not up for reelection until 2016. Other less-well-known outside groups have launched a similar ad campaign against Republican Senator Ron Johnson from Wisconsin, who is also not up for reelection until 2016 (Kraushaar 2013). Campaign ads aired three years before the election are unlikely to have an impact on reelection prospects, yet groups supporting both political parties are eagerly spending money as though it were campaign season.

Three months prior to AFF's defense of Senator Ayotte, the group also produced a series of ads that aired in Washington, D.C. television markets to oppose former Senator Chuck Hagel's confirmation as Secretary of Defense (Burns 2013A). It is obvious that the ads' only intended viewers were Washington insiders and, more specifically, United States senators. AFF spent tens of thousands of dollars on campaign ads to let Republican senators know that conservatives should oppose Hagel's confirmation because of comments he made years earlier about Israel. AFF did the same thing in May 2013 when they bought ad spots in D.C. markets to attack, of all people, White House Press Secretary Jay Carney over the Obama administration's surveillance of American reporters (Byers 2013). The ad questioned how Jay Carney's conscience (as a journalist) allowed him to continue working for the Obama White House (how this ad had any electoral or political impact is uncertain). These three examples (i.e., Ayotte, Hagel and Carney) demonstrate that AFF has no intentions of laying low during the political off-season (if there is such a thing anymore). This particular outside group is

truly a product of the era of the permanent campaign. They are releasing “campaign” ads without an election.

Karl Rove’s group American Crossroads/GPS produced an ad in May 2013 attacking Hillary Clinton in the wake of the Senate’s investigation into the Benghazi embassy incident. While the ad was released three years before the next presidential election, some have called the Crossroads ad “the earliest attack ad in presidential campaign history” (Avlon 2013). The ad features video clips from former Secretary of State Clinton’s testimony before the Senate panel, particularly her infamous rhetorical question, “...was it because of a protest or guys out for a walk who decided they’d kill some Americans? What difference at this point does it make?” The narrator of the ad follows Clinton’s question by saying, “The difference is a cover-up and four American lives that deserve the truth” (Johnson 2013).

Like the AFF ads supporting Senator Ayotte or opposing Chuck Hagel, the Crossroads ads attacking Hillary Clinton are somewhat mysterious in their intent. Hillary Clinton had not announced that she was even running for the Democratic nomination in 2016, yet American Crossroads/GPS preemptively attacked the presumed Democratic primary frontrunner three years before the election. Bill Kristol, the conservative editor of *Weekly Standard*, denounced the anti-Hillary ads on *FOX News Sunday*:

I do not like these conservative Republican groups putting ads out about Hillary Clinton. What is the point of that? That is just fundraising by American Crossroads and other groups. It’s ridiculous. There’s no campaign going on. Let’s pull the partisanship back (Cirilli 2013a).

Karl Rove was quick to take to the airwaves to question Kristol’s political loyalty: “I understand that criticism...is going to immediately [come from] Democrats...[but] I’m surprised Bill Kristol...would join in the chorus.” The objective behind the ad was clear,

but the tactics and strategy behind the Clinton-Benghazi ad were confusing even to conservative commentators. Kristol is likely correct that such ads are meant more for attention-getting and fundraising for outside groups than actually influencing election outcomes.

American Crossroads/GPS brief foray into off-season campaign advertising allowed the group to test the political waters in 2013, and it seems as though they decided to lay low and stay out of sight after the Clinton-Benghazi ad. A spokesperson for American Crossroads/GPS explained that

when we engage, we have a long-term sustained strategy we're pursuing rather than spending \$80,000 in March of the off year. Early spending is important but it needs to be sustained as part of a longer-term strategy. These short-term skirmishes are more designed for a brief impact, and to generate fundraising, and brand positioning (quoted Kraushaar 2013).

While many outside groups are choosing to spend money in the off-season on ads aimed at elected officials or specific policy positions, American Crossroads/GPS decided to take a break during the off-season to prepare for the 2014 and 2016 elections. According to a spokesperson for the group, American Crossroads/GPS will reemerge to begin its fundraising efforts in earnest during the fall of 2013.

The official 2012 Obama campaign and the 501(c)4 "Organizing for America" (Obama's official 2008 campaign reorganized into a non-profit group) merged into a new 501(c)4 group called "Organizing for Action" (OFA). The group "raised \$20.8 million from more than 355,000 donors since it formed" at the beginning of 2013 (Blumenthal 2013h). OFA has also jumped into the off-season campaign advertising market with a significant ad campaign (a "seven-figure commitment") touting the provisions of the Affordable Care Act (Stein 2013a). While American Future Fund and American

Crossroads both engaged in local media market ad-buying strategies to engage in off-season politics, OFA bought ad spots on cable television networks like CNN, MSNBC, Bravo and Lifetime in order to raise national awareness and enthusiasm for the Affordable Care Act among liberals and women.

The Republican outside group Americans for Prosperity (AFP) responded with their own national ad campaign that raised suspicion and anxiety about the implementation of the Affordable Care Act. Another Koch-funded outside group, “Generation Opportunity,” unleashed a major nationwide ad buy in September and October of 2013 in the weeks leading up to the launch of the health insurance exchanges. The ad features a very “creepy-looking Uncle Sam peering between a woman’s legs at a gynecologist’s office” (Shear 2013). The ad was part of the “Opt Out of ObamaCare” campaign, which encouraged uninsured Americans (primarily young Americans) to opt-out of the Affordable Care Act and pay the fine instead. The anti-ObamaCare campaign was a cooperative effort involving several influential conservative outside groups including Tea Party Patriots, FreedomWorks, Club for Growth, and Young Americans for Liberty (Stolberg and McIntire 2013). The initiative included millions of dollars in TV ads, grassroots door-knocking, campus activities, town hall forums and protests throughout Washington, D.C.

Even though Hillary Clinton has not officially announced that she will run for president (as of this writing in fall 2013), long-time Clinton supporters and former Clinton campaign personnel have already laid the foundation and begun the political ground game for a pro-Clinton Super PAC called “Ready for Hillary.” The group has

hired 270 Strategies, the consulting firm that organized Obama for America's grassroots political mobilization efforts. Jeremy Bird, co-founder of 270 Strategies, explained that

[b]y building a strong volunteer organization now that connects with young people, women, and voters in key minority communities, the Ready for Hillary team is ensuring that if and when Hillary makes any decision about her political future, she'll have the grassroots army she needs to pave her way to victory and the White House (Haberman 2013).

Ready for Hillary is staffed by strategists and consultants from Clinton's 2008 Democratic presidential primary campaign and supported (informally at the moment) by many top Democratic operatives. Among the notable supporters of Ready for Hillary are former California congresswoman Ellen Tauscher, former 2008 Clinton advisor and former White House Deputy Chief of Staff Harold Ickes, the incomparable James Carville, former White House political director Craig Smith and former Michigan Governor Jennifer Granholm (Romano 2013). These individuals are big names within the Democratic Party and undoubtedly give Ready for Hillary some much needed credibility and legitimacy that will assist their fundraising efforts. Getting Ready for Hillary up and running serves two purposes: it builds momentum and anticipation for Clinton's eventual announcement of candidacy, and it provides Clinton a thermometer for the public's support for a Clinton presidency.

