

# *Citizens United*, Campaign Finance, and Nonprofits

Professor Rick Hasen

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**Are Nonprofits People Too? Mar.20, 2012**



**SCHOOL OF LAW**  
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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

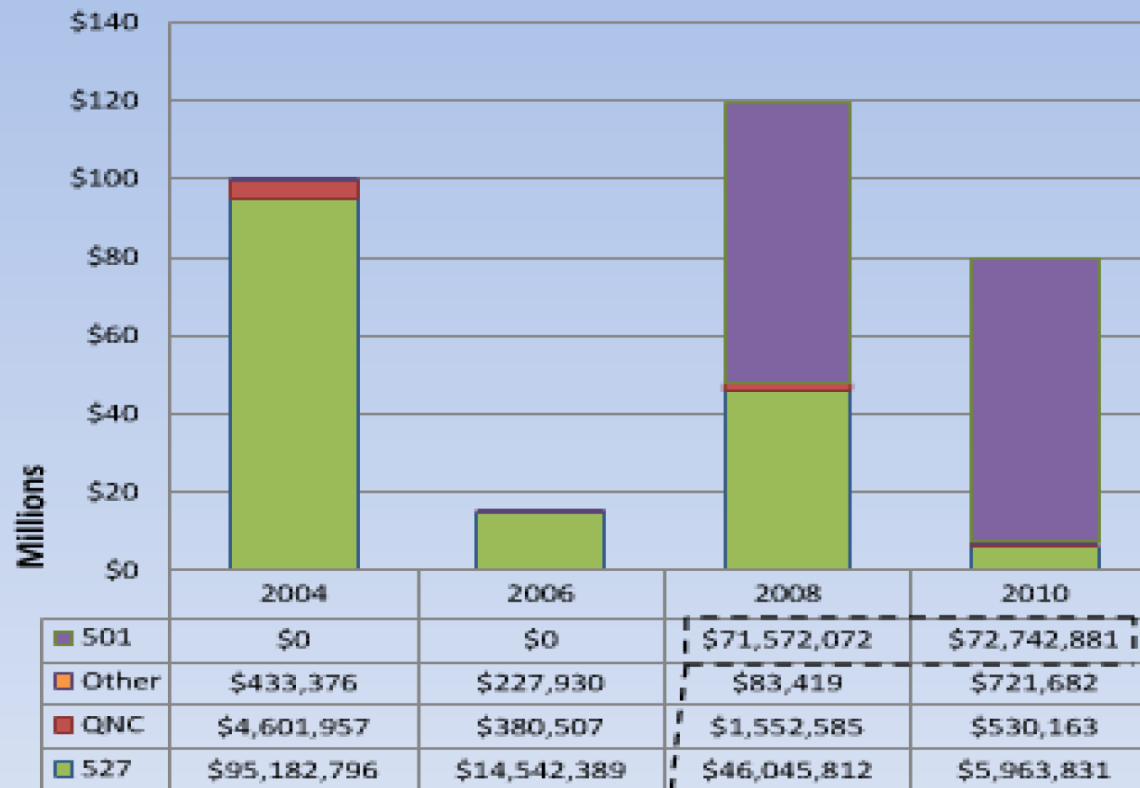
- Justice O'Connor retires and constitutional jurisprudence turns 180 degrees: since 2005 Supreme Court has struck down or limited campaign finance law in *every* campaign finance case it has taken
- *WRTL* case, preceding *Citizens United*, blew a hole in rules limiting corporate electioneering communications, 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*

