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A LANDMARK DECISION TURNS FORTY: A CONVERSATION ON *BUCKLEY V. VALEO*

*Nicholas W. Allard**

President, Joseph Crea Dean and Professor of Law

Today we gather to observe—I will not say celebrate—the fortieth anniversary of *Buckley v. Valeo*,¹ a landmark case remarkable for its impact, and frankly for lasting so long. Today’s program, organized by professor Joel Gora and featuring our exceptionally distinguished special guest speakers, is further proof of what has long been the case; that our great law school is a leading center for learning how to use the power of law to good effect for people and for society at home and abroad. Perhaps you will understand, and share with me, the great pride I feel as the President and Dean of Brooklyn Law School, as once again our law school takes on issues which are paramount; issues whose significance matters far beyond our campus, our city, and the empire state.

Understanding *Buckley v. Valeo* and its progeny and studying election campaign finance law is critical to address pressing questions about liberty, freedom, equality, and the very legitimacy of our democratic republic.

Our political election system is in shambles. Its damaged condition and disarray makes me think about the havoc in a trailer park after a tornado. And like the harm suffered in those terrible natural disasters, the destructive man-made wind fanned by dollars, distrust, and partisan distemper threatens the very foundation of our system of government. In order for our democracy to endure we will need more than a superficial cleanup and more than merely attempting to resume business as usual after each stormy election subsides. We need a selfless, collective, public-spirited effort, and

* Remarks given at the “A Landmark Decision Turns Forty: A Decision on *Buckley v. Valeo*” event on January 26, 2016.

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

we need to rebuild and strengthen our institutions on sound and safe ground. We need to be forward-looking, taking into account the climate change buffeting contemporary politics brought on, for example, by the dawn of a new age of mobile broadband campaigning and fundraising that soon will eclipse conventional broadcast media, and by electoral districting and primary systems that seem to be reinforcing polarization, gridlock, and dysfunction in government. The last thing we need to do is put Band-Aids on yesterday's problems, when in fact new challenges are upon us.

So, before we turn to the gospel of *Buckley v. Valeo* according to James, Ira, and Joel, I will invoke two readings from scripture. First, from the "Old Testament," the *Federalist Papers*: "If [people] were angels, no government would be necessary. If angels were to govern [people], neither external nor internal controls on government would be necessary."²

The lesson of this reading is that, as we consider campaign finance reform issues, we should keep our eye on the ball; that is to say that elections are a means to the desired end of good government—government that is of the people, by the people, and for the people—responsible to them and limited by them. That is our ultimate purpose and today's program is but a start, and will nicely set up what outside commentators have already described as possibly the most significant discussion of such issues that will occur in America this year—a free speech symposium at Brooklyn Law School organized by Professor Joel Gora, Judge Andrew Napolitano, and our exceptional constitutional law faculty for February 26, 2016—*Free Speech Under Fire: The Future of the First Amendment*.

My reading from the "New Testament" is Justice Brandeis' great dissent in *Olmsted v. United States*:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. [People] born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty

² THE FEDERALIST NO. 51 (James Madison).

lurk in insidious encroachment by [people] of zeal, well-meaning but without understanding.³

The lesson I take from this extraordinary passage is that it is not enough to assume and presume that one's cause is just, that one side or the other on the campaign finance debate has a monopoly of righteousness. We need to learn and to study all the facts, and discover what the root causes of our problems are. We must take care—especially because much is at stake—that our remedies are not worse than the disease. First, do no harm.

Specifically, in my personal view, the evils of corruption and tyranny that drove the advocates of the Federal Election Campaign Act and its amendments, and that motivated and drove the *Buckley v. Valeo* litigation, are indeed evils which are anathema to our way of life. But, in reality, corruption and tyranny are well guarded against in our system under current law and are less problematic than are the problems of *asymmetry*, which is to say inequality in the ability to participate and to be heard; *partisan dysfunction*, which sadly requires no elaboration to this audience at this time; and *waste*, which is to say that our campaigns are too long, too expensive, and too uninformative to do any damn good, and moreover that the biggest scandal is that politicians are compelled, or feel compelled, to spend their time and attention raising money in never-ending campaigns rather than doing their jobs and governing once elected. The good news is that the fresh ground we can cover together pursuing solutions to these real problems could prove fertile, and I sincerely believe improvement is possible.