Ready for Hillary has not aired any television ads at this point, instead concentrating their efforts on organizing potential donor lists and a grassroots volunteer infrastructure. They are, of course, accepting campaign contributions even though they are not actively or aggressively engaged in fundraising just yet. In fact, the group has already raised several million dollars since the beginning of summer 2013 from more than 10,000 donors (O'Connor 2013; Klein 2013). Many of the big name donors were

important campaign bundlers for President Obama's 2012 reelection (Good and Walshe 2013).

In response to the rise of Ready for Hillary, a group of conservative activists created "Stop Hillary PAC," an outside group using the Republican anxiety of a Clinton presidency as a mechanism to raise money (Peoples 2013). Stop Hillary PAC exploited a major fundraising opportunity in September 2013 when Hillary Clinton spoke at a Democratic fundraiser for her former campaign chairman and Virginia gubernatorial candidate Terry McAuliffe. Stop Hillary PAC sent out a fundraising email to Republican donors that said, "Hillary Clinton's close friend and political ally Terry McAuliffe is running for Governor in Virginia and Hillary is making a special trip to Washington to give a boost to his campaign. Any friend of Hillary's is no friend of ours and he must be stopped. Period..." (Cottle 2013). The executive director for America Rising, the group behind Stop Hillary PAC, explained that their involvement in the Virginia gubernatorial race was for "message testing" to see if Republican voters embrace the political cronyism narrative that could be used against Hillary Clinton in 2016.

Priorities USA/Action has been reorganizing and recalibrating its operations to become the primary outside group behind Hillary Clinton, the presumed 2016 Democratic presidential nominee. This is an important development in presidential politics because it is a passing of the torch from President Obama and his campaign personnel to Hillary Clinton and her campaign infrastructure facilitated by the restructuring and reconfiguring of existing outside groups. The torch does not need to wait to be passed from president to nominee until the 2016 DNC convention; it has already been done. As journalist Philip Rucker (2013) explains, "Refashioning itself as a

pro-Clinton super PAC would be a natural fit for Priorities, which already has strong ties to both Bill and Hillary Clinton.” Many of the top Priorities USA/Action personnel are former Clinton White House staffers from the 1990s and former Hillary Clinton staff from her years as a senator and Secretary of State. Additionally, many of the biggest contributors to Priorities USA/Action have been the biggest contributors, thus far, to Ready for Hillary.

In the days following the shutdown of the federal government in early October 2013, two Democratic outside groups, House Majority PAC and Americans United for Change (AUGC), began serious advertising campaigns against ten vulnerable Republican members of the House from competitive congressional districts (Blumenthal 2013f; McAuliff 2013b). A House Majority PAC spokesman said in a statement about the ads that “[v]oters deserve to know about their members’ role in the Republican government shutdown and their willingness to play reckless and dangerous games with our nation’s economy” (Blumenthal 2013f). The AUGC ads made certain to lay the blame for the shutdown and all of its negative ramifications on these vulnerable Republican congressmen:

[Full name of congressman] joined with Tea Party Republicans in Congress, and shutdown our government, putting hundreds of thousands of Americans out of work, putting benefits for veterans, seniors and the disabled at risk, denying cancer treatment for kids, and halting food inspections. Economists say that [full name of congressman]’s Tea Party shutdown could weaken the economy and devastate middle class families. Call Congressman [last name]. Tell him to do his job. End the Tea Party shutdown of our government.<sup>12</sup>

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<sup>12</sup> All ten versions of the ad are available through [www.americansunitedforchange.org](http://www.americansunitedforchange.org)

Every time a political moment arises (i.e., Sandy Hook, Benghazi, ObamaCare launch, government shutdown, etc.) outside groups take advantage of the opportunity and use it to attack members of Congress who are at risk.

In the year after the November 2012 elections, outside groups epitomized the permanent campaign phenomenon. Outside groups did not go away after the 2012 election. Instead, they intensified their efforts in the political off-season by focusing on fundraising strategies and producing targeted campaigns against elected officials and policy positions. The bigger and more prominent outside groups that played such a central role in the 2012 presidential campaign began gearing up for 2016 almost immediately after November 2012, even though neither party has an official nominee. Outside groups, then, might be far more than just auxiliary campaign surrogates. They might, in fact, become a permanent force in politics.

### **The IRS “Scandal” of 2013 and its Effects on the Perception of 501(c) Groups**

On May 10, 2013, Lois Lerner, the official in charge of overseeing tax-exempt groups at the IRS, publicly apologized for the “absolutely inappropriate” actions of targeting 501(c)4 groups with the words “tea party,” “patriot,” or “9/12” in their names (Goldfarb and Tumulty 2013). From the thousands of non-profit groups that applied for tax-exempt status between 2010 and 2012, the IRS flagged 298 groups for further inquiry (to see if they were running afoul of the IRS’ non-profit requirements). Of the 298 groups flagged, 94 organizations were investigated simply because of the politically charged words in their name (Eilperin 2013). Needless to say, conservatives were very upset with the admission. Jenny Beth Martin, the national coordinator of Tea Party

Patriots, said, “The IRS has demonstrated the most disturbing, illegal and outrageous abuse of government power. This deliberate targeting and harassment of tea party groups reaches a new low in illegal government activity and overreach” (Brown 2013). Senator Orrin Hatch (R-Utah) argued that the government needed “to have ironclad guarantees from the IRS that it will adopt significant protocols to ensure this kind of harassment of groups that have a constitutional right to express their own views never happens again” (Salant 2013).

The IRS carefully monitors the actions of 501(c)4 organizations’ political activities. By law, 501(c)4 groups are given tax-exempt status as “social welfare organizations.” These groups are allowed to express their political opinions so long as their “primary purpose” as an organization is not election-related. Local food pantries or domestic abuse shelters qualify as social welfare organizations because their primary purpose is helping others, thus the tax-exempt status is entirely appropriate. If a local food pantry wants to raise money from donors and use some of that money to advertise on television or radio to publicize its mission, goals or political opinions, it is entirely within its First Amendment rights to do so. The food pantry could even run TV ads criticizing elected officials for failing to take care of people in need and still not lose its tax-exempt status because, technically, the “primary purpose” of a food pantry is not political. This “pantry” could also legally raise an unlimited amount of anonymous contributions and not have to disclose the names of its contributors to the FEC or the IRS, even if it were spending tens of millions of dollars on a nation-wide campaign advertisement blitz because, technically, it is “not” a federally-regulated non-profit political organization, otherwise known as a 527 independent-expenditure committee.

Recall from the brief description in Chapter 1 and the more detailed explanation in Chapter 3 that all outside political groups whose sole purpose is to promote or oppose a candidate for office are required to submit contribution and expenditure records to the FEC in accordance with federal regulations of political action committees. 527 committees can raise and spend an unlimited amount of money on political ads so long as they do not run afoul of the non-coordination restrictions. The one shortcoming of 527 committees is that all contributions over \$250 must be disclosed to the FEC. Wealthy political donors who wish to remain anonymous cannot give vast sums of money to 527s and expect to stay in the shadows. But, as history has demonstrated, dark money in politics always finds its way over the dam. The solution to the anonymity problem (from a pro-dark money standpoint) is 501(c) status.

Wealthy donors can anonymously contribute unlimited sums of money to 501(c) groups because the FEC has no jurisdiction over tax-exempt non-profit groups. 501(c) groups do not have to disclose the names of their contributors to anyone while federally-registered PACs and 527 committees have to report all their records to the FEC *and* the IRS. Comparing political 501(c) groups with 527 committees, however, is a distinction without a difference. The only real difference between American Crossroads, a 527, and Crossroads GPS, a 501(c)4, is that Crossroads GPS does not have to disclose its donors. Both groups share personnel, facilities, bank accounts and the goal of promoting Republican candidates for office. The only reason Crossroads GPS exists is to accept anonymous big money donations that would need to be reported if the money was contributed to American Crossroads.

