Financing Free Speech

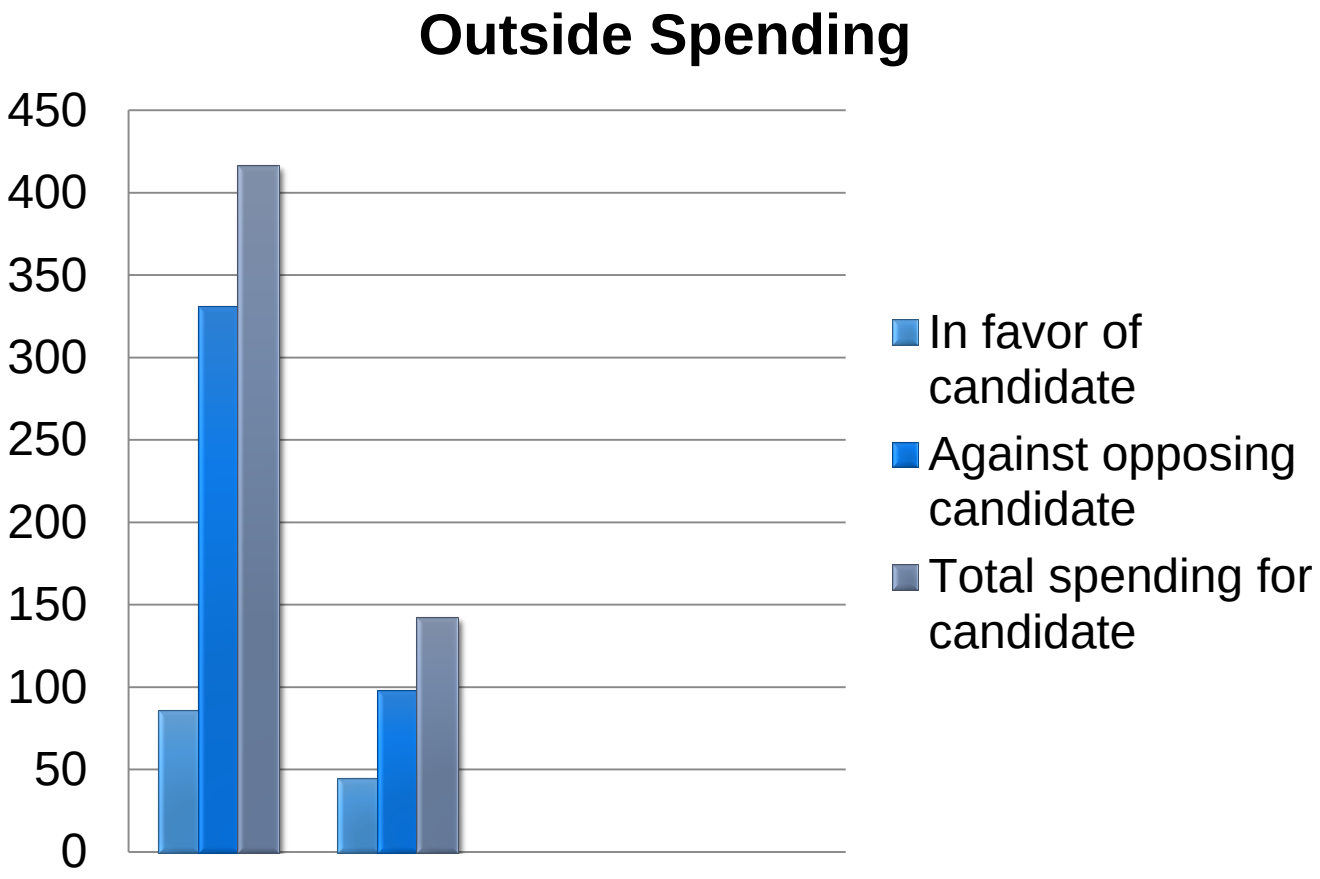
Allen Dickerson

Center for Competitive Politics

Outside Spending in the 2012 Race

- Mitt Romney's supporters spent roughly $416 million to support his election.
  - $85.4 million in pro-Romney ads, and $330.6 million in anti-Obama ads.
- The President's supporters spent roughly $142 million.
  - $44.5 million in pro-Obama ads, and $97.6 million in anti-Romney ads.