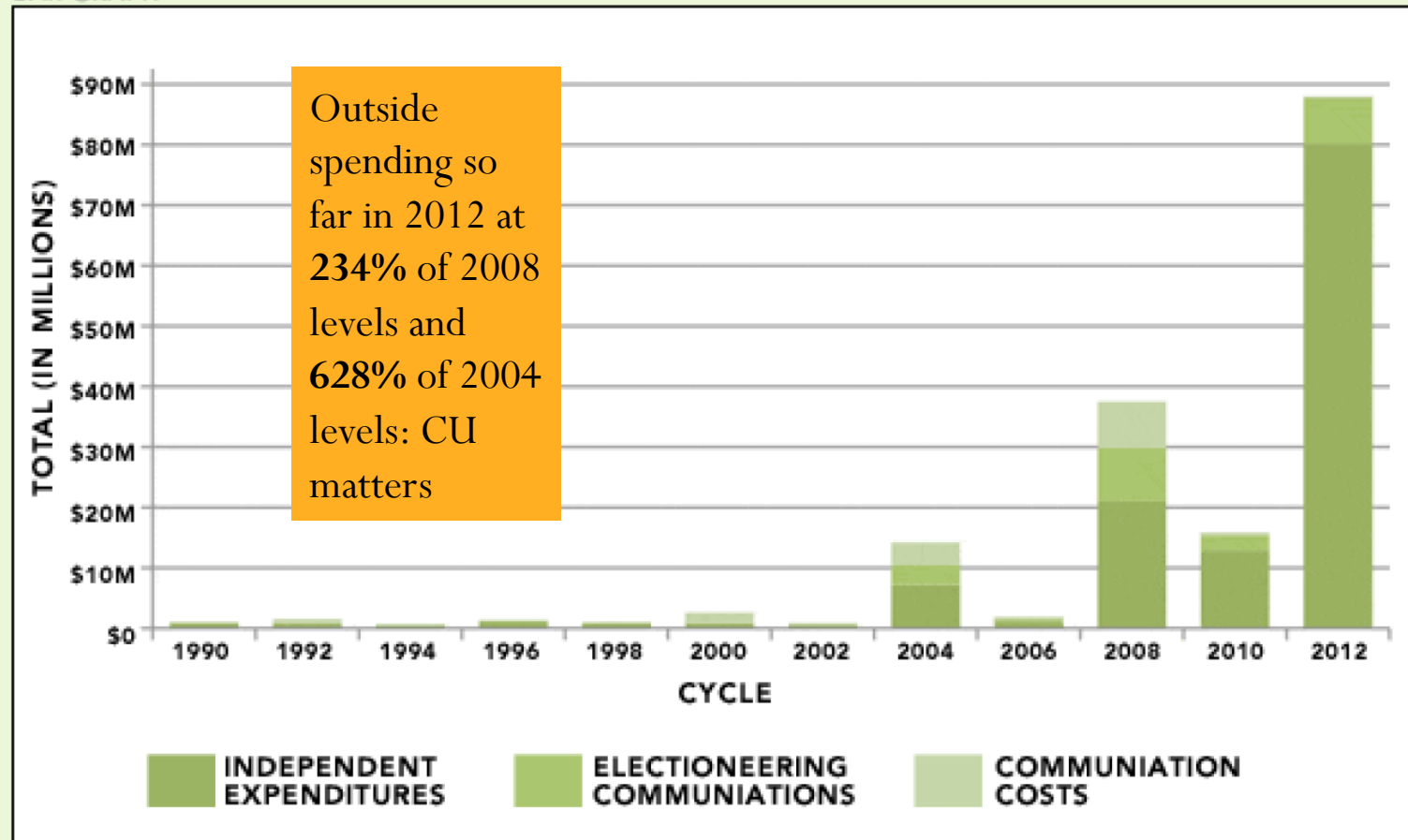
- Holding: limits on independent corporate spending in elections is unconstitutional
- Presumably applies to labor unions as well
- Theory: rejection of equality/anti-distortion argument of *Austin* case; rejection of argument that independent spending can lead to “corruption” or the appearance of corruption
- 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)

BAR GRAPH



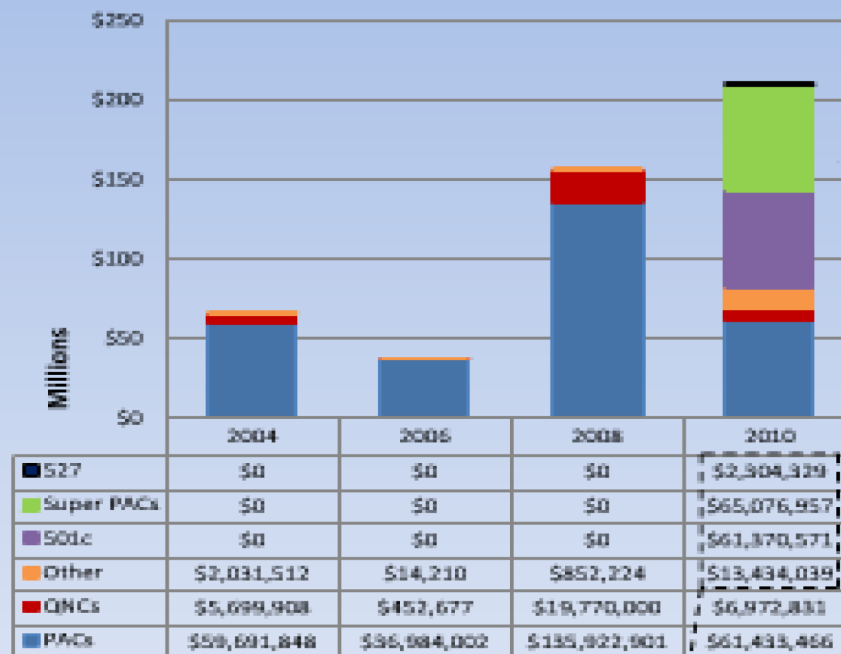
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# 501c4 Money Now Going into Express Advocacy

***67% of Total Independent Expenditures in 2010 Came from Groups 'Freed' by Citizens United***

**Independent Expenditures 2004 - 2010**



***Citizens United v. Federal Election Commission***

## 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.