Groups like Crossroads GPS, Americans for Prosperity and Priorities USA all operate under the radar of the FEC because they file as social welfare organizations, not as independent expenditure political advocacy organizations. 501(c)4 groups are monitored by the IRS and have much weaker regulatory criteria than 527 committees. The IRS observes 501(c) activities to make certain that the primary purpose of such groups is *not* election-related (Matthews 2013). Officially, the IRS tax code states that 501(c)4 must operate “exclusively” in their area of social welfare, but may participate in political activity so long as politics is not the “primary purpose” of the group (Blumenthal 2013b). The “standard” the IRS uses to determine which groups are in compliance with the tax-exempt policy is that 50% of the groups’ activities cannot be political in nature. Beyond that, there is no precise definition or clear interpretation of what “primary purpose” even means or how it could be quantified. In other words, 501(c) groups can be political, but politics cannot be their sole purpose. Most 501(c) groups get around this “standard” by claiming that they are social education groups that promote civil and economic awareness by informing the public about the importance of electing certain candidates. A trick of procedure and a twisting of words turn overt campaign advertising into public enlightenment that cannot be regulated by the FEC.

It is important to point out that absolutely zero conservative 501(c) groups were stripped of their tax-exempt status by the IRS (Matthews 2013). Conservative groups were required to fill out lengthy applications containing descriptions of their lobbying and political activities, but none of these groups was actually punished or reprimanded in any way (except for the hassle of filling out tedious paperwork) during the IRS inquiries. The hype surrounding the scandal was no doubt exacerbated and overblown by the

charged partisan campaign atmosphere. Conservatives were quick to use the IRS scandal as evidence of a much larger tyrannical conspiracy wherein President Obama and his Democratic allies in Congress were using the IRS to stamp-out conservative political voices (Cirilli 2013b). President Obama claimed that he knew nothing of the IRS selection criteria and said that, if true, the IRS' actions were "outrageous" (Blake 2013). Republicans did not believe him.

When the IRS story first broke, some within the campaign finance community were concerned that the public outrage would be directed completely at the IRS, making martyrs out of targeted 501(c)4 groups that could lead to complete deregulation of 501(c)4 groups. And, indeed, there were voices calling for the IRS to leave 501(c)4 groups alone altogether (Bernstein 2013). House Republicans introduced a bill in May 2013 that would "make it a crime" for the IRS to discriminate against 501(c) groups on the basis of their political views, a regulatory shift that would make it virtually impossible for the IRS to punish any groups violating the "primary purpose" conditions (Rayfield 2013). The conspiracies and faux outrage over the IRS targeting continued during the summer of 2013.

Once it became apparent that the IRS also targeted liberal groups for violations, the IRS scandal quickly faded from the spotlight (Nather 2013). The IRS selected 501(c)4 groups with the word "emerge" in their name for additional scrutiny, knowing that groups like Emerge Nevada, Emerge Maine and Emerge Massachusetts were strictly political organizations and thus did not meet the necessary tax-exempt requirements (Stein 2013b). All three groups were denied tax-exempt status. Additionally, United States Inspector General Russell George made no mention of the IRS targeting liberal

groups in his initial report to Congress, an omission that caused a stir amongst Democratic members of the House. IG Russell admitted that he only became aware of the bipartisan nature of the IRS targeting weeks after filing his first report (Stein and McAuliff 2013).

In response to the revelation, ranking member of the House Ways and Means Committee Rep. Sander Levin (D-Michigan) said, “Once again it is clear that the Inspector General’s report left out critical information that skewed the audit’s findings and set the stage for Republicans to make completely baseless accusations in an effort to tarnish the White House” (Stein 2013b). Rep. Elijah Cummings (D-Maryland) released a statement saying,

This new information should put a nail in the coffin of the Republican claims that the IRS’ actions were politically motivated or were targeted at only one side of the political spectrum. It is time for House Republicans to stop trying to score political points and start to focus on reforming the IRS (Rubin 2013).

In the end, the scandal slipped from public view and members of Congress and campaign finance organizations mobilized to challenge existing IRS policies that enable 501(c) groups to operate under the regulatory radar.

Rep. Chris Van Hollen (D-Maryland) and two campaign finance groups, Campaign Legal Center and Democracy 21, petitioned the IRS to clarify the “primary purpose” standard that the IRS uses to determine if a group is complying with tax-exempt criteria. Van Hollen argued that 501(c)4 status is legally only reserved to groups that are “exclusively” engaged in social welfare activities and also said that he plans “to file a lawsuit against the IRS to enforce the plain meaning of the law, and frankly get the IRS

out of the business of trying to draw these distinctions between whether something is 49 percent or 48 percent, or whatever it may be, political activity” (Blumenthal 2013b).

In July 2013, fourteen congressional Democrats sent a letter to Treasury Secretary Jack Lew demanding the elimination of the “primary purpose” standard and the development of specific regulatory criteria for 501(c)4 groups. The letter states that current IRS policies “make it nearly impossible for the IRS to make consistent and fair determinations when reviewing applications” and the “‘primary purpose’ standard in the current regulations thwarts central tenets of free and fair elections, such as the disclosure of donors” (Blumenthal 2013d). The letter also asks Secretary Lew to discard the primary purpose standard and instead enforce the plain reading of the law to only confer tax-exempt status on groups “exclusively” engaged in social welfare activities.

After the scandal dust had settled and people were no longer pointing partisan fingers at IRS officials, the public should have directed their animosity at the IRS review process for a completely different reason. What was lost in all of the conspiracy theories and baseless ideological accusations surrounding the IRS scandal was the fact that the IRS *did not* target the largest and most influential 501(c)4 groups that were clearly engaged in politics as their primary purpose. Crossroads GPS, Americans for Prosperity and Priorities USA, the top three 501(c)4 groups (in terms of spending), all avoided additional scrutiny from the IRS even though each group spent tens of millions of dollars on political advertisements and not a dime on traditional social welfare activities (think “food pantry”). Instead, the IRS review process focused entirely on small Tea Party and state-based progressive 501(c)4 groups. Senator Sheldon Whitehouse (D-Rhode Island), an advocate for campaign finance regulation and additional disclosure requirements, said,

“The IRS goes AWOL when wealthy and powerful forces want to break the law in order to hide their wrongful efforts and secret political influence” but goes after the “little guy” in order to give the appearance of doing its job (Thomas and Peoples 2013).

The IRS likely did not target the big and powerful 501(c)4 groups because: (1) they knew such well-funded groups could successfully win lawsuits against the IRS, (2) they did not want to give the appearance of playing politics with major campaign actors, and (3) not even the IRS could distinguish where 527 committees like American Crossroads or Priorities USA Action begin and where 501(c)4s like Crossroads GPS or Priorities USA end. By targeting 501(c)4 groups that are really just appendages to major 527 committees, the IRS might have worried about stepping into the FEC’s regulatory jurisdiction. It is not entirely clear why the IRS did not scrutinize the 501(c)4 groups that were most obviously abusing the “primary purpose” standard, but the fact that they did not begs the question as to what exactly the IRS was trying to accomplish by targeting the more ideologically extreme small 501(c)4 groups that had very little influence or spending power.