Turning to *Buckley v. Valeo* itself, it is an exceptional case—a 143-page *per curiam* behemoth with 178 footnotes, five separate opinions of the eight justices involved, writing eighty-three more pages, which with appendices yielded a 294-page reported decision. By 2010, the year of the *Citizens United* decision,⁴ *Buckley v. Valeo* already had been cited approximately in 2,500 cases, 4,000 law review articles, and has been consistently cited in cases both

³ *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

⁴ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (holding political spending is protected speech under the First Amendment).

upholding campaign finance laws and in some cases overturning them.⁵

So, questions I suspect our speakers will delve into today will include:

- Is the impact of *Buckley v. Valeo* what you expected?
- What explains its impact and staying power?
- Can we do better?
- If so, what do you recommend?

I am sure that we can leave some in-depth analysis of these questions until our upcoming free speech symposium in February. For now, I will conclude by referring to the actual Bible by citing *Numbers* and simply asking: “[w]hat hath God wrought?”⁶

In modern America, we too have been wandering in the wilderness now for forty years—and it is about time we find our way to a better place. Despite my dark opening comment about the reality of the terrible conditions of our broken election and campaign finance system, I remain an optimist, and with good reason. I have confidence, which our country’s history repeatedly demonstrates is warranted—confidence in the resilience and powerful self-correcting mechanisms built into our brilliantly designed, cantilevered system of government and confidence in the fundamental good nature and spirit of the American people.

⁵ See, e.g., *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 737 (2008) (using *Buckley* as instructive to determine § 319 of the Bipartisan Campaign Reform Act (2002) to be unconstitutional); *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 103–05 (2003) (using *Buckley* reasoning to constitutionally validate parts of the Bipartisan Campaign Reform Act (2002) and invalidate others); Jeremiah W. Nixon & Paul R. Maguffee, *Money Talks: In Defense of a Common-Sense Approach to Judicial Review of Campaign Contribution Limits*, 52 ADMIN. L. REV. 661 (2000) (discussing how “the United States Supreme Court embraced such a common-sense understanding of the risks posed by large campaign contributions”); Trevor Potter, *Buckley v. Valeo, Political Disclosure and the First Amendment*, 33 AKRON L. REV. 71 (1999) (discussing how the Supreme Court in *Buckley* “established the campaign and political disclosure framework for campaign finance jurisprudence”).

⁶ *Numbers* 23:23.

A LANDMARK DECISION TURNS FORTY: A CONVERSATION ON *BUCKLEY V. VALEO*

James L. Buckley

I am delighted to be part of this commemoration of the fortieth anniversary of *Buckley v. Valeo*,¹ and not just because it has assured me a measure of immortality. Although the Supreme Court's decision in the case was flawed in one important respect,² it warrants celebration because of the Court's critical holding that campaign spending is constitutionally protected speech.³

Buckley challenged the constitutionality of the Campaign Reform Act of 1974,⁴ which, among other things, placed ceilings on what could be spent in presidential and congressional campaigns,

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

² *Id.* at 28–29 (holding that a \$1,000 contribution ceiling for individual campaign contributions was constitutional to limit corruption and the appearance of corruption).

³ *Id.* at 51–58.

⁴ *Id.* at 7 (challenging, among others, the following provisions: individual political contributions limited to \$1,000 to any single candidate per election, with an overall annual limitation of \$25,000 by any contributor; independent expenditures by individuals and groups “relative to a clearly identified candidate” limited to \$ 1,000 a year; campaign spending by candidates for various federal offices and spending for national conventions by political parties subject to prescribed limits; and disclosure requirements for contributions and expenditures above certain threshold levels); Campaign Reform Act of 1974, Pub. L. No.93-443, § 3044, 88 Stat. 1263 (1974).

and also limited individual campaign contributions to \$1,000 per candidate,⁵ a figure that has since grown to \$2,700.⁶

When the legislation came to the Senate floor, I felt its restrictions on challengers were constitutionally suspect; that they were very bad policy, and I vigorously opposed them. So, when the legislation was enacted into law the only recourse was to test its constitutionality in court. And in this noble enterprise I was joined by a half-dozen or so enlightened co-plaintiffs.