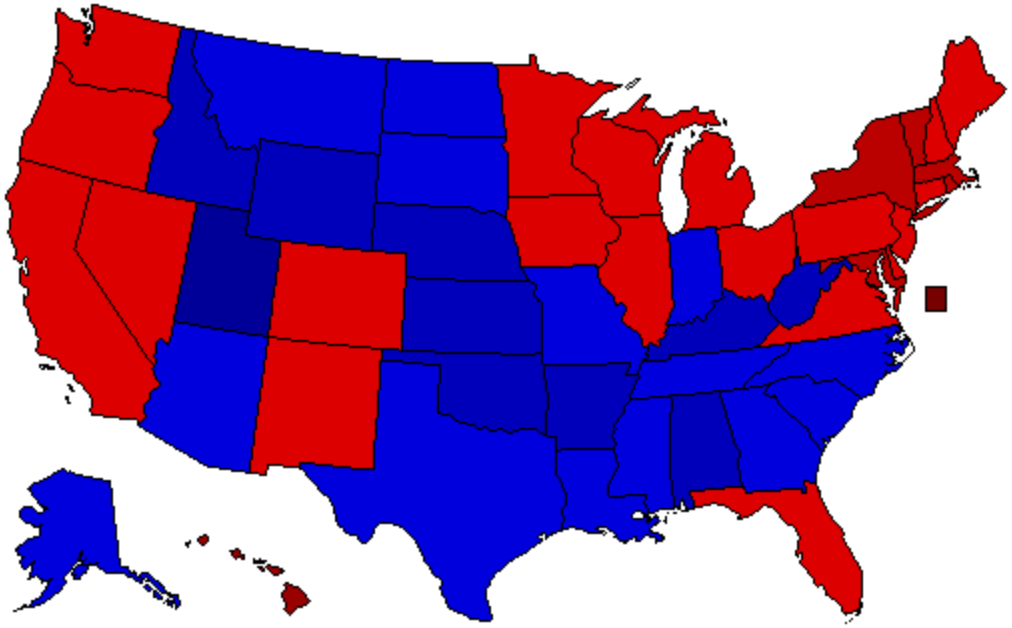
2012 Outside Spending Chart



All information in this chart is pulled from opensecrets.org

Return on Investment?

- Using traditional conservative blue for the GOP.

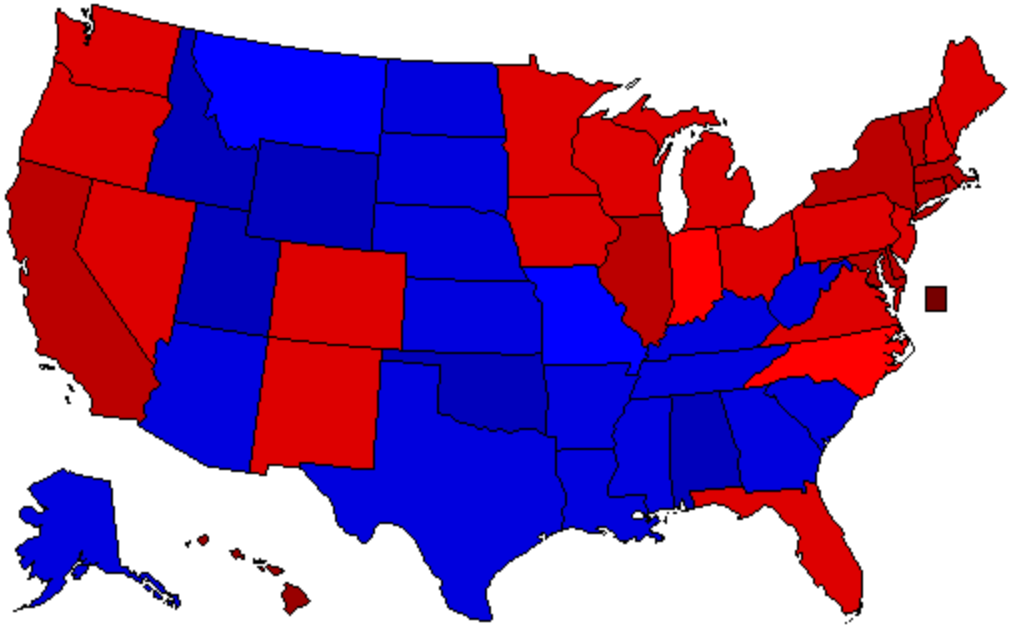


Obama 332 Romney 206

Maps from uselectionatlas.org

Compare to 2008.