What is clear, however, is that the IRS was in no position to efficiently and effectively scrutinize the activities of all 501(c) groups in the United States. For starters, the number of groups applying for tax-exempt status has skyrocketed since 2010, and most of these groups are expressly political in nature. As journalist Alex Seitz-Wald explained, “In practice, many of these groups are plainly political, but the IRS has never defined what differentiates an improper political group from a bona fide social welfare group, so they’ve been able to flout the intent of the law with impunity” (2013). The IRS is trying to perform important tasks without a clear and specific legal mandate. The law

states that only groups that exclusively engage in social welfare are eligible, but these groups can also engage in political speech, so long as it is not *too* political. Not having specific standards for qualification is the same as having no standard. And without a serious standard, groups like Crossroads GPS and Priorities USA can spend tens of millions of dollars on campaign advertising and somehow not violate the “primary purpose” principle. Unless Crossroads GPS and Priorities USA are operating the largest underground network of clandestine homeless shelters and free medical clinics in American history, they are without a doubt engaged in more political activity than social welfare activity.

In the end, after several congressional investigations into the IRS review scandal, no evidence was ever provided that any of the IRS employees involved in the application screening process used discriminatory or intentionally partisan selection criteria. Groups with the words “Tea party,” “Patriot,” “9/12” and “Emerge” were all flagged because of their known ideological associations, but rightfully so. These groups were, in fact, primarily political, thus deserving scrutiny. This scrutiny, however, needs to be dispensed systematically, universally, and justly. Almost all of the 501(c)4 applications should have been denied if the law had been enforced. Despite not finding any incriminating evidence, Lois Lerner, the official in charge of overseeing tax-exempt groups, was forced into retirement for “neglect of duties” in September 2013. She was obviously thrown under the bus to provide political cover to higher ranking government officials. Unfortunately, her resignation did not have an ameliorating effect.

Representative Darrell Issa (R-California), the congressman leading the crusade against the IRS, was not appeased at all by Lerner’s departure: “We still don’t know why

Lois Lerner...had such a personal interest in directing scrutiny.” Cleta Mitchell, lead attorney in True the Vote’s (Texas-based group) lawsuit against the IRS, continued to insist that Lerner was clearly “involved in [the targeting of conservative groups], she knew about it, she has an agenda, as do others in the IRS” (Dinan 2013). It evidently does not matter that the investigation into the “scandal” failed to produce any evidence of malevolent or insidious intent by anyone at the IRS; people will continue to believe the narrative that they want to believe, regardless of the facts. Representative Levin (D-Michigan) explained, “The basic overreaching premise of the Republicans that the IRS had an ‘enemies list’ and was being influenced from the outside has been proven wrong again, as it has again and again.” Instead of continuing the witch-hunt without witches, everyone, Democrats and Republicans, should be appalled by the loose, arbitrary and nonsensical regulatory procedures at the IRS. Clear lines need to be drawn and fair standards need to be implemented.

If Congress wants to keep dark money out of campaign advertising, it needs to overhaul the entire 501(c) section of the tax code. Specifying definitions about “primary purpose” and quantifying allowable proportions of political activity for 501(c)4 would be an ineffective half-measure that would only divert the flow of dark money to another communications vehicle. Charles and David Koch have already chartered a new organization called Association for American Innovation, a 501(c)6 “business league.” The addition of the 501(c)6 to the Koch alliance indicates that outside groups are uncertain what type of regulatory constraints they might face in 2014 and 2016. Ken Gross, a political law expert, explained that “501(c)4 groups are getting a lot of heat these days, but (c)6s are like mom-and-apple-pie organizations” (Stone 2013). The IRS

scandal brought a lot of attention to 501(c)4s and how flagrantly such groups abuse their tax-exempt status for the sole purpose of operating like a 527 committee without the need to disclose contributions. It is likely that 501(c)4s will face additional scrutiny in the 2014 and 2016 elections even if Congress, Treasury, and/or the IRS fail to reform existing policies. By creating a 501(c)6 business league the Koch brothers can funnel dark money to new kinds of groups that have not garnered much attention and do not have as much audit exposure, but still have similar political fundraising and spending capabilities.

### **Campaign Finance Reform Post-2012**

Long before the IRS scandal made headlines, it was no mystery that campaign finance laws and regulations were a complex mess of contradictory legislation and Supreme Court rulings stretched out over more than a century. Moreover, campaign finance regulatory responsibilities fall within the jurisdiction of several government agencies including the IRS, FEC, FCC and DOJ at the federal level alone. Most states have their own campaign finance laws that candidates must also navigate. The American system of government is not designed for states, the bureaucracy, Congress and the Presidency to all work in perfect harmony with one another to regulate a universal set of campaign finance laws. This complex hodgepodge of regulations and laws at both the state and national levels is so convoluted and overwhelmingly complicated that loopholes exist within every nook and cranny, making most of the laws and court cases null and void.

Prior to the twenty-first century, the momentum of campaign finance reform was moving in the direction of increased regulation, complete disclosure and a transition towards a regime of public campaign financing (like the rest of the world's democracies). Beginning with *FEC v. Wisconsin Right to Life* (2007) and culminating in *Citizens United* and *SpeechNow* (2010), the momentum shifted towards a completely deregulated campaign finance regime where money could freely flow with no concern for transparency or accountability. The Supreme Court evidently changed its mind in 2010 and decided that corporate free speech was more important than free and fair elections. Within days of the Court's decision in *Citizens United*, campaign finance reform advocates immediately began considering constitutional amendments and state legislation to counteract the effects of *Citizens United*. The unprecedented amount of money spent in the 2012 election cycle combined with the enlightenment of IRS regulatory protocols created a spark that ignited a grassroots movement for reform that seems to be gaining enough momentum of its own to put the United States back on the track of getting dark money out of politics.

#### *Calls for a Constitutional Amendment*

The Supreme Court's decision in *Citizens United* (2010) drew heavier criticism and mobilized more opponents than the recent decisions regarding the constitutionality of the Affordable Care Act and the Defense of Marriage Act. While the latter two cases certainly attracted some grumbling and fist-shaking, opponents of the *Citizens United* decision declared war and dedicated themselves to its repeal. The only way to completely repeal the *Citizens United* decision, however, is through a constitutional

amendment. With Congress being a house divided, an amendment seems highly unlikely. Nevertheless, the bleak prospects have not stopped grassroots organizers at the state level from calling for a national convention to propose an amendment.

The Hawaii and New Mexico state legislatures were the first to pass resolutions in early 2012 calling on their members of Congress to pass an amendment that overturns *Citizens United* and to send it the states for ratification. The efforts in Hawaii and New Mexico were supported by three national non-partisan interest groups that are dedicated to overturning *Citizens United*: Common Cause, Free Speech for People, and Move to Amend. John Bonifaz, executive director of Free Speech for People, explained:

The *Citizens United* ruling presents a direct and serious threat to the integrity of our elections, unleashing a torrent of corporate money into our political process. The ruling is also the most extreme extension yet of a corporate rights doctrine which has been eroding our First Amendment and our US Constitution for the past 30 years. As with prior egregious Supreme Court rulings which threatened our democracy, we the people must exercise our power under Article V of the Constitution to enact a constitutional amendment which will preserve the promise of American self-government: of, for, and by the people (Nichols 2012).