At the outset, it is instructive to look at the diverse plaintiffs in *Buckley*. What we had in common was not ideology, but our status as political outsiders. Although I was a U.S. senator at the time, I had squeaked into office four years earlier as a third-party candidate. My co-plaintiffs included former Senator Eugene McCarthy, who in 1968 had bucked his party's establishment by running a presidential primary campaign effective enough to cause Lyndon Johnson to withdraw his candidacy for reelection. Other plaintiffs included the very conservative American Conservative Union, the equally liberal New York Civil Liberties Union, and Mr. Stewart Mott, a wealthy sponsor of liberal causes who had contributed \$220,000 to the McCarthy presidential campaign.⁷

What we all had in common was a concern that the 1974 Act would effectively squeeze independent voices and reform movements out of the political process by making it even more difficult than it already was to raise effective challenges to the political status quo. We believed that the Act's restrictions were fundamentally flawed, both constitutionally and as a matter of public policy.

The core value protected by the First Amendment's speech clause is the freedom of political speech.⁸ It is incontrovertible that in today's world it takes money, and a great deal of it, for political

⁵ *Buckley*, 424 U.S. at 6, 29 (“[T]he weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the \$1,000 contribution ceiling.”).

⁶ Campaign Reform Act, § 3044; see *Citizens' Guide*, FED. ELECTION COMM'N, http://www.fec.gov/pages/brochures/citizens.shtml#how_much (last updated Feb. 2017).

⁷ *Buckley*, 424 U.S. at 7–8; see 147 CONG. REC. S3, 4001 (Mar. 2001).

⁸ U.S. CONST. amend. I.

speech to be heard. Therefore, we opposed the limits on contributions and spending as unlawful. We found the legislation equally objectionable as a matter of policy, because a healthy democracy should encourage competition in the political marketplace rather than increase the difficulties already faced by those challenging incumbents, all of whom enjoy such enormous advantages as name recognition, automatic access to the media, and the good will generated by handling constituent problems.

Given this fundamental political reality, a challenger who is not a celebrity in his or her own right must be able to persuade both the media and a broad base of potential contributors that his or her candidacy is credible. This requires a substantial amount of seed money. As I testified in the case, I could not have won election in 1970 if the \$1,000 limit on individual contributions had been in place.⁹ Thanks to about \$60,000 in gifts from a handful of individuals, my campaign was able at the outset to hire key personnel, print campaign literature, and rent strategically located space in New York City for my headquarters.

This caused the media to take my candidacy seriously, and that in turn enabled me to raise—largely through means of mailings—the two million required for a competitive campaign. Nor could Senator McCarthy have launched a serious challenge to an incumbent president without the more than one million he received from a dozen early supporters.

In *Buckley*, we won a number of our arguments before the Supreme Court but lost a critical one. The Court agreed that the restrictions placed on what could be spent in political campaigns were unconstitutional.¹⁰ It held, however, that the limitations placed on individual contributions were constitutional because of Congress's express concern of avoiding the fact or appearance of corruption in federal elections.¹¹ But, because of the understandable assumption that an individual cannot corrupt himself, the Court

⁹ See *Buckley v. Valeo*, 387 F. Supp. 135 (1975) (testimony of Hon. James Buckley); accord *JAMES L. BUCKLEY, FREEDOM AT RISK* 182 (2010).

¹⁰ *Buckley*, 424 U.S. at 39.

¹¹ *Id.* at 45.

overturned the limits that Congress had placed on what candidates could spend on their own campaigns.¹²

In the wake of the *Buckley* decision, we are left with a package of federal election laws and regulations that have distorted virtually every aspect of the election process. The 1974 amendments to the Federal Election Campaign Act were supposed to deemphasize the role of money in federal elections. Instead, the limit on individual contributions has made the search for money a candidate's central preoccupation.

When I ran in 1970, I never made telephone calls requesting money, and I doubt that I attended as many as a half-dozen fundraising occasions. Passing the hat was the exclusive concern of my finance committee. Today, from the moment they take office, members of Congress routinely spend an hour or two on the phone every day soliciting contributions for their future reelection campaigns. Federal campaign regulations have virtually driven grassroots action from the political scene. The rules have become too complex; the costs of a misstep too great.

In 1970, when on campaign tours around New York State, I would often run into groups that, on their own initiative, had rented storefronts from which to dispense my campaign literature, man the phones, and dispatch volunteers. Today, anyone intrepid enough to engage in that sort of spontaneous activity must hire a lawyer, and even then, they must be prepared to prove in court that they were acting independently of their candidate's campaign.

Today's reformers complain about the power of political action committees—the notorious PACs—and they do so with substantial justification. Those committees can have very specific legislative objectives and they may condition contributions on a candidate's commitment to vote this way or that in future legislation. But their proliferation and growth are a direct consequence of the restrictions placed on individual giving. A citizen who would have contributed a substantial amount to a candidate in whom he believes, but is today limited to \$2,700, will find other outlets for the rest of the money he has earmarked for political purposes. The PACs provide a ready alternative.