- Again using traditional colors.



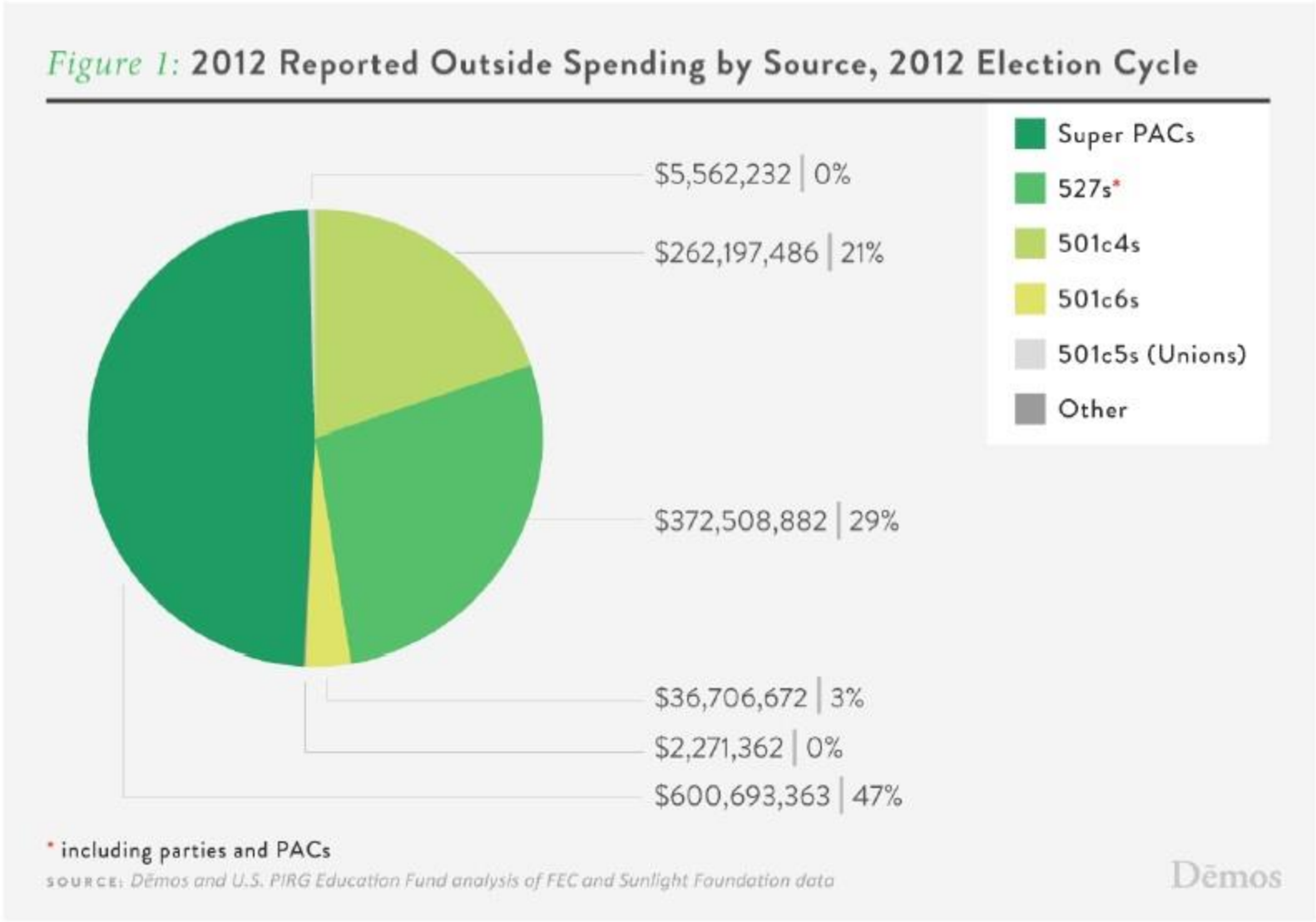
Obama 365 McCain 173

Maps from uselectionatlas.org

How the Hoosiers Voted.