By May 2013, thirteen state legislatures had passed resolutions urging Congress to pass an amendment overturning *Citizens United*: Maine, West Virginia, Colorado, Montana, New Jersey, Connecticut, Massachusetts, California, Rhode Island, Maryland, Vermont, New Mexico and Hawaii (Nichols 2013). Each of the resolutions was supported by Democratic and Republican state legislators. By July 2013, the state legislatures of Oregon, Delaware and Illinois passed their own resolutions, bringing the total to sixteen states (Wing 2013). Since then, state legislators in Wisconsin and Arkansas have introduced resolutions of their own with bipartisan sponsorship and support (Gentilviso 2013; Halsted 2013; Blumenthal 2013e).

In response to the numerous state resolutions calling for an amendment, Representative Rick Nolan (D-Minnesota) introduced the “We the People Amendment” in Congress (Fama 2013). The proposed amendment has two components:

**Section 1. [*Artificial Entities Such as Corporations Do Not Have Constitutional Rights*]**

The rights protected by the Constitution of the United States are the rights of natural persons only.

Artificial entities established by the laws of any State, the United States, or any foreign state shall have no rights under this Constitution and are subject to regulation by the People, through Federal, State, or local law.

The privileges of artificial entities shall be determined by the People, through Federal, State, or local law, and shall not be construed to be inherent or inalienable.

**Section 2. [*Money is Not Free Speech*]**

Federal, State, and local government shall regulate, limit, or prohibit contributions and expenditures, including a candidate's own contributions and expenditures, to ensure that all citizens, regardless of their economic status, have access to the political process, and that no person gains, as a result of their money, substantially more access or ability to influence in any way the election of any candidate for public office or any ballot measure.

Federal, State, and local government shall require that any permissible contributions and expenditures be publicly disclosed.

The judiciary shall not construe the spending of money to influence elections to be speech under the First Amendment.

The proposed amendment is called the “We the People Amendment” because of language that Justice Stevens used in his dissenting opinion in *Citizens United*:

corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their ‘personhood’ often serves as a useful legal fiction. But they are not themselves members of “We the People” by whom and for whom our Constitution was established (2010).

The amendment would revoke the concepts of corporate personhood and corporate free speech, and give Congress the authority to establish campaign spending and contribution limits. In essence, this proposed 28<sup>th</sup> Amendment would bring American campaign finance back to a regulationist campaign finance trajectory where limits on campaign contributions and expenditures are allowed. While the amendment certainly faces an uphill battle, Representative Nolan is in this fight for the long-haul: “It wouldn’t surprise me if this took five or even 10 years. But there is no doubt in my mind that the movement to amend will ultimately be successful” (Fama 2013).

Not everyone rushed to support such amendment proposals. Long-time opponent of campaign finance regulation and Senate minority leader Mitch McConnell (R-Kentucky) called the amendment proposal “absurd.” When asked about the amendment at the American Enterprise Institute, Senator McConnell criticized Democrats for being hypocrites:

[Democrats] were not uncomfortable with corporate free speech when corporations that owned newspapers or television stations were engaging in it... They only become uncomfortable with it when the Supreme Court said, ‘Why should there be a carve-out for corporations that own the media outlet and for no one else?’ It’s an absurd proposal and it won’t go anywhere.” (Balcerzak 2013).

While senators like John McCain (R-Arizona), a long-time supporter of campaign finance regulation, have called *Citizens United* the “worst decision ever,” Senator McConnell was undoubtedly very pleased with the decision (Wing 2012). Recall that Senator McConnell filed a lawsuit in federal court against the McCain-Feingold Bipartisan Campaign Reform Act in 2003, claiming that the law unnecessarily regulated campaign spending by outside groups. Senator McConnell suffered a minor defeat in the Court’s

*McConnell v. FEC* (2003) decision, but was vindicated by the Supreme Court's *Citizens United* decision.

Whatever his motives and interests may be, Senator McConnell is right about one thing: the “We the People Amendment” and similar proposals will not go anywhere, and he is uniquely situated to make sure they go nowhere. Senator McConnell is a big fan of the filibuster, even on procedural motions that historically produced no partisan disagreement. So long as Mitch McConnell is the minority leader in the Senate, he will certainly do whatever he can to halt the amendment proposal. Even without McConnell's defensive tactics in the Senate, the House of Representatives is poised to be controlled by the Republican Party for several election cycles given the gerrymandered districts that were created in 2011. Even though Republican voters disapprove of unlimited corporate campaign spending, the biggest cheerleaders for an unlimited and unregulated campaign finance regime are Republican members of Congress (though not all Republicans approve of *Citizens United*), despite the fact that outside and corporate spending did not help Republicans win the 2012 election.

### *Legislative Campaign Finance Proposals*

The first campaign finance legislative proposal to be introduced post-2012 was the “Follow the Money Act,” a bill introduced by Senator Ron Wyden (D-Oregon) and Senator Lisa Murkowski (R-Alaska). The bill had two major goals: (1) require “full transparency on the part of independent political spenders who intend to influence our vote,” and (2) “impose costly sanctions on those who believe that evading the law is simply a cost of doing business in the independent political realm” (Wyden and

Murkowski 2013). These two senators were frustrated with the amount of independent and anonymous advertising by outside groups in the 2012 election cycle, and they wanted to create a universal disclosure regime that would require *every* individual, group or other independent entity that produced campaign ads to abide by the exact same reporting and transparency requirements as official candidates. Instead of treating registered PACs, 527s and 501(c)s differently than official campaign actors like national party committees or candidates, the “Follow the Money Act” would bring all political campaign producers under the jurisdiction and regulation of the FEC. The bill also proposed an interagency cooperation protocol between the FEC and the IRS for monitoring the political activities of 501(c)s and proposed giving the Treasury Department oversight powers to create a strong unified enforcement structure.

The bill was met with fierce opposition from both Democrats and Republicans. Predictably, Senate Republicans refused to even discuss the bill even though a Republican senator was a co-sponsor. Senate Democrats were just as hands-off. Even campaign finance reform advocates had little good to say about the “Follow the Money Act.” For starters, the bill itself “ignores a series of landmark Supreme Court cases that struck down vague and overbroad requirements” for outside groups (Keating and Wang 2013). The Supreme Court’s decisions in *Buckley v. Valeo* (1976) and *Citizens United v. FEC* (2010) both maintained “that citizens and entities wishing to speak out about political issues cannot be forced to assume the ‘onerous restrictions’ of PACs” (Keating and Wang 2013). It may seem simple and even necessary to treat 527s and 501(c)s the same as federally registered PACs, but the Supreme Court has upheld through numerous decisions the constitutional right of outside groups to engage in independent expenditures

without have to officially register or report revenue sources and expenses to the FEC. Because outside groups are considered the same as individuals post-*Citizens*, they are constitutionally protected against any additional regulations or restrictions on their political “speech.”

Furthermore, the “Follow the Money Act” proposed changing the definition of “independent federal election related activities” from the *Buckley* standard of “express advocacy” to a more subjective standard of “any expenditure that...considering the facts and circumstances, a reasonable person would conclude is made solely or substantially for the purpose of influencing or attempting to influence the nomination or election of any individual to any federal office” (Rottman 2013). This standard is very similar to the “I know it when I see it” standard for obscenity. The Wyden-Murkowski revised standard proposal rallied additional opposition from outside groups such as the ACLU and NRLC, and would have required other advocacy interest groups like the Sierra Club, NRA, NAACP, and Planned Parenthood to officially register as PACs and disclose the names of their contributors. As a result of its lackluster support in the Senate combined with the opposition mounted against it, the “Follow the Money Act” was dead on arrival. Moreover, the failure of the bill illustrated the near impossibility of passing a major campaign finance reform bill in Congress. There are simply too many actors, interests and precedents working against reform at the national level.

