Journal of Law and Policy

Volume 25 | Issue 1 Article 1

12-2-2016

Introduction; The Past, Present and Future of Free Speech

Joel M. Gora

INTRODUCTION: THE PAST, PRESENT, AND FUTURE OF FREE SPEECH

*Joel M. Gora**

This may be a historic moment for the First Amendment. In 2016, a landmark Supreme Court ruling turned forty, the Supreme Court turned a corner, and First Amendment rights may turn out to be strengthened. January 30, 2016 marked the fortieth anniversary of the U.S. Supreme Court's landmark decision in *Buckley v. Valeo*,[1] dealing with the clash between First Amendment rights and campaign finance limits. And February 12, 2016, the day Supreme Court Justice Antonin Scalia died, marked the end of a ten-year period when the "Roberts Court" became perhaps the most First Amendment friendly and speech-protective Court in the Nation's history. And the surprise outcome of this past presidential election may, unexpectedly, enhance the future of free speech, because Judge Neil Gorsuch, Donald Trump's nominee to succeed Justice Scalia, seems to be a strong supporter of the First Amendment.[2]

I. BUCKLEY V. VALEO: A LANDMARK DECISION TURNS FORTY

To celebrate the anniversary of *Buckley v. Valeo*, Brooklyn Law School had an extraordinary program featuring two of the key players in that landmark litigation. They were Judge James L. Buckley, the lead plaintiff in the landmark case, and Mr. Ira Glasser, a leader of the ACLU, both of whom helped organize a "strange bedfellows" coalition of liberals and conservatives to challenge the

* Professor of Law, Brooklyn Law School.

[1] Buckley v. Valeo, 424 U.S. 1 (1976).

[2] *See, e.g.*, Tejinder Singh, *Judge Gorsuch's First Amendment Jurisprudence*, SCOTUSBLOG (Mar. 7, 2017, 11:16 AM), http://www.scotusblog.com/2017/03/judge-gorsuchs-first-amendment-jurisprudence/ (examining Judge Gorsuch's First Amendment jurisprudence).

campaign finance laws at issue.[3] They were also joined by our own Dean Nick Allard, a person with deep political and practical experience and insights.

As a young ACLU attorney, I was privileged to have been one of the lawyers who argued that case in the Supreme Court on behalf of the challengers and in defense of the First Amendment. In its opinion, the Court declared:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.[4]

That principle would also be the basis for the Court's more recent and highly controversial decision in *Citizens United v. Federal Election Commission*,[5] holding that these First Amendment rights also allowed corporations, unions, and nonprofit organizations to use their funds to communicate their views on government and the politicians who run it.[6]

---

[3] After he left the Senate, Senator Buckley would continue his distinguished career of public service as a high-level Executive Branch official and then as a United States Circuit Judge for the District of Columbia Circuit, becoming one of the few people in American history to have served in such capacities in all three branches of our government. *See Biography: Buckley, James Lane*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=b001026 (last visited Jan. 16, 2017). Mr. Glasser would go on to become the Executive Director of the ACLU, a position he held, with great distinction and energy, for almost a quarter of a century. *See Ira Glasser*, FLEX YOUR RTS., https://www.flexyourrights.org/about-us/board-of-advisors/glasser/ (last visited Jan. 16, 2017).

[4] *Buckley*, 424 U.S. at 57.

[5] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); *see* Adele Nicholas, *Citizens United Decision Sparks Controversy*, INSIDE COUNSEL (Apr. 1, 2010), http://www.insidecounsel.com/2010/04/01/spending-spree (showing that the Supreme Court's decision in *Citizens United* has sparked a passionate debate over whether corporations should have been extended First Amendment rights).

[6] *See Citizens United*, 558 U.S. at 365–66.

Where did this all begin? How did it come about that the Supreme Court subjected campaign finance restrictions to strict First Amendment free speech scrutiny? Here is the background.[7]

In 1972, Congress passed the Federal Election Campaign Act,[8] with the ungainly acronym of FECA, to try to control what was viewed as excessive political campaign spending, especially on television advertising.[9] Hailed as reform, the new law limited the amount of money that federal candidates and their supporters or detractors could spend on media advertising. The FECA also required, for the first time, extensive and burdensome registration, reporting, and disclosure by those who made such expenditures. We at the ACLU got a rude awakening about the new "reform" law when the very first suit brought by the federal government to enforce the law was filed—by President Richard Nixon's Justice Department—against a handful of anti-war activists.[10] What was their crime or offense? They had sponsored an ad in the *New York Times* sharply criticizing President Nixon for his wrongful conduct of the war in Vietnam and praising the few members of Congress

---

[7] For more information about the origins of the case, see Richard L. Hasen, *The Nine Lives of Buckley v. Valeo*, *in* FIRST AMENDMENT STORIES (Richard W. Garnett & Andrew Koppleman eds., 2011); Joel M. Gora, *Still Searching Today for a Better Way*, 6 J. L. & POL'Y 137 (1997); Joel M. Gora, *The Legacy of Buckley v. Valeo*, 2 ELECTION L.J. 55 (2003).