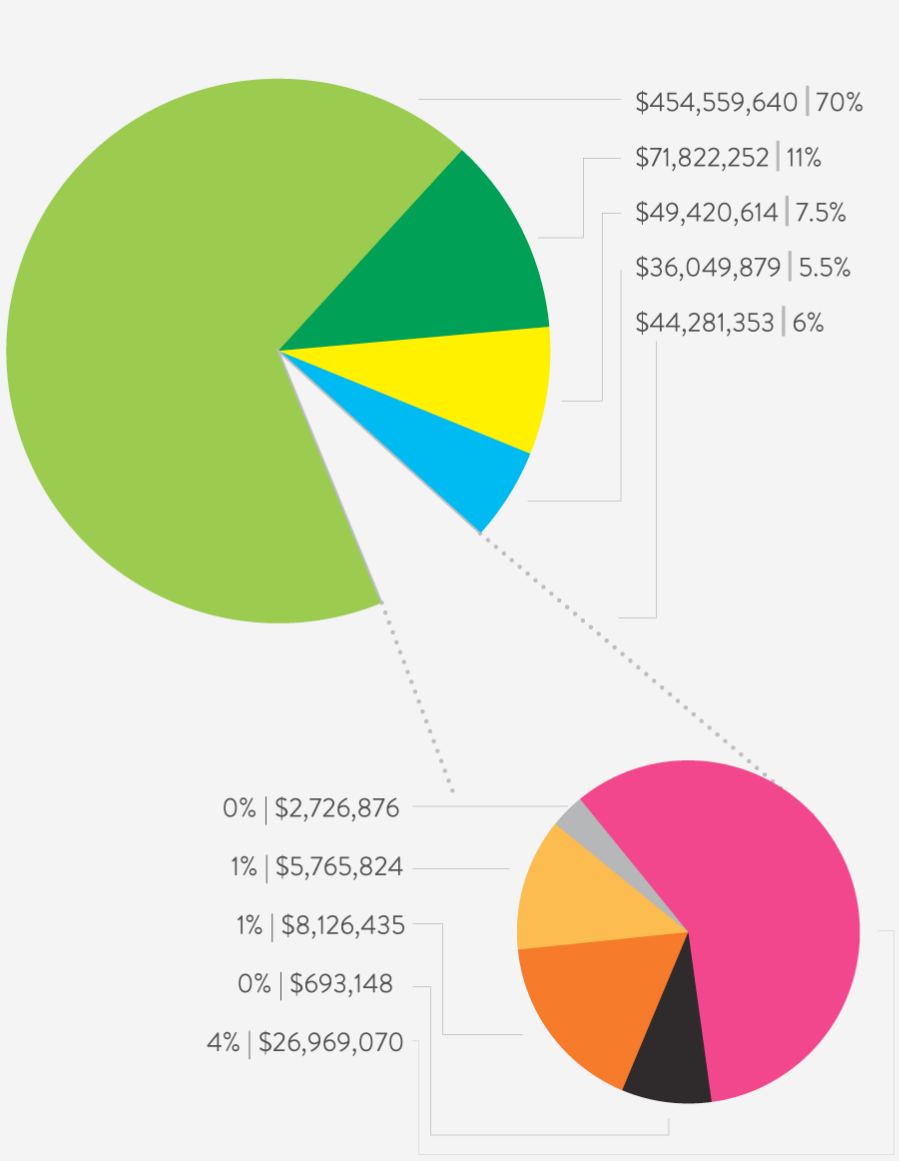
- Richard Mourdock raised $7.9 million versus Joe Donnelly's $4.7 million.
- Outside spending was $16.4 million for Mourdock, $12.1 million for Donnelly.
- And yet: Richard Mourdock receives 44.5% of votes for senator.
- Romney takes 54.3%.

2012 Outside Spending by Source



Super PAC Funding by Source

Figure 4: **Super PAC Fundraising by Source, 2012 Cycle**



*including parties and PACs

SOURCE: *Dēmos and U.S. PIRG Education Fund analysis of FEC and Sunlight Foundation data*

November 7, 2012.

