

**Fromm/Great Free Speech Cases/Carcieri/Session 8  
Campaign Finance/*Citizens United v. FEC***

Thesis: While *Citizens United* is highly defensible as a matter of law, as a matter of politics a well drafted constitutional amendment invalidating *Citizens United* would also be highly defensible.

I) Background

II) *Citizens United* is highly defensible as a matter of law.

A) Precedent:

*Santa Clara County v. Southern Pacific RR* (1886) held that corporations are “persons” protected by the Due Process Clause of the 14<sup>th</sup> Amendment.

*Buckley v. Valeo* (1976) held that the dependence of communication on the expenditure of money does not introduce a non-speech element or reduce the scrutiny required by the 1<sup>st</sup> Amendment.

*First National Bank of Boston v. Bellotti* (1978) held that speech that is otherwise within the protection of the 1<sup>st</sup> Amendment does not lose that protection due to its corporate source.

B) Text

The 1<sup>st</sup> Amendment provides that “Congress shall make no law ... abridging the freedom of speech ....” As Justice Scalia thus wrote, concurring in *Citizens United*, the 1<sup>st</sup> Amendment “is written in terms of speech, not speakers. Its text offers no foothold for excluding any category of speaker,” including associations with a corporate form.

C) Doctrine

Since the laws challenged in *Citizens United* burden political speech, the issue was whether they could survive strict scrutiny. The Solicitor General relied centrally on two rationales.

- 1) The anti-distortion interest - this argument understandably failed
- 2) The anti-corruption interest - this argument appears stronger, and yet the majority and dissent plausibly disagreed

III) As a matter of politics, a well drafted constitutional amendment invalidating *Citizens United* would be highly defensible.

A) Politics: Raw power and political considerations

B) Principle

- 1) Structure – readjusting the balance of power between public and private sectors
- 2) Substance – Benson: the equality, information, participation, and anti-corruption interests combine to justify this amendment.

C) While they are not without merit, proposals to address the problem by legislation and by appointing justices who will overturn *Citizens United* in a future case would inadequately solve the problem.

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Campaign Finance/*Citizens United*, cont'd

D) Three Current Proposed Amendment to invalidate *Citizens United*

- 1) Move to Amend's "We the People Amendment." Introduced in Congress by Rep. Richard Nolan (D-MN) on April 28, 2015, this proposal provides:

Section One: "The rights protected by the Constitution of the United States are the rights of natural persons only. Artificial entities, such as corporations, limited liability companies, and other entities, 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 Two: "Federal, State, and local government shall regulate, limit, or prohibit 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."

- 2) In his book "Six Amendments," retired Supreme Court Justice proposes the following amendment in response to *Citizens United*:

"Neither the First Amendment nor any other provision of this Constitution shall be construed to prohibit the Congress or any State from imposing reasonable limits on the amount of money that candidates for public office, or their supporters, may spend in election campaigns."

3) A proposal introduced in Congress by Senator Bernie Sanders in January 2015 provides, in full:

“ARTICLE ----

Section 1: Whereas the right to vote in public elections belongs only to natural persons as citizens of the United States, so shall the ability to make contributions and expenditures to influence the outcome of public elections belong only to natural persons ...

Section 2: Nothing in this Constitution shall be construed to restrict the power of Congress and the States to protect the integrity and fairness of the electoral process, limit the corrupting influence of private wealth in public elections, and guarantee the dependence of elected officials on the people alone by taking actions which may include the establishment of systems of public financing for elections, the imposition of requirements to ensure the disclosure of contributions and expenditures made to influence the outcome of a public election by candidates, individuals, and associations of individuals, and the imposition of content neutral limitations on all such contributions and expenditures.

Section 3: Nothing in this Article shall be construed to alter the freedom of the press.

Section 4: Congress and the States shall have the power to enforce this article through appropriate legislation.”