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Common Cause v. Schmitt

455 U.S. 129 (1982)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 18, 1981

PERSONAL

Re: Nos. 80-847 & 80-1067, Common Cause v. Schmitt

Dear Harry:

7
In light of your concurring opinions in Citizens Against Rent Control v. Berkeley and California Medical Ass'n v. FEC, 49 U.S.L.W. 4842 (1981), you may have second thoughts on the above case. It is institutionally unfortunate to have Common Cause come down 4/4.

Although there are differences in our approach to election cases, it seems to me we agree on the basics. All but the affluent must pool their resources if their voices are to be heard. Core First Amendment rights are implicated by restrictions on contributions and expenditures so long as sources are made public. Both of our opinions in Berkeley agree that the restriction at issue must be subjected to exacting judicial scrutiny. Because § 9012(f) of the Presidential Election Campaign Fund Act also encroaches directly on political expression and association, it too must be tested by a rigorous standard. In your Berkeley concurrence, you quoted Buckley v. Valeo, 424 U.S. 1 (1976) and First National Bank v. Bellotti, 435 U.S. 765 (1978), in concluding that the restriction could be upheld only if it "advances a sufficiently important governmental interest and employs means 'closely drawn to avoid unnecessary abridgment' of First Amendment freedoms." I do not think § 9012(f) is sufficiently "closely drawn" to survive under your standard or mine.

In Buckley, we held that contribution limitations were permissible to avoid corruption or its appearance. In Bellotti, we explained that maintaining citizens' confidence in the integrity of government was an interest of the highest importance. Appellants argue that § 9012(f) survives First Amendment scrutiny because it avoids corruption or its appearance. Unlike Berkeley or Bellotti, there is evidence in the record that Congress was concerned that voter confidence was threatened by the power of large contributors in presidential campaigns. As appellants state, Congress adopted public financing of presidential campaigns to free candidates from reliance on contributors "who expect a return on their

investment, usually in the form of some governmental favor or largesse." FEC Brief in No. 80-1067, quoting New York Times, June 11, 1971 at 35, col.5. Since you stressed in your Berkeley opinion that your analysis would be different if the record supported the claim that voter confidence was threatened, is it correct to assume that your vote to reverse in Common Cause is based on the congressional finding that public funding of presidential campaigns is necessary to preserve voter confidence? The Congressional expression, of course, related to candidates.

But § 9012(f) is an expenditure limitation rather than a contribution limitation, and therefore it is not narrowly drawn to advance the governmental interest it allegedly promotes. This would be a different case if the challenged provision limited contributions to independent political committees advocating the election of a presidential candidate to \$1,000, as in Buckley, or if the restriction was a \$5,000 limit on contributions to multicandidate political committees, as in California Medical Ass'n. Such contribution limits might be upheld under Buckley. Because this alternative method of advancing the governmental interest of preserving voter confidence exists, the expenditure limitation of § 9012(f) cannot survive challenge. Like the expenditure limitation struck down in Buckley, § 9012(f) is not narrowly drawn to avoid corruption or its appearance resulting from large contributions to presidential candidates. Only a contribution limitation is a permissible method of avoiding corruption or its appearance.

Appellants in Common Cause also argue that § 9012(f) is necessary to prevent corruption resulting from the power of leaders of independent committees. The FEC cites a statement by the founder of NCPAC after a meeting with President Reagan that the committee was "keeping the pressure on." FEC Brief in No. 80-1067 at 27. This is simply not "corruption," but a valid democratic process at work. Reminding incumbents of the stands they took when they were candidates is surely in the best tradition of political accountability.

I do not read the record as supporting the claim that Congress adopted public financing of presidential campaigns to avoid corruption or its appearance resulting from the power of leaders of committees. Attempting to enforce campaign promises to take certain stands on public issues is not the type of "return on investment" that concerned Congress. Nor does the record indicate that there has been any "corruption," such as unwarranted personal rewards for leaders of independent political committees.

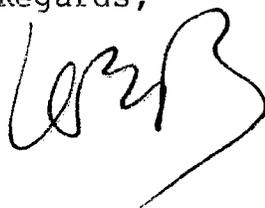
Finally, although Common Cause alleges that one of the appellee committees is not really an "independent" committee, that claim is not before the Court. Administrative remedies are the proper method to insure that candidates do not circumvent the public financing scheme by establishing "independent" committees. Because of the less restrictive alternative of administrative

proceedings, § 9012(f) cannot be justified as necessary to enforce candidates' promises not to accept contributions.

Because this expenditure limitation is not closely drawn to achieve its permissible goal of avoiding corruption or its appearance resulting from large contributions, and because the record does not support the claim that it is justified to prevent corruption resulting from the power of leaders of independent political committees, § 9012(f) cannot survive the rigorous judicial scrutiny we agree applies.

This of course, is personal to you.

Regards,

A handwritten signature in black ink, appearing to be 'Blackmun', written in a cursive style.

Justice Blackmun

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: The Chief Justice

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SUPREME COURT OF THE UNITED STATES

No. 80-847

80-847 COMMON CAUSE, ET AL., APPELLANTS
v.
HARRISON SCHMITT, ET AL

80-1067 FEDERAL ELECTION COMMISSION, APPELLANT
v.
AMERICANS FOR CHANGE, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

[January —, 1982]

PER CURIAM.

The judgments are affirmed by an equally divided Court.
JUSTICE O'CONNOR took no part in the consideration or de-
cision of these cases.

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Supreme Court of the United States
Washington, D. C. 20543

October 6, 1981

Dear Chief:

Applying the standard of 28 U.S.C. Section 455(a) and (b)(5), I have disqualified myself from participating in 80-847, Common Cause et al. v. Harrison Schmitt et al., consolidated with 80-1067, Federal Election Commission v. American for Change, et al.

Sincerely,



Sandra D. O'Connor

The Chief Justice

cc: The Conference
Clerk of the Court