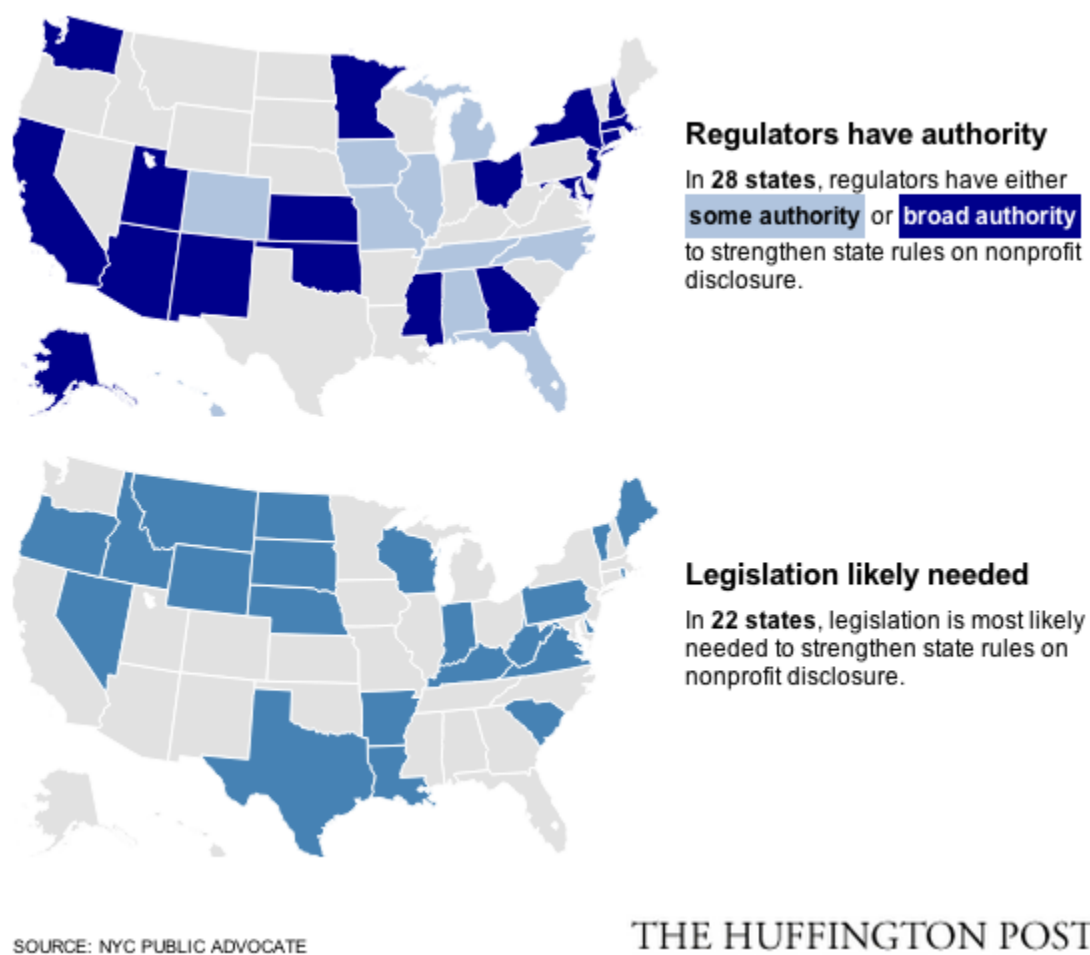
Most of the legislative attempts to overturn or undermine *Citizens United* have been introduced at the state level, whether through legislative proposals in state legislatures or through initiatives and referenda on state ballots. As of October 2013, six states have passed campaign finance legislation: Arizona, Connecticut, Florida,

Maryland, Minnesota and Wyoming. The Connecticut and Maryland bills included stricter disclosure requirements and higher contributions limits for state candidates. The logic behind such legislation stems from the assumption that donors give money to dark money outside groups because they are not legally allowed to contribute more money to the candidate of their choice. If disclosure requirements make outside groups less lucrative, then give big money contributors higher caps to make hard money contributions to candidates the most desirable means of contribution. The same compromise (disclosure for higher limits) was proposed in the Minnesota state legislature, but the final bill only included contribution increases (Blumenthal 2013c). New York is the only state to enact disclosure requirements without increasing contribution limits (McAuliff 2013).

New York State was able to initiate tough disclosure requirements without legislation. According to a recent report by New York City Public Advocate Bill de Blasio, twenty-eight states already give regulators the authority to require outside groups to disclose contributors' names and donations if they are active within the state (de Blasio 2013). Craig Holman, a campaign finance expert, explained, "In most states...transparency of corporate spending in elections can simply be required by the appropriate regulatory agencies—if they have the resolve to exercise their authority" (McAuliff 2013). According to the NYC Public Advocate report, twenty-two states would likely need to pass legislation to give regulatory agencies or attorneys-general the authority to require transparency and disclosure from outside groups (Figure 5.1). If the political will existed within state legislatures and the grassroots momentum began to apply pressure on state governments, it is very possible that states could effectively

regulate the activities of outside groups without an amendment to the U.S. Constitution. While candidates for national office are not bound by state-based campaign finance laws, outside groups are required to obey the laws of the states in which they are airing campaign ads.

**Figure 5.1: How States Can Require More Disclosure**



*McCutcheon v. Federal Election Commission* (2013)

Even if state legislatures or Congress successfully pass legislation that places heavier restrictions on outside groups, it could all be for naught if the Supreme Court decides to declare aggregate contribution limits unconstitutional. That is exactly what

Shaun McCutcheon, the plaintiff, is hoping for in his lawsuit against the FEC. Currently, federal election law caps the maximum amount of money that an individual can contribute to candidates in an election cycle. The limit is presently set at \$123,000 in overall contributions (to parties, registered PACs and candidates) with a special cap of \$48,000 in contributions to candidates (Fuchs 2013). With the candidate contribution limit set at \$2,600 per contributor, individuals can only give the maximum contribution to eighteen candidates ( $48,000/2,600 = 18.46$ ). McCutcheon argued before the D.C. Court of Appeals that aggregate contribution limits “violate donors’ free-speech rights and severely restrict the ability of candidates and parties to compete in an age of free-for-all spending by super PACs and political non-profit groups” (Abad-Santos 2013). The D.C. Court upheld that aggregate contribution limits were still constitutional according to the Court’s decision in *Buckley v. Valeo* (1976). McCutcheon, with the backing of the RNC, appealed the decision and asked the Supreme Court to take the case. The Supreme Court added the case to its docket in February 2013.

Fred Wertheimer, a campaign finance reform advocate with Democracy 21, expressed concern over *McCutcheon*’s potential to derail more than 100 years of campaign finance regulation:

If the Supreme Court reverses its past ruling in *Buckley v. Valeo* (the 1976 case that allows individual contribution limits), the Court would do extraordinary damage to the nation’s ability to prevent the corruption of federal officeholders and government decisions...It would also represent the first time in history that the Court declared a federal contribution limit unconstitutional (Wolf 2013).

D.C. Circuit Judge Janice Rogers Brown wrote in the court’s majority opinion against McCutcheon that “the aggregate [contribution] limits are justified” and McCutcheon’s

argument that “the limits are unconstitutionally low and unconstitutionally overbroad” was not sufficient to overturn *Buckley*’s “corruption, or appearance of corruption” rationale for the limits (Weigel 2013).