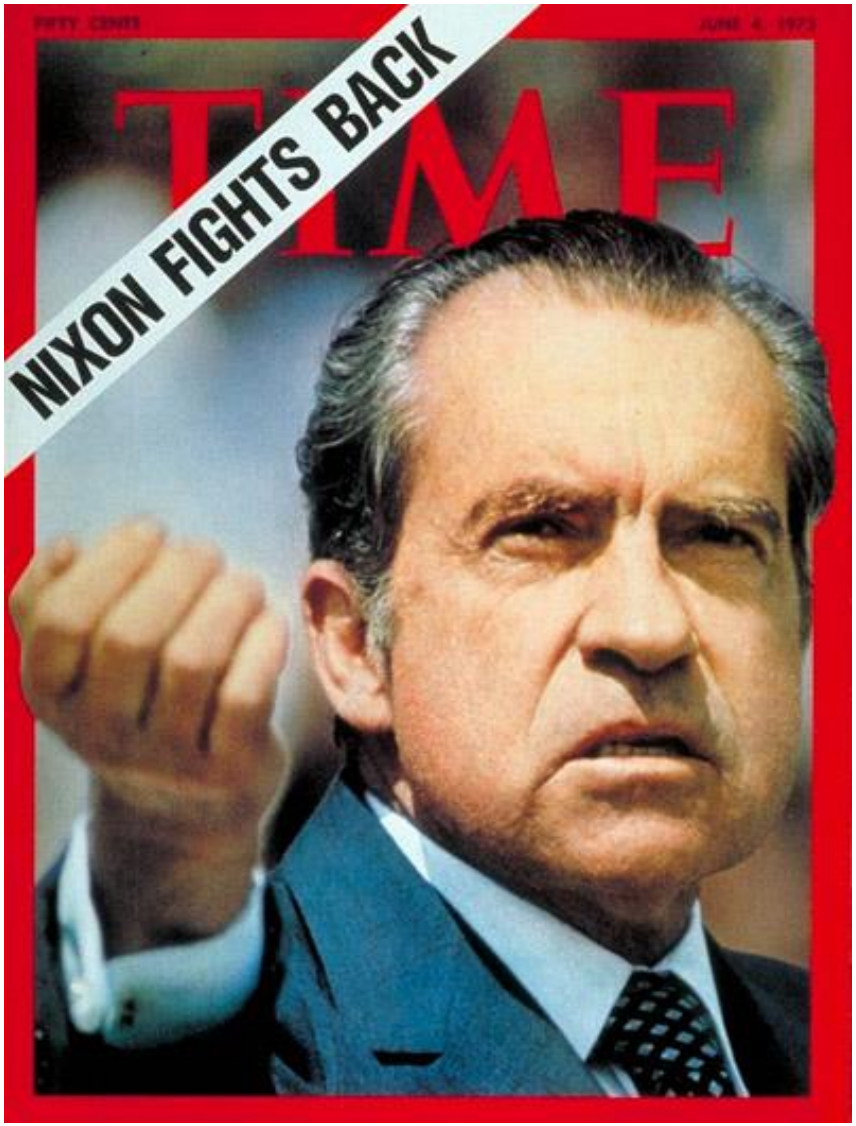
- Which of these famous Supreme Court maxims seems more apt?
- Congress should fight “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.” *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990).
- “It is our law and our tradition that more speech, not less, is the governing rule…the First Amendment confirms the freedom to think for ourselves.” *Citizens United v. FEC*, 130 S. Ct. 876, 911, 909 (2010).

How did we get here? The *Buckley* Grand Bargain.

1974: Following the Watergate disaster, Congress passes revisions to FECA.

FECA imposed hard caps on contributions *and* expenditures.

Faced with a constitutional challenge to this legislation, the Court issues its grand bargain.



The Terms of the Bargain: *Buckley v. Valeo* (*per curium*)

- Money is required for effective advocacy.
- The only state interest justifying campaign finance limits: *quid pro quo* corruption or the appearance of such corruption.
- Expenditures may not be limited.
- Expending = a more direct form of First Amendment activity.
  - Sec. 309 of the Federal Corrupt Practices Act of 1925 had capped spending in Senate races at $25,000 and House races at $5,000.

The Terms of the Bargain, Cont'd.

- Contributions are treated as a vehicle more likely to cause a *quid pro quo*.