[8] Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972). For decades, the FECA and its later amendments were contained in Title 2 of the United States Code. A few years ago, all of the federal campaign finance laws, plus the federal voting and election laws, were moved to a new Title 52, Voting and Elections. *Editorial Reclassification, Title 52, United States Code*, OFF. L. REVISION COUNSEL: U.S. CODE, http://uscode.house.gov/editorialreclassification/t52/index.html (last visited Jan. 16, 2017).

[9] The three major federal campaign finance law statutes of modern times are (1) the Federal Election Campaign Act of 1971 at issue in those early ACLU cases, (2) the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 94-443, 88 Stat. 1263 (1974), which enacted the far more restrictive "reforms" that were at issue in the *Buckley* case, and most recently, (3) the Bipartisan Campaign Reform Act of 2002, or BCRA, Pub. L. No. 107-155, 116 Stat. 81 (2002) also known by its more common label, the McCain-Feingold bill, which in part gave rise to the *Citizens United* case.

[10] *See* United States v. Nat'l Comm. for Impeachment, 469 F.2d 1135 (2d Cir. 1972).

who sought to impeach the President for war crimes.[11] The government's suit claimed that the anti-Nixon ad might influence voters since the President was running for reelection that year, and therefore could be suppressed under the new campaign finance law.

Frankly, we were stunned that a law heralded as election reform could be used to strike at the very heart of the First Amendment's protections of freedom of speech, press, and association that safeguard the democratic ability of the people to criticize their government. We were relieved when lower courts ruled that the new law could only be used against groups whose primary purpose was electing candidates, and not against organizations, like the impeachment group or the ACLU, engaged in issue advocacy and government criticism.[12] Dissenters would be free to challenge the government without fear of official repression.

But our relief was short-lived. The Watergate scandals erupted and involved some incidents of campaign finance irregularities—most of which were already illegal or subject to disclosure—and that provided the basis for a stampede for more "reforms." The result was that Congress passed the FECA Amendments of 1974,[13] a sweeping and unprecedented attempt to use campaign finance controls to suppress First Amendment rights and, in the process, undermine free speech as the engine of democracy. That new law severely limited the amount of money that candidates, parties, and even independent groups, individuals, and nonpartisan issue organizations could spend to speak about politics and elections. Run a one-quarter-page ad in the *New York Times* criticizing the President of the United States and the FECA Amendments viewed that not as free speech, but as a felony. The law also subjected individuals and groups to new and even more burdensome reporting and disclosure requirements just for criticizing the public records of elected officials. And all those limits, with jail sentences to back them up, would be enforced by a new body—the Federal Election

---

[11] The text of the advertisement is set forth as an appendix to the court's opinion in the *National Committee for Impeachment* case. *Id.* at 1143.

[12] *See id.* at 1141; Am. Civil Liberties Union v. Jennings, 366 F. Supp. 1041, 1057 (D.D.C. 1973), *vacated as moot sub nom.*, Staats v. Am. Civil Liberties Union, 422 U.S. 1030 (1975).

[13] *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 94-443, 88 Stat. 1263.

Commission—the majority of whose members would be hand-picked by Congress, the very incumbents that the First Amendment was designed to let the people criticize and control. Talk about putting the fox in charge of guarding the chicken coop.

Fortunately, not everyone thought these so-called reforms were so great. Some thought the restrictions on campaign giving and spending violated the very core of the First Amendment's protections and undermined the essential role of free speech in safeguarding democracy. As mentioned at the outset, a group of plaintiffs, including conservative Senator James L. Buckley, liberal anti-war Senator Eugene McCarthy, the American Conservative Union, and the New York Civil Liberties Union organized a "strange bedfellows" coalition of liberal and conservative politicians and groups to challenge these new draconian restrictions on political freedom in America. They claimed that, as outsiders and underdogs challenging the establishment and the status quo, they would not be able to get their messages out without being able to raise and spend a modest number of larger donations from friends and supporters. Their lead counsel was Ralph K. Winter, a Yale Law School professor, who would go on to a long and distinguished career as a United States Circuit Judge for the Second Circuit. One of the other key lawyers for the challengers was John R. Bolton, who would later serve in top foreign policy positions and is now a Senior Fellow at the American Enterprise Institute.

