Citizens United, Campaign Finance, and Nonprofits

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Federal Campaign Finance Law before *Citizens United*

- Contribution limitations
  - $5000 contribution limit to (even independent) PACs (rise of 527s)
- Source limitations
  - Corporate and labor union ban on express advocacy (limited PAC option) [upheld as constitutional in *Austin* (1990), *McConnell* (2003)]
  - McCain-Feingold Amendment for “Electioneering Communications”
  - Exception to both corporate bans for QNC/ *MCFL 501c4*
  - organizations [*MCFL* (2003)]
- Disclosure rules
  - McCain-Feingold Amendment for “Electioneering Communications” expanded disclosure
Things Change at the Roberts Court/FEC

- Justice O’Connor retires and constitutional jurisprudence turns 180 degrees: since 2005 Supreme Court has struck down or limited campaign finance law in every campaign finance case it has taken

- *WRTL* case, preceding *Citizens United*, blew a hole in rules limiting corporate electioneering communications, and led to growth in election-related activity by, among others, political organizations organized under 501c4 status
501c4s as election vehicles

- Big rise in “electioneering communication” activity by 501c4s
- Benefit of 501c4 over 527: donor anonymity [disclosure to IRS but not public]
- Risk of 501c4s losing c4 status if political activity becomes “primary purpose”
- At first unclear if IRS would subject c4 contributions for political purposes to gift tax, but IRS has backed off
- Not clear whether DISCLOSE Act could/should be extended to activities of 501c4s
- Some 501c4s may be breaking campaign finance law because they are acting as political committees without registering with FEC
501c Non-Profits Dominate Electioneering Communication Spending in 2010

Electioneering Communications 2004 - 2010

Federal Election Commission v. Wisconsin Right to Life
Citizens United

- Holding: limits on independent corporate spending in elections is unconstitutional
- Presumably applies to labor unions as well
- Theory: rejection of equality/anti-distortion argument of Austin case; rejection of argument that independent spending can lead to “corruption” or the appearance of corruption
- Since Citizens United, very little direct independent corporate spending; most corporate spending from closely held corporations; public corporations worry about alienating customers
After *Citizens United*

- Rise of Super PACs (following *SpeechNow* and FEC rulings): eliminates $5000 contribution limit to PACs and source limitations.
  - Theory: if independent spending cannot corrupt, then contributions to fund independent spending cannot corrupt either
- Super PACs replace 527s—no need for this campaign finance vehicle
- 501c4s still provide benefits of donor anonymity, and c4s have pushed the envelope in 2010 and 2012 by acting as super PACs without disclosure
- Corporations and wealthy individuals may prefer to give to super PACs, 501c4s, or Chamber of Commerce (c6) to shield identity
Explosion of Outside Money (Spending through March 8 of Election Year)

Outside spending so far in 2012 at 234% of 2008 levels and 628% of 2004 levels: CU matters.
501c4 Money Now Going into Express Advocacy
Does *Citizens United* Go Further in Freeing Nonprofits from Political Activity Limits?

- Dicta v holding

- Example 1: *Citizens United* said that the identity of the speaker does not matter for First Amendment purposes, yet the Court recently affirmed that it does *not* violate the First Amendment to bar *foreign spending* in elections. (Why?)
Example 2: Dicta on All Corporations, Including Nonprofits

“Due consideration leads to this conclusion: *Austin* should be and now is overruled. We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”
Understanding the dicta

• What does this mean for limits on lobbying by 501c3s, etc.?

• **Aprill**: Categorical statement best understood in context of overruling *Austin*. Not a rejection of other theories (such as subsidy theory as to 501c3s) to limit political activity of certain nonprofits.

• *Citizens United* dicta could be used for further attacks on 501c3 rules, 501c4 primary purpose activities. I am skeptical such attacks would work, at least in near term.