¹² *Id.* at 52–53, 58.

There is general agreement that the current law governing federal campaigns is worse than unsatisfactory.¹³ The answer, however, is not to place further restrictions on the freedom of speech, as so many continue to urge,¹⁴ but rather to reexamine the premises on which the existing ones have been based. In the first instance, it has been amply demonstrated in a dozen races that money itself cannot buy elections. The voters have the final say. But what money can, and must, do is buy the minimum exposure without which no candidate, however meritorious, has a chance.

Second, while it is of course true that large contributions can corrupt, the likelihood that a candidate will be seduced by them is vastly overstated. The overwhelming majority of wealthy donors back candidates in whom they believe and with whom they are in general agreement, and they are far more tolerant of differences on this point or that than are the PACs or other single-issue organizations to which a candidate must otherwise turn for necessary financing.

Corruption only occurs when a legislator casts a vote that violates his convictions in exchange for financial support, and studies of actual voting patterns suggest that kind of corruption is far too rare to warrant the distortions created by the present law in an attempt to avoid the appearances of corruption.¹⁵

However, this is not to deny the importance of minimizing such appearances. Our current law addresses the problem by requiring a timely disclosure of all contributions over a specific amount.¹⁶ That enables opponents to publicize any gift that might give rise to an adverse inference, and the public can then judge whether the contribution in fact is apt to corrupt the recipient.

I long supported that safeguard, but thanks to a recent dissent by Supreme Court Justice Clarence Thomas from the Court's holding in *Citizens United v. Federal Election Commission* that disclosures

¹³ See, e.g., E. JOSHUA ROSENKRANZ, *BUCKLEY STOPS HERE: LOOSENING THE JUDICIAL STRONGHOLD ON CAMPAIGN FINANCE REFORM* (1998).

¹⁴ See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

¹⁵ See BRADLEY A. SMITH, *CAMPAIGN FINANCE REGULATION: FAULTY ASSUMPTIONS AND UNDEMOCRATIC CONSEQUENCES*, CATO INST. (Sept. 13, 1995), <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa238.pdf>.

¹⁶ 52 U.S.C. § 30104 (2015).

of contributions are constitutional under the 2002 Bipartisan Campaign Reform Act,¹⁷ I believe that there may be a better way to deal with this matter.

In his opinion, Justice Thomas described in chilling detail the organized harassment of individuals who had made contributions in support of a California referendum that would define marriage as a union between a man and a woman.¹⁸ He then concluded that he could not “endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in ‘core political speech, the primary object of our First Amendment protection.’”¹⁹

I am no longer sure that I can either, especially given the power of today’s social media to mobilize instant retaliation. I therefore believe that Congress should consider legislation to delete the limits on individual giving, while requiring that all contributions be made anonymously. This could be done by requiring that they be routed through a neutral third party such as a bank. To ensure anonymity, however, the law would have to impose a serious penalty such as mandatory prison time for any disclosure of a contribution’s source.

But, whether one discloses contributions or requires their anonymity, what makes no sense is to retain a set of rules that makes it impossible for a Stewart Mott to provide a Eugene McCarthy with the seed money essential to a credible challenge to a sitting president, or that makes politics the playground of the super-rich who can finance their own campaigns.

I recognize that congressional incumbents will instinctively resist my suggestion because the elimination of campaign contribution limits would make it easier for challengers to unseat them. Nevertheless, their liberation from the odious chore of daily pleas for money might incline them to oblige me. But, only then will the *Buckley v. Valeo* plaintiffs be able to claim a total victory.

¹⁷ See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 369–71 (2010).

¹⁸ *Id.* at 481–82 (Thomas, J. concurring in part and dissenting in part).

¹⁹ *Id.* at 485 (quoting *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 264 (2003)).

A LANDMARK DECISION TURNS FORTY: A CONVERSATION ON *BUCKLEY V. VALEO*

Ira Glasser

I was struck, as I always am, by Dean Allard's reference to Judge Brandeis's line from *Olmstead v. United States* about how we should beware of men of zeal, well-intentioned but without understanding.¹ Nothing provides a better aphorism for our subject today than that.

