BUCKLEY AFTER 40 YEARS

by Floyd Abrams[[1]](#footnote-1)

This week is the 40th anniversary of the oral argument in the Supreme Court of *Buckley v. Valeo* and next year the 40th anniversary of the decision in that case will be—depending on one’s view of the case-- regretted or celebrated. I’m a celebrant, so welcome to the party!

*Buckley* was a case that dealt with and addressed a number of difficult topics—limitations on the funding of issue advertisements, potential distinctions between the funding of those ads by making contributions directly to candidates and spending money independently on ads directly advocating the election of individuals, money spent on one’s own behalf—I could go on. Today, I’m going to focus on the most controversial (or, if you’re of that view, notorious) part of the *Buckley* case That is its holding that held unconstitutional under the First Amendment, congressionally dictated limits on independent expenditures seeking to persuade people how to vote in the elections.

 I want to start with a question asked by Justice Potter Stewart during the *Buckley* argument, a question phrased this way: “We are talking about speech, money is speech, and speech is money, whether it be buying television or radio time or newspaper advertising, or even buying pencils and paper and microphones. That’s the — that’s certainly clear, isn’t it?” It’s *Buckley*, in a part of the opinion drafted by Justice Stewart,that answered that question and the affirmative answer it provided has led to enormous conflict ever since.

There was a time when *Buckley* was a very big deal. I sometimes think that legal scholars could not be hired for a generation unless they contributed a defamatory adjective of their own about the case. As Joel Gora, one of the chief counsel for the Buckley plaintiffs, put it, *Buckley* has been routinely denounced in scholarly circles as a “derelict, a spot, a blemish on the law.” Scholars have vied with each other about what previous Supreme Court horror it should be compared with. Was it simply as awful as *Lochner v. New York*, in which the Supreme Court massively intruded into statutory regulation of the economy by declaring a state statutory limit on bakers working over 10 hours a day and 60 hours per week unconstitutional? Or was it, perhaps even worse, comparable to *Plessy v. Ferguson*, which upheld racial segregation as constitutional on the basis of the Court’s conclusion that anyone who viewed “the enforced separation of the two races” as “stamp[ing] the colored race with a badge of inferiority” was misapprehending the nature of segregation since such a view could not be reached “by reason of anything in the act, but solely because the colored race chooses to put that construction upon it.” Or maybe *Buckley* was even worse than that, comparable, as one distinguished attorney argued in the New York Times on the twentieth anniversary of *Buckley’s* issuance, to the pre-Civil War and possibly Civil War-causing *Dred Scott* opinion, which, in the course of its disgraceful holding that northern courts were obliged to recognize the rights of southern slaveholders in their human property, property that had no civil or human rights at all, observed that to rule otherwise would be dangerous for a number of reasons one of which was that it would “give persons of the negro race … the full liberty of speech in public and in private upon all subjects upon which its own civilians might speak.”

Scholarly critics of *Buckley* may not have had *Dred Scott* in mind when they piled on it but they certainly had the First Amendment in mind when they did so, and they were deeply disturbed by what they viewed as that ruling’s unacceptably expansive treatment of it. Most centrally, they took great offense at the instantly quotable observation of the Court that “[t]he concept that government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment,” a phrase to which I will return.

*Buckley* is no longer center stage, superseded in its supposedly Satanic nature by—of course*—Citizens United*, a case which I view through a somewhat different prism than most other people I know do. And most of the people in the nation, 79% of whom disapproved of it in a recent national poll. For them, it’s the case that brought more money, far too much more money, into politics. For me, it’s the case in which four members of the Supreme Court, in dissent, concluded that a rather savage and unremittingly hostile 2008 documentary film about Hillary Clinton, when she appeared to be the likely Democratic candidate for President, could constitutionally be deemed *criminal* if it were at all funded by any corporation and shown on television, cable or satellite within 60 days of an election day or 30 days of a primary or convention. So that you have no doubt where I’m coming from on these issues, I think that conclusion of the four dissenting jurists in *Citizens United* is a low point in recent First Amendment jurisprudence.

The majority in *Citizens United,* of course, held that corporations could spend unlimited sums via independent expenditures on elections. It was the decision that led Justice Stevens, in his much (and I thing wrongly) praised dissenting opinion, to predict that “[s]tarting today, corporations with large war chests to deploy on electioneering may find democratically elected bodies becoming much more attuned to their interests”; that led The New York Times to foresee that its effect would be to “thrust politics back to the robber-baron era of the 19th century” by allowing “corporations to use their vast treasuries to overwhelm elections”; that led the Washington Post to warn that “corporate money, never lacking in the American political process, may now overwhelm … the contributions of individuals”; that led the San Francisco Chronicle to say that “Voters should be prepared for the worst: cash-drenched elections presided over by free-spending corporations”—I could go on. *None of those predictions have been close to correct, not one*. The visage of free-spending corporations presiding over our elections is unreal. It did not happen and there is no reason to think it will.