In our brief to the Supreme Court we challenged all of these limits on free speech and said that the law was the greatest frontal assault on the First Amendment protections of political speech and association since the Alien and Sedition Acts. It would stifle the voices of outsiders, political underdogs, and dissidents, and thereby it would entrench the incumbents in Congress who had written the law precisely to barricade themselves in power.

The case raised so many issues. Were limits on spending for political speech in effect limits on the speech itself? It has always struck me that this was an easy one. The less the government allows you to spend on speech, the less speech you will have and the harder it will be to get your message out. Can political speech be limited in this fashion? That too always seemed an easy one since all agree that protection of robust and uninhibited political speech is at the core of the First Amendment. Whose political speech and money can you

limit? All candidates and parties, even those new ones trying to get their voices heard? Independent groups like the ACLU, the Sierra Club, Planned Parenthood, and the NRA, who spend funds to criticize the government and the officials—often candidates for election—who run it? Labor unions who speak on behalf of their members? Wealthy individuals like George Soros, Michael Bloomberg, and the Koch brothers, who have spent hundreds of millions of dollars supporting political advocacy of all kinds? The news media, almost all corporate entities, usually owned by wealthy individuals and exerting enormous influence on our elections? These ramifications of the new law all involved one fundamental question: does the First Amendment permit the government to exercise such controls over political speech?

The Supreme Court satisfied many of our concerns in its landmark *Buckley* decision, declaring for the first time that campaign funding limits violated First Amendment rights.[14] It was a great victory for freedom of speech and association, anchored in the bedrock principle that the remedy for bad or problematic speech is "more speech, not enforced silence."[15] The Court emphatically struck down limits on political expenditures on the ground that the First Amendment prohibited any limiting or leveling of political speech.[16]

But the *Buckley* ruling was not a complete victory for the First Amendment since the Court upheld limitations on contributions to prevent corruption or the "appearance of corruption."[17] The resulting dual regime—with limits on how much could be contributed to candidates and parties, but no limits on how much could be spent by or in support of candidates and parties[18]—would contribute to so many of the problems we have had since then as people and groups tried to find other ways to convey their message since they were limited in how much they could give directly to the candidates and parties of their choice. Today's phenomenon of "Super PACs" is just the latest manifestation of what happens when

---

[14] Buckley v. Valeo, 424 U.S. 1, 56–58 (1976).

[15] Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

[16] *Buckley*, 424 U.S. at 51, 54, 57–58.

[17] *Id.* at 28–29.

[18] *See* Joel M. Gora, *Still Searching Today for a Better Way*, 6 J. L. & Pol'y 137, 146 (1997).

you limit contributions to candidates and people try to find other ways to sidestep those limits.[19]

And then, of course, there is *Citizens United*,[20] and the impact of the death of Justice Antonin Scalia. His was a powerful judicial voice who was deeply skeptical of campaign finance restrictions and limitations as fundamentally incompatible with democracy. In 1975, the year before *Buckley* was decided, the ACLU published a pamphlet which said campaign finance limitations were direct violations of the First Amendment and were incumbent protection mechanisms. Justice Scalia must have read that pamphlet, because his powerful dissent in *Austin v. Michigan Chamber of Commerce*[21] pointed to the totalitarian possibilities of government control of political spending, and his persuasive dissent in *McConnell v. Federal Election Commission*[22] was a devastating exposé of campaign finance limitations intended to stifle criticism of the people in power. With his voice being stilled, the prospects for continued protection of the right to spend money to speak about government and politics were called into serious question. More broadly, also in jeopardy, was the foundational principle that it is the people, not the government, who get to decide how much and what kind of speech they need and want, in both the political arena and in life more generally; the view that free speech is not the enemy of democracy or liberty, but its engine and ally. Justice Scalia's death, and the likely prospect of his replacement being a nominee appointed by a Democratic President having a less powerful commitment to free speech, seemed likely to result in the end of the Roberts Court as a strong protector of First Amendment rights in the campaign finance regulation area and so many others. This would have had an enormous impact on our constitutional law and culture. But the surprising outcome of the 2016 national elections may result

---

[19] *See SpeechNow.org v. Fed. Election Comm'n*, 599 F.2d 686 (D.C. Cir. 2010), which helped launch super PACs by saying that contributions to a group which only made independent expenditures, which cannot be limited in amount, could also not be limited in amount.

[20] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[21] Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 679–95 (1990) (Scalia, J., dissenting).

[22] *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 248–64 (2003) (Scalia, J., dissenting).

in a continuation of the Roberts Court legacy of strong protection of First Amendment rights.