I also want to remind us that we are talking here about remedies. We are not arguing about the problem. It is a great mistake in public policy and in legislation to focus with almost hyperbolic intensity and near exclusivity on the nature of a problem, so that people get so excited about how terrible this problem is that they proceed to enact and support remedies that have no bearing on the problem, and may make it worse or create other problems that did not exist before.

There are numerous examples. In the 1970s and 1980s, rising crime was a big problem, so former U.S. Attorney General Edwin Meese proposed to get rid of the exclusionary rule and the Miranda warning.² And people bought that because they were so excited about the problem that they failed to notice that getting rid of those rights, (A) would have no effect on solving the problem; and (B)

¹ *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

² See Yale Kamisar, *The Case of Meese vs. Miranda: His Attacks Speak to His Constituency, Not to the Law*, L.A. TIMES (Feb. 11, 1987), http://articles.latimes.com/1987-02-11/local/me-1562_1_miranda-ruling; Associated Press, *Meese Hopes to Eliminate Evidence Exclusionary Rule*, L.A. TIMES (May 7, 1985), http://articles.latimes.com/1985-05-07/news/mn-11122_1_exclusionary-rule; see also State-by-State and National Crime Estimates by Year(s), UNIFORM CRIME REPORTING STATISTICS, <https://www.ucrdatatool.gov/Search/Crime/State/StatebyState.cfm> (demonstrating the rise in crime rates in the United States under the United States total, violent crime rates, and property crime rates from the years of 1970 to 1989).

would create new problems by getting rid of rights that were very important to have.

Alcoholism was a problem in the early twentieth century that was of runaway proportions. But Prohibition was not the solution. Not only did this remedy not solve the problem, it created an immense range of other problems: it increased crime, it increased violence, it violated rights. The “War on Drugs” only repeated that mistake, and it is still with us.

So, what you always have to look at when you are dealing with a problem is not just the severity of the problem, but also whether the proposed remedy will solve the problem and whether it will, unintentionally or not, create new and perhaps even worse problems. The problem here is inequality of speech resulting from an inequality of wealth. That is a problem that has been with us for a long time. Thomas Jefferson was hardly a man of the working class. And I grew up in New York where the names of the governors were Lehman, Roosevelt, Harriman, Dewey, and Rockefeller. With the exception of Dewey, those four governors were what you might today call part of the one percent. I daresay they had more speech than my father, who was a construction worker with a fifth-grade education, and they certainly had more access to the political system. And that has always been true. Whoever owned the *Times* had a lot more speech than I did or the people who owned *The Nation* did.

So, inequality of wealth has always led to inequality of speech, and that has been a distortion and a problem in how democracy works, no question about it. But the solution that campaign finance advocates and the laws that they succeeded in passing, the remedy that they proposed, was to give the government the power to restrict speech in order to equalize it. That was their theory.

The first time that power was used by the government under campaign finance legislation was against these three bedraggled people who wandered into my office at the New York Civil Liberties Union (“NYCLU”) early one day in 1972. In addition to people with real civil liberties problems, we were always getting people who were half-crazy walking in wanting to be clients, and therefore, we had to decide whether to just gently lead them out, or listen further to what they were saying. And even if we thought they were crazy, that did not mean they were not having their rights violated.

These three people and their story at first sounded a little bizarre. And I remember thinking how old they were—but they were probably about as old as I am now. And one of them, the one that had the money to pay for an advertisement they had published and wanted to publish again, came in with his shirt wide open and was half-naked. They came walking in, and they were carrying on about the secret bombing of Cambodia and the war in Vietnam, and how this was all unconstitutional because the war was being fought without Congressional authorization.³

And they thought that this was a basis for impeachment, so they paid for and ran this almost unreadable two-page advertisement in the *New York Times*. It had a list of “honor rolls” of people in Congress who had voted for resolutions against the war. They had “dishonor rolls” of people who had supported the war. They attacked Nixon. They attacked Kissinger. This was early 1972. I remember seeing it. I looked at it. I rolled my eyes a little bit at it and turned to the sports pages.

And so why were they in my office? They were there because the U.S. government had gone into federal court in the Eastern District and gotten an injunction prohibiting them from publishing that ad again and threatening the *Times* from ever accepting an ad like that again, under penalty of criminal prosecution.