Given the Supreme Court’s recent willingness to undo campaign finance regulations that have been in place for more than forty years, many are still concerned (even after *McCutcheon*’s defeat in the D.C. Circuit) that the Supreme Court will throw out the current limit of \$123,000 every two years. Because many wealthy donors would like to contribute millions of dollars per election cycle, they currently have to give the majority of their money to outside groups that are not subject to contribution regulations. If the Court overturns the *Buckley* aggregate contribution limit, then wealthy donors could directly contribute millions of dollars (depending on the number of national candidates in the donor’s party) every two years.

The Supreme Court heard oral arguments in *McCutcheon v. FEC* on October 8, 2013. Although not an official party to the case, Senate minority leader Mitch McConnell was given special permission by the Supreme Court to present his views during oral arguments.<sup>13</sup> He argued that contribution limits (not just aggregate limits) constituted an unreasonable burden on freedom of speech and should be overthrown. McConnell also argued in his amicus brief that the “time has come for the Court to revisit the distinction [between contributions and expenditures]” (Blumenthal 2013g). While the Court is not considering whether or not individual-to-candidate contribution limits are unconstitutional, the Court could still accept McConnell’s legal reasoning to establish new criteria for scrutinizing contribution limits that would inevitably lead to their

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<sup>13</sup> The amicus brief was written in McConnell’s name and his presence in the case came at his own request. However, McConnell had his lawyer deliver arguments before the Supreme Court.

complete abandonment in a future Supreme Court case. As former solicitor general Charles Fried explained, McConnell's argument was a poorly "disguised first step to try to get an absolute anything goes no limits regime on campaign contributions" (Blumenthal 2013g).

Early reports from the oral arguments in *McCutcheon* suggest that the five conservative justices were ready to "free big individual donors" to give money to more candidates in a given election cycle. Chief Justice John Roberts, considered to be the swing vote in this case, explained that limiting an individual's ability to contribute money in a campaign "seems to me a very direct restriction" of free speech (Sherman 2013). The Obama administration's lawyer in the case, Solicitor General Donald Verrilli, argued that if aggregate contribution limits were eliminated "less than 500 people [could] fund the whole shootin' match." In response, Justice Scalia argued that there was nothing wrong with a few hundred people financing the entire election. He said that Verrilli's fears were unjustified since the Supreme Court had already determined that "enormous amounts of money" spent in support of a member of Congress is not a problem (alluding to *Citizens United*). Other justices (who dissented in *Citizens United*) disagreed with Scalia's conclusion. Justice Kagan said to laughs that "if this court is having second thoughts about its ruling that independent expenditures are not corrupting, we could change that part of the law" (Sherman 2013). Prior to her appointment on the Supreme Court, Elena Kagan was Solicitor General for the Obama administration and served as lead counsel for the FEC in *Citizens United*. It is safe to say that she would be overjoyed if the Court decided to reevaluate its position on the corrupting influence of independent expenditures or direct contributions.

In response to the first day of the case, President Obama said that “essentially, [the Court could] say anything goes; there are no rules in terms of how to finance campaigns” (Gerstein and Tau 2013). While the Supreme Court could, in fact, decide to throw out *all* contribution limits in its *McCutcheon* decision, it is unlikely that the Court would do so this year. It is very likely that *McCutcheon* is a necessary prelude to an eventual elimination of all contribution limits just as *Citizens* was a necessary prelude to *McCutcheon*, *WRTL* to *Citizens*, etc. It seems as though the Supreme Court will only throw out the aggregate contribution limit of \$123,000 this time around. The majority opinion in *McCutcheon* (assuming aggregate limits are thrown out) will undoubtedly serve as the necessary precedent for the future undoing of direct contribution limits to individual candidates, as well as existing state limits on individual contribution limits.

Ironically, if the *McCutcheon* decision does lead to the removal of aggregate and, ultimately, individual contribution limits, then candidates would once again become the primary receivers of excessive amounts of campaign cash. This would completely undermine the necessity and existence of outside groups and empower official candidates to have more control over their message and raise even more money than 2012. While that may sound like an optimal outcome (assuming the removal of outside groups from the campaign environment is a worthy objective), it would effectively bring the American campaign finance regime back to pre-Watergate levels (which is exactly what Shaun McCutcheon and his supporters desire).

*Public Opposition to Citizens United*

Almost every member of Congress, Supreme Court justice, political operative and big-money contributor that wants campaign finance regulations to disappear altogether is conservative.<sup>14</sup> Almost every member of Congress, interest group and advocacy organization calling for fair elections or public financing is progressive. There is a clear partisan division on campaign finance among political elites. Among the electorate, however, the partisan divide begins to fade away. The American public, Democrats and Republicans, seem to be in clear opposition to *Citizens United*, corporate personhood, dark money outside groups, and the state of American campaigns in general.

The citizens of Montana and Colorado both overwhelmingly rejected the *Citizens United* decision and expressed this discontent through ballot resolutions in 2012. 75% of Montana residents (a very conservative state) and 74% of Colorado residents (a swing state) voted for their respective state legislatures to officially condemn the *Citizens United* decision (Arola 2012). The ballot results have no legal effect, nor would a state resolution rejecting the decision. Still, both states sent clear signals to Washington, D.C. that the campaign finance fight is far from over.

The opposition to unlimited corporate money in campaigns is even rising up locally through city ballot propositions. More than 175 cities including Chicago, San Francisco and Los Angeles have approved propositions and resolutions to officially condemn corporate personhood and unlimited spending (Almendrala 2013; Miles 2013). A measure is expected to be on California's 2014 state ballot urging the state legislature

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<sup>14</sup> To be fair, there are some important Republican opponents to unlimited campaign spending: Senator John McCain, Senator Lisa Murkowski, Representative Walter Jones, former Senator Olympia Snowe, and former Speaker Newt Gingrich to name a few. A report by Free Speech for People published the names of 126 Republican members of Congress who oppose *Citizens United*. Of course, publicly opposing *Citizens United* is a far cry from joining Democrats in passing an amendment to overturn *Citizens United*.

and members of Congress to amend the Constitution to overturn the *Citizens United* decision. These hundreds of cities are joined by dozens of states that are already mobilizing their resources to push against *Citizens United*.

When polled, a majority of the American people also express their disapproval of the *Citizens United* decision. 63% of voters oppose *Citizens United*, with 46% of voters strongly opposing it (Joseph 2012). 55% of voters do not believe that corporations should be able to spend unlimited money in politics (like people). When asked about their support for specific campaign reform ideas, the American people also indicate a willingness to further regulate campaign finance and campaign activities. 50% of voters support completely government-funded campaigns and a ban on private contributions: 60% of Democrats, 48% of independents and 41% of Republicans (Figure 5.2) (Saad 2013). If they had the chance to vote for a law that imposed fundraising and expenditure caps on congressional candidates, 79% of voters said they would: 82% of Democrats, 78% of independent and 78% of Republicans (Figure 5.3).

## Figure 5.2: Gallup Public Opinion Data on Government-Funded Campaigns

### *American's Views on Law Creating a New, 100% Government-Funded Campaign Finance System for Federal Election*

Next, suppose that on Election Day you could vote on key issues as well as candidates. Would you vote for or against a law that would establish a new campaign finance system where federal campaigns are funded by the government and all contributions from individuals and private groups are banned?