But overheated and apoplectic denominations of the case continue, with more than a number of characterizations of the case being similar to that of Bill Moyer who predicted that it would “likely prove us infamous as” – that’s right – “the Dred Scott ruling of 1857.”

It is not as if nothing has happened. On the financial side, very wealthy individuals and families have coughed up far more than ever before enormous amounts of money in support of the campaigns of candidates they favored. That is money that *Buckley* permitted them to spend but—to use the too-often-repeated journalistic word of choice—they supposedly felt “unleashed” to do so because of *Citizens United*, or—as I think more likely-- by the riotously exaggerated publicity attendant to it. So while the last time I looked (a few years ago) not a single one of the Fortune 100 companies had contributed a penny to any of the large SuperPacs, a number of billionaires and many more millionaires have done just that. As one result, we have more candidates for the Republican presidential nomination who will probably stay in the race longer than would otherwise have been the case. A good thing, I would have thought, perhaps even pro-democratic by giving the public more candidates for longer times to choose from.

 One of them, Donald Trump, is self-financing his own campaign, as *Buckley* permits him to, and for doing so and denouncing candidates who can’t and therefore don’t, Trump has been gathering plaudits from scholars who I suspect would be embarrassed to be photographed with him. What a strange world we live in.

The ability of wealthy individuals and families to spend large sums of money to support their favorite candidates and to be protected by the First Amendment in doing so stems from *Buckley*. So let’s return first to the statute at issue in it. In response to public outrage at what came to be known, simply, as “Watergate”, a law was adopted which greatly limited a federal candidate’s overall expenditures and set an extremely low limit on those expenditures; which severely limited what a candidate could spend on his or her own campaign; which placed a ceiling of $1,000 on how much anyone could spend in support of a candidate; and which placed enforcement of the law in the hands of a Commission chosen by politicians.  The law was challenged by an extraordinary collection of individuals and organizations — by, among others, conservative Senator James Buckley and liberal Senator Gene McCarthy; by Stewart Mott, a wealthy McCarthy supporter; by the Libertarian Party and the Mississippi Republican Party; by the American Conservative Union and the New York Civil Liberties Union.

Senator McCarthy’s involvement in the case is especially worth recalling. In 1968, Lyndon Johnson was President, the war in Viet Nam was raging and there was great discontent, particularly on the left but limited to it, over its apparently endless and fruitless continuation. Senator McCarthy campaigned against President Johnson in the New Hampshire Democratic primary from the liberal-left and startled the political world by coming close to defeating him. McCarthy’s campaign was financed by a few sizeable contributions by admirers of his who opposed the war. But for those contributions, the campaign could not have gained traction and, by all accounts, could not have succeeded in completely shaking up the 1968 race for President. As a result of his so very close call in New Hampshire, President Johnson did not stand for reelection, leading ultimately to a very close Nixon-Humphrey race. So when the *Buckley* case was commenced the following decade, the liberal Senator McCarthy joined the conservative Senator James Buckley and the wide range of groups I have previously identified in challenging the constitutionality of the then-new Federal Election Campaign Act of 1974.

The Court’s opinion in *Buckley* (there were many of them but I speak now of the opinion of the Court) dealt with many issues but I want to recall for you what it said about the “is money speech?” issue identified by Justice Stewart. It concluded that “[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.” It responded to the claim that too much money in politics led to too much “bad” or negative speech in elections by concluding that “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.” And it was *Buckley*, which definitively responded to the position that, in the name of equality, the *amount* of speech by anyone may be limited.

That position was later denounced by Ralph Winter, later and still now on the Court of Appeals for the Second Circuit, and then co-counsel to the Buckley plaintiffs, this way: “Rarely has so sinister a proposition been so attractively packaged.” The Supreme Court addressed it this way in the sentence that I read in truncated form a few minutes ago and that I will read in full now: “The concept that government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources and to assure unfettered exchange of ideas for the bringing about of political and societal changes desired by the people.”