So, I listened and I thought, well, that cannot be. This was a clear First Amendment issue; the government was trying to suppress dissent, and surely the courts cannot allow that. So I read the injunction, and it cited this statute, which I had never heard of, called the Federal Election Campaign Act of 1971 (“FECA”).⁴ And the statute provided a remedy for unequal speech in politics by saying that if anybody published an ad that praised a candidate for federal election, or was in derogation of that candidate’s opponent, they

³ For a fuller discussion of the circumstances surrounding this advertisement, see *United States v. Nat’l Comm. for Impeachment*, 469 F.2d 1135, 1143–47 (2d Cir. 1972).

⁴ See Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1971) (codified at 52 U.S.C. §§ 30101–30146); FED. ELECTION COMM’N, FEDERAL ELECTION CAMPAIGN LAWS (2015), <http://www.fec.gov/law/feca/feca.pdf>.

could not do so without the money that they were spending counting against the limits of campaign spending by the favored candidate.⁵

So now the candidate, who knew nothing about this ad, had to either certify that the ad was his and have its cost count against the spending limits imposed by the new law or renounce the ad, or else it could not be published. So, it meant that a group of citizens who had the money to buy the speech could not exercise their speech. The speech at issue was criticism of a president and the conduct of a war in an election year. And if there was anything that the founders of this country meant to protect when they passed the First Amendment, it was that sort of speech on that sort of issue at that sort of time.

So, we represented them on appeal. We went into court—the case was called *National Committee for Impeachment v. United States*,⁶ I think—and we won in the Second Circuit. And I thought, okay, that is it. We slapped them around, and that is the end of that. That kind of stuff was happening all the time where public officials would step out of line, and you win the case, and it's over.

But later that same year, in September of 1972, shortly before *National Committee for Impeachment* was decided, we tried to publish an ad in the *Times* in the form of an open letter to President Nixon, criticizing him for opposing school busing for the purposes of racial integration. He had been a vigorous opponent of such school busing, and we were a vigorous supporter of it. So, we published this ad in the form of an open letter to him, criticizing him and urging him to change his position. We also listed an “honor roll” of members of Congress who supported our position.

I did not think there was going to be any problem with that. The American Civil Liberties Union (“ACLU”) never got involved in elections—we were barred by our own bylaws from ever taking a position for or against an electoral candidate, and we never had. Nor did we in our open letter. Criticizing public officials on civil liberties

⁵ Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, 52 U.S.C. §§ 30101–30146, *invalidated by* *Buckley v. Valeo*, 424 U.S. 1 (1976); *see also* *Buckley v. Valeo*, 424 U.S. at 51 (invalidating parts of the statute placing ceilings on campaign finance that impose a “substantial restraint on the ability of persons to engage in protected First Amendment expression”).

⁶ *Nat'l Comm. for Impeachment*, 469 F.2d 1135.

issues is what we did. That was our mission. And that was what most organizations like us did on whatever issues defined their missions.

So, we submitted the ad to the *Times*. We raised some money for it, we submitted it to the *Times*, and we got a letter back from the *Times* saying they could not publish the ad. And they could not publish the ad because, in the *National Committee on Impeachment* case, they were threatened with criminal prosecution if they ever ran such an ad again. They had this threatening letter in their files. Their lawyers told them they had better not do it.

So, we had a meeting with the general counsel of the *Times*, and we said, we are going to sue, because the result of this is we cannot speak. We cannot get our position in the paper. We do not own the paper, so we have to buy the space. We are lucky enough to be able to buy the space, we have the money to buy the space, but we cannot buy the space. So, you could write an editorial like this and be protected by the First Amendment, but we cannot buy the space to say the same thing you could say in your editorial because of the government's threat to you that you will be criminally prosecuted if you sell us the space!

They agreed that if we filed that lawsuit, they would file an *amicus* brief on our behalf, and that is what happened. That case was called *ACLU v. Jennings*,⁷ and we won that case too. So that was the second time within a year that the use of the campaign finance laws had been struck down. And these were the first two, and to my knowledge at that time, the only two applications of the Federal Election Campaign Act of 1971.⁸ Not against big corrupt money people, but against groups of citizens exercising precisely the right of speech, at precisely the time it was intended to be particularly effective, that the First Amendment was designed to protect.

So, we won that case, and in the course of these two cases, we discovered by the arguments against us that the theory of the Campaign Finance Act was that any speech that praised a candidate or was critical of a candidate might affect how people voted. Even

⁷ *American Civil Liberties Union, Inc. v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973).

