

## FROMM INSTITUTE/GREAT FREE SPEECH CASES/SESSION EIGHT

### BRIEFS FOR *Buckley v. Valeo*, *Citizens United v. FEC*

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

F/P: The Federal Election Campaign Act (FECA) of 1971, as amended in 1974,

- 1) limited various *contributions* to federal political campaigns;
- 2) limited various *expenditures* in such campaigns by
  - a) independent individuals and groups on behalf of a clearly identified candidate,
  - b) candidates from personal/family resources,
  - c) the campaigns themselves;
- 3) required disclosure of most contributions and expenditures in such campaigns; and
- 4) established a system of public funding for such campaigns.

I: Whether these restrictions violate the First Amendment.

H: Yes/no; under heightened scrutiny, applicable to restrictions on political speech, the contribution limits and public funding provisions are upheld, and all the expenditure limits are struck down.

R: While governmental interests in 1) avoiding actual or apparent corruption and 2) equalizing relative financial resources of candidates and the ability of individuals to influence elections are insufficient to justify any of the expenditure limits, the governmental interest in preventing actual or apparent corruption is sufficient to support the contribution limits.

R: Money = speech, i.e., “this Court has never suggested that the dependence of communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.”

R: Unlike expenditure limits, contribution limits place little direct constraint on political communication, for they permit the symbolic expression of support evidenced by a contribution but do not in any way infringe the contributor’s freedom to discuss candidates and issues.

R: “The First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive, or unwise.”

#### *Citizens United v. Federal Election Commission* (2010) (Justice Kennedy for the majority)

F/P: 2 USC sec. 441b severely limited corporate and union expenditures to advocate the election or defeat of candidates through any form of media. In January 2008, Citizens United (C-U), a nonprofit corporation, released the movie *Hillary*, essentially a feature length negative advertisement urging viewers to vote against Hillary Clinton, a candidate for her party’s nomination for President. Seeking to make *Hillary* available through video-on-demand, C-U produced two short ads for the movie, (which provided C-U’s website address), that it ran on broadcast and cable TV. Fearing that the ads violated federal law, C-U sought a declaratory judgment. District Court → J/FEC, C-U appealed.

I: Whether sec. 441b violates the First Amendment

H: Yes

R: Since sec. 441b burdens political speech, it is subject to strict scrutiny.

R: Since speech restrictions based on the *identity* of the speaker are all too often simply a means to control the *content* of the speech, *Bellotti* established that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity.

R: Since the anti-distortion rationale accepted in *Austin* would permit government to ban political speech simply because the speaker is an association with a corporate form, *Austin* is now overruled.

R: Since media corporations amass wealth using the corporate form, the anti-distortion rationale would enable Congress to ban the political speech of media corporations, which is unacceptable.

R: Most corporations are small, without large amounts of wealth.

R: "Independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. (The governmental interest accepted in *Buckley* was that of avoiding quid pro quo corruption), and independent expenditures do not lead to, or give the appearance of, quid pro quo corruption. In fact, there is only scant evidence that independent expenditures even ingratiate. Ingratiation and access, in any event are not corruption."

R: "The appearance of influence or access ... will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse to take part in democratic governance."

**Scalia, Alito, and Thomas, concurring:** "The First Amendment is written in terms of "speech," not speakers. Its text offers no foothold for excluding any category of speaker ...."

**Stevens, Ginsberg, Breyer, and Sotomayor, dissenting:**

"In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process.... The Framers took it as a given that corporations could be comprehensively regulated in the service of the public welfare.... Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech, it was the free speech of individual Americans that they had in mind.... Corporations are different from human beings .... Unlike natural persons, corporations have "limited liability" for their owners and managers, "perpetual life," separation of ownership and control, and favorable treatment of the accumulation of assets .... Unlike voters in U.S. elections, corporations may be foreign controlled."