*Buckley* did not address the question of whether its ruling applied to corporations, although two of the entities before it were corporations, including the New York Civil Liberties Union. That issue, one that was addressed at length in both the majority and dissenting opinions in *Citizens United*, has long been a matter of some frustration to me since a good deal of my practice has involved my urging First Amendment arguments in cases involving corporations, cases in which (except when campaign finance issues were center stage) no one even suggested that corporations could not receive First Amendment protection. This has not just been true in cases involving the press — the *Los Angeles Times*, after all, is owned by a corporation, and this university is too — but across the board. Within the past few months, for example, I have represented a pharmaceutical company arguing that the First Amendment barred the FDA or the United States from imposing civil or criminal sanctions on it for promoting off-label use of its drugs, so long as what they said was truthful and non-misleading. A preliminary injunction in our favor was entered on First Amendment grounds last month by the United States District Court for the Southern District of New York. And for a number of years before that, I represented a rating agency in a hard-fought (and now settled) case with the United States in which one of our defenses was that the action had been brought in retribution against my client because it had downgraded the United States. The federal court for the Central District of California, held that if we could prove what we alleged that it would have constituted a First Amendment violation. In both these cases, government fought hard and skillfully but never even suggested that because my clients were corporations, it could make no such claim. Neither did any judge.

Some years before, I had represented Barnes & Noble with respect to a subpoena issued by Special Prosecutor Kenneth Starr in an effort to learn what books Monica Lewinsky had purchased as a gift for President Clinton. And no one in that case made such an argument. The same is true when I represented the Brooklyn Museum when Mayor Rudolph Giuliani sought to close it down because he disapproved of some of its art. Or when I represented a tobacco company that challenged a FDA requirement that it place on its cigarette packages of ill or dead people who had smoked. I could go on but I’m really not trying to offer a resume, only the undeniable proposition that it has been so universally recognized that corporations receive First Amendment rights that except in this area, there is no shock when the words “First Amendment” are used in the same sentence with “corporation.”

But when the topic of campaign finance is discussed, there is a sort of supershock. Consider NYU Professor Bert Neuborne, a fine scholar and good friend, who after writing that unlike corporations, human beings “die, do not enjoy economic advantages like limited liability, and most important, have a conscience that sometimes transcends crude economic self-interest,” then observed that these supposed differences “raise a threshold question … about whether corporations are even in the First Amendment ballpark.” But there is no “question” about that issue at all. And when books, such as “Corporations are People” state, flat out, that corporations are not “holders of constitutional rights,”they simply ignore all 25 case cited by Justice Kennedy in *Citizens United* which are directly to the contrary.

I have long been struck by the all but unanimous denunciation by the press of *Buckley* and *Citizens United*. No government decree can tell newspapers or bloggers how many editorials or other forms of commentary to write in favor or in opposition to a candidate or how much to spend in doing so. No government requirement adopted in the name of fairness, can tell Fox News just what the words “fair and balanced” really mean. No statute, in the name of electoral purity, can limit, even for a day, what the press prints about elections, however unfair its coverage or how great the impact of publication may be. As the Supreme Court observed in *Mills v. Alabama*, a case cited and relied on in *Buckley*, and which was decided almost 50 years ago, “there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of government affairs … of candidates … and all … matters relating to political process.” (Mills v. Alabama, 384U.S. 214, 218-19 (1966)). *Buckley* cited and relied on *Mills* and another press-freedom case, *Miami Herald v. Tornillo* [418 US 241 (1974)] for what I have long thought to be the unexceptionable conclusion of *Buckley* that “legislative restrictions on advocacy or defeat of political candidates are wholly at odds with the guarantees of the First Amendment.”

Yet leading press entities continue to denounce the holding of *Buckley,* a case they rarely mention by name, the better to vilify its younger Supreme Court cousin, *Citizens United*, a case which has nothing to do with expenditures by individuals; and to vastly overstate the impact of money on the ongoing presidential race.

Money does matter enormously, of course, but not the way and certainly not to the extent some in the press sometimes claim. Consider, for example, the prediction in a New York Times editorial on July 31st, before the first scheduled Republican debate this year, that the debate might provide “entertainment and conflict” but that that “circus will probably have little effect on the race” as compared to the appearances of some of the candidates before the Koch brothers and their colleagues seeking their financial support. Tell that to Jed Bush, with all of his SuperPac monetary support, and his so limited public support. Or to Ben Carson and Bernie Sanders, both of whom rose high in their parties’ acclaim when they had very little campaign funding. Or to the former Scott Walker.

If you’d like to read a more enlightened analysis of the topic, I urge you to review Jack Schafer’s take on the topic in Politico published on August 25th, a review which muses that it probably pleases Bernie Sanders “each morning to wake up and realize that the trajectory of his campaign shows that Chief Justice John Roberts and Antonin Scalia didn’t ruin the country in quite the way that progressive groups had feared in 2010” since “the new order” supposedly created by *Citizens United* hadn’t, after all, “been enough to stop him and Donald Trump from skyrocketing in the polls this summer.” “Expectations,” Shafer wrote, “that big money would float the best-financed candidate directly to the White House” had simply not materialized.