II. THE ROBERTS COURT'S FREE SPEECH LEGACY

In the aftermath of Justice Scalia's death, many experts speculated about what Roberts Court precedents were at risk as a result of his expected replacement by a Democratic President's nominee. One scholar confidently predicted that *Citizens United* would be one of the first to go.[23] And, I wondered, what aspects of that case would be abandoned? The part that allowed labor unions, including the AFL-CIO, to spend union treasury money on pro-union political messages supporting pro-union candidates? The part which allowed Citizens United, the ACLU, and every one of the hundreds and thousands of issues organizations in America who use their organization's funds to speak out on government and politics on behalf of their members and supporters? Or perhaps the part that said to silence the six million corporations in America from speaking in the same fashion was a vast censorship? Or could it be the part where the Court said that if it allowed the government to limit the speech of corporations, the government could accordingly limit the speech of the news media, almost all of which are corporations? Or finally is it the part where the Court said that under the First Amendment the government does not get to tell the people how much, or what kind, of political speech—or any other kind of speech—they are allowed to have?[24]

These questions remained so troubling in the wake of Justice Scalia's death and what seemed the strong likelihood that his successor would not have the same passionate commitment to the protection of political speech and its funding, or to First Amendment rights more generally. The landmark *Citizens United* ruling was squarely based upon, embraced, and reaffirmed the landmark

---

[23] *See* Adam Liptak, *Supreme Court Appointment Could Reshape American Life*, N.Y. TIMES (Feb. 18, 2016), http://www.nytimes.com/2016/02/19/us/politics/scalias-death-offers-best-chance-in-a-generation-to-reshape-supreme-court.html.

[24] *See, e.g.*, *Citizens United*, 558 U.S. at 356 ("When government seeks to use its full power . . . to command where a person may get . . . information or what distrusted source he or she may not hear it uses censorship to control thought. The First Amendment confirms the freedom to think for ourselves.").

Buckley decision. For the past forty years *Buckley* provided the constitutional framework for the law governing the financing of our politics and the doctrinal platform for *Citizens United*. Both decisions, of course, have been harshly criticized, as well as staunchly defended. But their core principle—that the people, and not the government, should decide how much free speech they want and need in order to challenge the government—remains an essential foundation of democracy. The critical question now is how long will such views prevail concerning campaign finance regulation or a host of other First Amendment questions?

Those questions will still be faced by a new Court. As President Donald Trump has pledged to nominate Justices "in the mold of Justice Scalia," the threats to the First Amendment may have receded considerably and the Roberts Court's First Amendment legacy may continue a strong one. And given President Trump's occasionally disparaging comments about certain settled First Amendment rights,[25] pushback from a free speech friendly Court would be in order.

III. INTRODUCING THE SYMPOSIUM: FREE SPEECH UNDER FIRE

To explore the broader free speech themes of the meaning of the First Amendment reflected in *Buckley* and *Citizens United*, the law school hosted an all-day Symposium on February 26, 2016, titled "Free Speech Under Fire: The Future of the First Amendment."[26] For free speech, it may be the best of times, yet the worst of times. The Roberts Supreme Court, from 2006 to 2016, may well have been the most speech-protective Court in a generation, extending free speech protection on a number of fronts and rebuffing claims by government and its allies to limit such protections. Yet these free speech rulings have drawn fire from critics, both on and off the Court, contending that the decisions are inconsistent with the democratic and egalitarian purposes of the First Amendment and impose unnecessary and burdensome restrictions *on government*.

---

[25] *See* David Cole, *Donald Trump vs. The First Amendment*, NATION (Jan. 18, 2017), https://www.thenation.com/article/donald-trump-vs-the-first-amendment/.

[26] Brooklyn Law School Journal of Law & Policy Symposium: Free Speech Under Fire: The Future of the First Amendment (Feb. 26, 2016).

The death of Justice Scalia silenced a powerful judicial voice for First Amendment rights in so many key areas. But if his replacement takes a similar view, the Court's protection of the First Amendment may remain strong. Regardless of what the Court does, however, even more importantly, in everyday life censorship and suppression of speech seems more the rule than the exception, both at home and abroad. That is where the ultimate battle for freedom may be fought.

To explore these questions, the Symposium brought together many of the Nation's leading First Amendment advocates and scholars to address all sides of these pressing issues as they play out in the areas of hate speech, money and speech, corporate and commercial speech, and surveillance and speech. Only the future will tell us what is in store for the First Amendment. But the ideas, analyses, and perspectives of the papers that follow will be at the center of the debate over what path the Court and the Nation should take.