- *Exception*: Unless contribution limits seem designed to expressly stifle political competition.

  - "Act 64's contribution limits would have reduced the funds available in 1998 to Republican challengers in competitive races in amounts ranging from 18% to 53% of their total campaign income."-*Randall v. Sorrell*, 548 U.S. 230, 253 (2006).

The Terms of the Bargain, Cont'd.

- Disclosure, rather than bans or caps, is the appropriate regulatory tool for expenditures.

- Few exceptions: Socialist Workers.
  - Members of the SWP lost their jobs, the SWP offices were shot at, FBI monitored them. *Brown v. Socialist Workers*, 459 U.S. 87 (1982).

- Threats, harassment, or reprisals must be connected to the disclosures. *Nat'l Ass'n of Manufacturers v. Taylor*, 582 F.3d 1, 22 (D.C. Cir. 2009).

Austin v. Chamber of Commerce

- Rare departure from *Buckley* by the Supreme Court.
- Determined that corporate independent expenditures could distort the will of the people using mass aggregations of wealth.
- First real curtailing of expenditures. Held corporations could not independently spend for or against candidates.
  - *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), permitted corporations to make independent expenditures on ballot issues.

Justice Scalia on the Grand Bargain

- “The Court thus holds, for the first time since Justice Holmes left the bench, that a direct restriction upon speech is narrowly enough tailored if it extends to speech that has the mere *potential* for producing social harm.”
- “The principle the Court abandons today -- that the mere potential for harm does not justify a restriction upon speech -- had its origin in the "clear and present danger" test devised by Justice Holmes in 1919…and championed by him and Justice Brandeis over the next decade in a series of famous opinions opposing the affirmance of convictions for subversive speech.” *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 683-684 (1990) (emphasis in original).

Citizens United: A Return to *Buckley*

- *Citizens United v. FEC*: Overrules *Austin* and affirmed that other types of 'corruption' (i.e. getting access to a member of Congress) are not constitutional rationales for limiting expenditures.
- Corrected the *Austin* ruling and ruled that independent expenditures could be made for or against candidates, as well as ballot measures.
- "Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials. " *Citizens United v. FEC*, 130 S.Ct. 876, 912 (2010).

SpeechNow.org and the Bargain

- Affirms the principle that what *Buckley* permitted individuals to do, individuals may do so in concert.
- Thus the Super PAC.
  - We, and the FEC, prefer “Independent Expenditure Only Committee.”
- So: as to expenditures, the government *may not* discriminate against the speaker based on the identity or form of the speaker.
- As for contributions…

The Anomaly of *Beaumont*.

- 2003 case denying the ability of a non-profit to contribute to a candidate.

- The Court noted that "current law focuses on the corporate structure's special characteristics that threaten the integrity of the political process." *FEC v. Beaumont*, 539 U.S. 146, 153 (2003) (citations and internal quotations omitted).
  - *U.S. v. Danielczyk* (Fourth Circuit, currently before the Supreme Court).

No State Favored Speech

- The Court has also prohibited the State from using its power to favor one *type* of speech over another.
- “We have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other” *Davis v. FEC*, 554 U.S. 724, 750-751 (2008).
- “Any increase in speech resulting from the Arizona law is of one kind and one kind only--that of publicly financed candidates. “ *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2820 (2011).

On to Policy…

- While the categories of regulation, and what is permitted, are relatively clear, in practice well-meaning regulations can chill protected speech.

Low Contribution Limits

- In theory, prevented by *Randall v. Sorrell*.
- Yet, many states have contribution limits much lower *per capita* than those upheld Federally in *Nixon v. Shrink Missouri Gov't PAC*.
- High burden to prove unconstitutionality:
- "These five sets of considerations, ***taken together***, lead us to conclude that Act 64's contribution limits are not narrowly tailored. Rather, the Act burdens First Amendment interests by threatening to inhibit effective advocacy by those who seek election, particularly challengers; its contribution limits mute the voice of political parties; they hamper participation in campaigns through volunteer activities; and they are not indexed for inflation." *Randall v. Sorrell*, 548 U.S. 230, 261 (2006) (emphasis added).