⁸ *See generally id.* (demonstrating that this case was one of the first cases to apply FECA); *Nat'l Comm. for Impeachment*, 469 F.2d 1135 (demonstrating that this case was another case to be among the first to apply FECA); 52 U.S.C. § 30101 (2002).

if there was no advocacy for or against the election. Even if it was just issue speech, which is all that the ACLU did, or those three people who walked into my office six months earlier had done. It might affect the election, the government said, and therefore the money could not be spent on speech without all of the restrictions that were built into the Campaign Finance Act.

And from the beginning, at its roots, the original sin of campaign finance advocacy was the notion that any speech in an election year on an issue that was critical of or praiseworthy of a candidate for federal election might affect how people voted. That, if somebody saw our ad criticizing President Nixon for his position on school integration, it might cause them to vote against him. Therefore, it was construed as a campaign act instead of as free speech.

They kept passing these things in new forms, and we kept striking them down. And this has gone on now for almost fifty years. A lot of the provisions that were at stake in the McCain-Feingold Act were different versions of the same thing. The limitations against speech by corporations, people have had in mind, "oh, they're limiting corporate speech, that's a great thing. We don't want Exxon and J.P. Morgan Chase affecting our elections." Well, in fact those sorts of corporations do not spend money on campaign speech. So, who spends money on campaign speech? Other corporations, like the *ACLU Incorporated*. Like the *NAACP Incorporated*. And yes, like *Citizens United Incorporated*. And not campaign speech in the sense of advocating for a candidate's election or defeat, but campaign speech in the sense of speaking out on issues during an election campaign.

Those were the corporations that ended up being limited and threatened by the legislation. Did it affect the money in electoral speech? No. Has the money in politics gotten worse or better in the last forty or fifty years during the time these campaign finance laws have reigned? It has gotten worse. Has inequality been reduced in electoral advocacy or has it been increased? It has been increased, for reasons that have nothing to do with the exercise of free speech.

What Judge Buckley was saying about Eugene McCarthy was exactly right. He became a big advocate of our position because of what had happened to him. He was running a quixotic campaign. When he started his primary campaign in New Hampshire, he went into that primary as part of an anti-war effort to turn incumbent

Lyndon B. Johnson around. And when he started that campaign, he was, you know, this guy from Minnesota. Nobody ever heard of him in New Hampshire. He had 2 percent name recognition and no money. Well, if you have 2 percent name recognition and no money, how do you run a campaign in New Hampshire? You don't.

And so he ended up having, I think initially it was just three people who were giving him high six-figure or seven-figure contributions, all of which would be a crime today, even under the *Buckley* decision. And who needs money in that kind of a campaign? It is precisely the insurgent who is not known.

How do you get the money? If the incumbents want to beat you, they make you collect it in small chunks because that is almost impossible to do. And you need money to raise money. If you are going to use direct mail to raise money in small chunks, you need millions of dollars to fund a direct mail campaign. If you are going to do television advertising, you need money. There was no Internet back then.

The insurgents are the ones who need money. The incumbents do not need anywhere near as much money. They have the name recognition. They have the franking privilege. They have the ability to call a news conference and make news because they are already elected. The insurgents always are the ones who do not have name recognition, do not have the visibility, and cannot be heard. They are the ones who need the big gifts. Without the big gifts they cannot get started.

So, McCarthy gets these three large contributions—contributions that would be a crime today, and since 1971. He buys time in New Hampshire. He gets known. He ends up coming so close in the primary campaign. He did not beat Johnson, but he got so close that Johnson shortly thereafter announced that he would not seek reelection. And the whole tenor of politics and the war in Vietnam changes, which was after all Senator McCarthy's goal.

If the current campaign finance restrictions, even after the *Buckley* decision, were in place, McCarthy never gets off the ground. No liberal in America objected to McCarthy's campaign at the time. All of the people who are against big money now, who carry on about *Citizens United v. FEC*,⁹ were the ones who

⁹ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

supported the Eugene McCarthy campaign then. Always beware of whose ox is gored.

As Judge Buckley said, what united the strange bedfellows in the *Buckley* case was that they were all outsiders.¹⁰ They were all insurgents from different political points of view running against the establishment. That is what united them. And they were all discriminated against by campaign finance laws.

Professor Joel Gora, once early in his tenure at the ACLU, and Professor Bradley A. Smith have called FECA and the amendments of 1974, the “Incumbent’s Protection Act.”¹¹ It was that then, and it has been that ever since. And incumbency has increased during the forty or fifty years of campaign finance legislation. So has the inequality of campaign speech, so has the inequality of money, so has the inequality of speech in general. The remedies of the campaign finance laws have not worked on their own terms; they have made the problem worse. They have constantly been used by the government to attack speech that was not even an intended target of campaign finance laws.