	Vote for	Vote against	No opinion
	%	%	%
National adults	50	44	6
Men	54	43	4
Women	46	46	9
18 to 29 years	49	46	5
30 to 49 years	52	43	4
50 to 64 years	50	44	6
65+ years	48	44	8
East	56	40	4
Midwest	57	37	6
South	42	52	7
West	48	44	8
Democrats	60	34	5
Independents	48	47	5
Republicans	41	54	4

### Figure 5.3: Gallup Public Opinion Data on Limiting Campaign Money

*American's Views on Limiting the Amount of Money Congressional Candidates Can Raise and Spend on Campaigns*

Next, suppose that on Election Day you could vote on key issues as well as candidates. Would you vote for or against a law that would put a limit on the amount of money candidates for the U.S. House and Senate can raise and spend on their political campaigns?

	Vote for	Vote against	No opinion
	%	%	%
National adults	79	19	3
Men	79	19	2
Women	79	18	3
18 to 29 years	71	27	2
30 to 49 years	84	14	2
50 to 64 years	83	15	2
65+ years	75	20	5
East	75	23	2
Midwest	86	15	2
South	79	19	2
West	78	18	4
Democrats	82	16	2
Independents	78	20	3
Republicans	78	21	1

Pushed even further, 61% of Americans said they would vote for a law that limited the presidential campaign to five weeks before Election Day (Jones 2013; Kopan 2013). Given the American public's recorded distaste for campaigns, it is not surprising that a clear majority of voters want to restrict the campaign window to just prior to the election (Edwards-Levy 2012). Unfortunately, the American people will not get any of their wishes. A recent Pew survey of fifteen major newspapers discovered that there has been more coverage of the 2016 presidential campaign so far in 2013 than there was at

similar points in 2005 and 2009 before their respective campaign cycles (Hitlin 2013; Mirkinson 2013). As of September 27, 2013, there have been 335 stories about the 2016 presidential campaign, compared to just 132 stories from the first nine months of 2009. Without any declared candidates from either party, coverage of the 2016 presidential campaign has already begun.

## **Conclusion**

The future of outside groups is uncertain. The Supreme Court's decision in *McCutcheon* could initiate a paradigm shift in how money is spent in campaigns. If the Supreme Court throws out aggregate contribution limits and/or individual contribution caps, wealthy donors will likely redirect their money to official campaigns and away from outside groups. After all, wealthy contributors only give money to outside groups because they cannot legally give more than \$2,600 to their preferred candidate. Without contribution limits, million dollar checks will begin flowing to official campaigns instead of Super PACs and non-profits. Outside groups would still be able to raise and spend unlimited money regardless of the decision in *McCutcheon*, but outside groups would become less attractive contribution vehicles for wealthy contributors who are trying to gain access to official candidates.

The state of campaign finance reform could possibly begin moving in the other direction towards more regulation. If an amendment is ratified redefining corporate personhood and free speech as it relates to political spending, wealthy contributors would lose most of their disproportionate influence. Rich donors would still contribute more money than the average American contributor, but being limited to \$2,600 is a substantial

reduction in their monetary advantage. Likewise, if the states or Congress are able to pass comprehensive disclosure or more robust public financing legislation, outside groups would become less lucrative. It is quite clear that candidates simply want more money; they do not necessarily care if that money is coming from the taxpayer or outside special interest groups. Furthermore, if contribution limits, expenditure limits, or perhaps even campaign season restrictions could be implemented via constitutional amendment and/or state/federal legislation, the campaign finance regime would be completely overhauled and the era of unlimited campaign spending and anonymous outside group negativity would be a thing of the past.

The future of outside groups is uncertain because the momentum of campaign finance reform is also uncertain. A more deregulationist campaign finance regime resulting from the conservative majority on the Supreme Court could undermine the legitimacy of outside groups by making them unnecessary. A more regulationist regime resulting from legislation or amendments could undermine or prohibit outside groups altogether. Outside groups exist because of the loopholes and unintended consequences of the existing campaign finance regime; it is therefore quite fitting that outside groups could also perish because of future campaign finance reforms. Time will tell if the grassroots, bottom-up, Article-V-amendment-convention approach to campaign finance reform is ultimately successful or not. While meaningful reforms are not expected before the 2014 midterm elections, the money spent in 2014 and 2016 coupled with the expected negativity of outside groups in those elections has the potential to further motivate support for a complete campaign finance reform game-change.

Assuming that no substantial reform legislation is passed by either the states or Congress, and assuming that *McCutcheon* has no significantly detrimental effect on the attractiveness of outside groups, outside groups are here to stay and their influence on negative campaign advertising is likely to continue in 2014 and 2016. Given outside groups' pre- and post-*Citizens United* preference for negative attack advertising, it is a safe assumption that outside groups will be just as negative in future elections. There is very little reason to expect that outside groups will experience an about-face and embrace promotional, comparative, prospective or positive advertising. As long as outside groups exist, they will only add more negativity to the already overly negative official campaign market.

While negativity in campaign ads is not in and of itself hazardous to American democracy, too much negativity in campaigns has the potential to further increase popular disapproval and disillusionment with the political system. Geer (2006) is not incorrect when he argues that negativity in campaigns is healthy for democracy because it enables voters to more easily see the flaws in candidates. Negativity might only be effective or useful, however, in campaigns if it is complemented with robust promotional and comparative components. Unlike official candidates from 1952 to 2012, outside groups in 2012 did not come close to producing a strategic balance of promotional, comparative and negative ads. The conventional consultant wisdom that voters can recall negative messaging more readily than promotional messaging may very well be true, but it is overwhelmingly clear that voters also despise negative campaign politics. The new normal of unmitigated mudslinging initiated by outside groups could lead to exacerbated levels of dissatisfaction with the political system. Without a higher proportion of

promotional and/or comparative ads from outside groups or official candidates in subsequent elections, voters will eventually have a good reason to tune out of politics altogether just to avoid the cacophony of attacks ads.

Because the expectation for the future advertising strategies of outside groups is decidedly negative, the approach of official campaigns in future elections could change as a result of the normalization of outside groups in politics and the adaptation of official campaigns to the expected behavior of outside groups. In other words, while official campaigns *did not* adjust their advertising strategies to the rise of outside groups in 2012, it is possible that official campaign professionals will learn some lessons from 2012 and evolve accordingly. Again, only time will tell. If outside groups are still around and still prominent campaign actors in the 2016 presidential election, official campaigns might balance the negative messaging of outside groups with more promotional, comparative, prospective and positive advertising. So, while my hypotheses regarding the influence of outside groups on official campaigns were incorrect in 2012, they very well might be correct in 2016 and beyond.

Future research should also examine the influence of outside groups in congressional and state campaigns. While the overwhelming majority of money spent by outside groups was spent on the presidential campaign, significant amounts of money were spent on campaign advertisements in competitive congressional elections and state races. Advertisements from official campaigns and outside groups in these down-ballot races can be analyzed in the exact same way that this dissertation analyzed ads in presidential campaigns. Perhaps outside groups are just as negative and retrospective in congressional and state campaigns as they were in the 2012 presidential campaign.

Maybe official candidates in congressional and state campaigns responded to the influx of outside group ads by running a more promotional, positive and prospective campaign. Or, maybe the results from down-ballot races will be the exact same as the results from the 2012 presidential campaign. An examination of future presidential, congressional and state campaigns will undoubtedly provide more illumination to the phenomenon of outside groups in campaign advertising markets.

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