Overbroad or vague "expenditures"

- "Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *FEC v. WRTL II*, 551 U.S. 449, 474 (2007).
- National Defense Committee: Submits advisory opinion request with text of seven ads, four donation requests, or whether political committee registration is mandatory for NDC.
- FEC answers regarding five ads and "could not approve a response by the required four affirmative votes concerning the remaining advertisements and donation requests, or concerning NDC's other questions." AO 2012-27.
- CSG's Policy Paper discussed the personhood movement, the problems with how personhood would affect Colorado citizens, and the philosophical rationale for personhood rights to attach at birth.
  - Closed with sentence: "If you believe that 'human life has value', the only moral choice is to vote against Amendment 62."

SCOTUS on the Institutional Press.

- "We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." *Citizens United v. FEC*, 130 S. Ct. at 905 (internal citations omitted).
- "With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred." *Id.* at 906.

Protecting the Institutional Press in CO.

- Colorado law also heavily protects institutional press, but offers no safe harbor for small-time blogs and alternative Web based sources.
    - 2-(8)(b) "Expenditure" does not include:
    - (I) Any news Articles, editorial endorsements, opinion or commentary writings, or letters to the editor printed in a newspaper, magazine or other periodical not owned or controlled by a candidate or political party;
    - (II) Any editorial endorsements or opinions aired by a broadcast facility not owned or controlled by a candidate or political party;
    - (III) Spending by persons, other than political parties, political committees and small donor committees, in the regular course and scope of their business or payments by a membership organization for any communication solely to members and their families;
    - (IV) Any transfer by a membership organization of a portion of a member's dues to a small donor committee or political committee sponsored by such membership organization; or payments made by a corporation or labor organization for the costs of establishing, administering, or soliciting funds from its own employees or members for a political committee or small donor committee.

Overbroad Registration and Disclosure

- *Sampson v. Buescher*: The Tenth Circuit strikes down a registration rule that forced registration when $200 is spent by two or more persons.
- Opposition used campaign finance to stifle grassroots activists on the other side. (“Plaintiffs had raised less than $1,000 in monetary and in-kind contributions for their cause when supporters of annexation challenged the failure of the opponents to register as an issue committee.” 625 F.3d 1247, 1249.)
- Yet, the problem has not been fixed.

The DISCLOSE Act of 2013?

- Expansion of time for “electioneering communication” to from the 60 day/30 day under present law to January 1 to election day of an election year.
- Past editions of DISCLOSE also attempted a new definition for the functional equivalent of express advocacy…which could present national problems akin to those with the Coalition for Secular Government.
- From 2012 DISCLOSE:
  - “Expressly advocates the election or defeat of a clearly identified candidate, or is the functional equivalent of express advocacy because, when taken as a whole, it can be interpreted by a reasonable person only as advocating the election or defeat of a candidate, taking into account whether the communication involved mentions a candidacy, a political party, or a challenger to a candidate, or takes a position on a candidate’s character, qualifications, or fitness for office.”

Picture Disclaimers and Top Funder Disclaimers.

- The 2010 (House passed) version of DISCLOSE was even more onerous.
- Show the CEO of an organization who sponsors an ad. Why is this necessary? What information is gleaned?
- List of the “Top Five Funders.” This implies a certain support for the specific content of that advertisement that simply may not be there.
  - Also a nice way to eat up too much time of a message, diluting its effectiveness.

Overbroad rules with 501(c)(4) orgs.

- Not all 501(c)4 organizations are tied to Karl Rove.
- Potential chill is made worse by the problems with defining “express advocacy.”
- Could be used by opponents in pernicious ways.
- *NAACP v. Alabama*; *Bates v. City of Little Rock*.

Shareholder Paternalism

- Justice Kennedy on checks to corporate power:
  - “There is, furthermore, little evidence of abuse that cannot be corrected by shareholders "through the procedures of corporate democracy.” *Citizens United v. FEC*, 130 S. Ct. 876, 911.
- Refers to current procedures.
- But political activists have now begun to hijack the process.

Making the Bargain work for everyone.

- It turns out we have a very stable system.
- The problems with this system seem to come from those who wield it to stifle those they disagree with.
- Time for us to pay attention to these unintended consequences of *Buckley*, not blindly oppose *Citizens United*.
- Dangers include defining political advocacy, over-ambitious disclosure and disclaimer rules, and unreasonably low limits.