So, when you look back at the *Buckley* case and what we did, that was the reason. We had won a few cases before, but they just kept coming. And so, the *Buckley v. Valeo*¹² litigation was an attempt to comprehensively, finally knock this thing out and reestablish the First Amendment. And if you were going to deal with the issue of inequality of speech and money in politics, you had to find a different way to do it. Maybe public financing, maybe giving candidates the franking privilege so that they had it as well as the incumbents. Maybe lots of things. Maybe deal with the tax structure so that the inequality of money did not go so much further out of control as it did.

¹⁰ James L. Buckley, judge, Remarks at the Brooklyn Law School Journal of Law & Policy Symposium: Free Speech Under Fire: The Future of the First Amendment (Feb. 26, 2016).

¹¹ Joel M. Gora, *Free Speech, Fair Elections, and Campaign Finance Laws: Can They Co-Exist?*, 56 HOWARD L. J. 763, at 791 (2013); see P.J. O’Rourke, *Incumbent Protection Acts*, ATLANTIC (Apr. 2005), <http://www.theatlantic.com/magazine/archive/2005/04/incumbent-protection-acts/303829/>.

¹² *Buckley v. Valeo*, 424 U.S. 1 (1976).

But the radicals who might be dealing with the inequality of the tax structure would rather deal with suppressing the speech of the ACLU, the NAACP, and Citizens United. What Citizens United did when it made that film attacking Hillary Clinton¹³ could have been what we might have done in making a film attacking positions taken by George Bush. But because it was a right-wing group attacking a liberal, most liberals thought that this was speech they would rather not see.

Finally, the one thing one has to remember about all of this is that the fight over the McCain-Feingold Act, which is the successor fight to what started with *Buckley*, only related to speech on radio and television. If the Court had ruled differently in *Citizens United* than it did,¹⁴ and upheld the constitutionality of those restrictions, the government would have gained the power to ban a book.

That question was directly asked of the government during the Supreme Court argument: if you could ban a film critical of Hillary Clinton in an election year, could you ban a book critical of her? Could you ban a book that praised her? Could you ban her own book? The answer to all of those questions that the government gave was yes. If the First Amendment allows you to ban the film that Citizens United produced from being broadcast on television, then it could ban Simon and Schuster from publishing a book that said the same thing.¹⁵

So, the question always was: what is the remedy to this problem everybody is concerned about? Does the remedy achieve what it claims to achieve? No. Does it make the situation better or worse? It makes it worse. Does it create a whole other set of problems that nobody anticipated, the way alcohol prohibition did? Yes, it does. It creates a threat to the right of free speech.

And the main use of campaign finance laws, the main use over the fifty years that they have been in existence—since before *Buckley*—the main use has been to try to restrict the speech of not-for-profit cause organizations. It has never successfully stopped people like the Koch brothers or Stewart Mott or George Soros. I mean, George Soros spent twenty-seven million dollars in 2004 on

¹³ See *Citizens United*, 558 U.S. at 319–20.

¹⁴ See *id.* at 333, 349, 372.

¹⁵ See *id.* at 349.

this kind of advocacy.¹⁶ Did you hear a single liberal ever complain about that?

People in this country have always been supporters of free speech, so long as it was their own. And that is the lesson of what has now become the liberal dilemma. People of zeal, well intentioned, concerned about inequality of speech, which is a valid concern, and so blinded by it that they have supported remedies that, if they are successful, will destroy them. *The Nation* magazine came out for a Constitutional amendment to reverse *Citizens United*.¹⁷ What that would require if they were successful would be rewriting the First Amendment. Who do you think is going to get injured by that? It is not going to be the Koch brothers. It is going to be *The Nation* magazine and people like them.

So, this is wrongheaded. It is the kind of mistake that we made with alcohol prohibition. It is the kind of mistake we made with the drug war. And it has been the dominant liberal mistake in Constitutional rights for almost half a century now. And if there is a lesson to be learned by looking back to the *Buckley v. Valeo* decision, that is the lesson.

¹⁶ Kenneth P. Vogel, *George Soros Rises Again*, POLITICO (July 27, 2016), <http://www.politico.com/story/2016/07/george-soros-democratic-convention-226267>.

¹⁷ *Dump 'Citizens United'*, NATION (Jan. 18, 2012), <https://www.thenation.com/article/dump-citizens-united/>.