But that’s on-the-ground analysis. We’re in a more scholarly setting today so let’s return to theory. I quoted previously Justice Stewart’s query during oral argument in Buckley as to whether money wasn’t speech. And of course, whatever money is, it isn’t quite speech. Money is money. But without it, it’s difficult if not impossible for speech to occur. Here’s the way Professor Eugene Volokh responded to the criticism of any literal equation of money and speech. “Of course”, he wrote, “money isn’t speech. But so what? The question is not whether money is speech, but whether the First Amendment *protects your right to speak using your money.”* “After all,” Professor Volokh said, “money isn’t lawyering , but the Sixth Amendment secures criminal defendants’ right to hire a lawyer. Money isn’t conception or abortions, but people have a right to buy condoms or pay doctors to perform abortions. Money isn’t education, but people have a right to send their children to private schools. Money isn’t speech, but people have a right to spend money to purchase *The New York Times.* Money isn’t religion (at least not for most of us) but people have a right to donate money to their church.” Well said.

In praising *Buckley*, I do not mean to denigrate the need for greater attention to be paid to the issue of equality. That is not only a current political issue but a moral one. But it is not to be solved or, I would argue, even addressed by limiting speech. There are many non-First Amendment threatening ways to seek to address the issues of equality generally or even as limited to the political process. The decision of the Supreme Court holding unconsitutional a central part of the Voting Rights Act, for example, seems to me to be indefensable. The gerrymandering that has made elections to Congress in most districts so non-competitive that many find it irrelevent to vote is not only morally odious but raises legal issues that the Supreme Court has not addressed. Significantly increased voter identification requirements and limitations on times and places of voting are at odds with any democratic norms.I think we should have more public funding of elections and more disclosure of who spends what in elections. I could go on.

But limiting speech about elections is something else entirely.We should, in the end, bear in mind what the First Amendment is about. It is a protection against government, the same government that passed and sought to enforce the supposed campaign finance “reforms” that were at issue in both *Buckley* and *Citizens United*. It is not just that the First Amendment, like the rest of the Bill of Rights, applies only to acts of the government. It is that it is, at its core, nothing but a protection against government.

It is worth recalling that when representatives of the states met in Philadelphia in the summer of 1787 to draft a Constitution for the nation, that they were unanimous that there was no need for a bill of rights. A motion to have a bill of rights was defeated by a 10-0 vote. The new government was one of delegated powers and no power had been included in the Constitution allowing freedom of speech or of the press, freedom of religion and of assembly, to be overcome. So, delegates said, why include a bill of rights? Alexander Hamilton, in his influential argument in Federalist 84, put it this way: Why should the charter of the newly reorganized nation “declare that things should not be done which there is no power to do? Why, for instance, should it be said that that the liberty of the press should not be restrained when no power is given by which such restrictions may be imposed?” Hamilton went further: “The Constitution is itself,” he wrote, “a BILL OF RIGHTS.”

 That sort of argument, familiar to lawyers, may have sufficed to persuade the tired delegates, as they prepared to adjourn their deliberations, to omit any reference to a bill of rights but it was not sufficient to persuade Thomas Jefferson, then the United States Ambassador to France, fully to support ratification of the new Constitution without a bill of rights, since such a document was in his view, “what the people are entitled to against any government on earth, general or particular, and what no just government should refuse, or rest on inference.”

The pressure of Jefferson and his allies in state legislatures finally prevailed during the ratification process, and James Madison, having previously opposed the inclusion of a bill of rights as unnecessary, became its leading draftsman in the House of Representatives. With the First Amendment, Madison urged, “[t]he right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government.”

 It is thus no surprise that the Supreme Court has frequently emphasized the government-restraining core of the First Amendment.That is what Justice William O. Douglas was referring to when he observed that “[t]he struggle for liberty has been a struggle against government.” And that is what Justice Robert Jackson, in a typically felicitous phrase, conveyed in stating that “[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.”

It is that spirit that animates the *Buckley* ruling and it should come as no surprise that the portion of the decision I have discussed today was drafted by Justice Stewart, a leading defender of freedom of the press, and joined by such an indelible First Amendment defender as Justice William Brennan, the author of many rulings vindicating First Amendment claims as well as those relating to equality in all areas of American life. Justice Brennan thus signed on to the proposition from *Buckley* with which I commenced this talk, that the very “concept that government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” So it is and so it remains. And if the vast amount of our fellow citizens disagree, that only shows the continuing need for the First Amendment.

1. Raymond Pryke First Amendment Lecture
University of California Irvine
November 16, 2015
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