

Correspondence

Politics and the Constitution

To the Editors:

Judge Wright's examination of the Supreme Court's reasoning in *Buckley v. Valeo*¹ provides us with a valuable diagnosis of the weakness of that opinion.² He accurately characterizes the opinion as a mechanical application of pluralist doctrines, but he weakens the cogency of his critique by advocating pluralism in another form. Judge Wright warns us about a free market of social forces, yet he cites with approval Justice Holmes's characterization of the First Amendment as a guarantee of the free market of ideas.³ In so doing, the Judge escapes one pluralist ideology only to embrace another.

Holmes's most famous words about speech are:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.⁴

These words can be construed in two ways: the success of an idea in free competition is the best evidence of its truth; or, there is no such thing as the truth of an idea, so the only meaningful warrant of an idea is that it has succeeded in competition. I leave it to others to dispute which interpretation of Holmes is correct. My point is that on either gloss, it appears that the primary purpose of the First Amendment is to promote the uninhibited transactions in ideas that make valuation of ideas possible.⁵

There is an alternative way of seeing the matter, a way that can be traced back to James Madison. Justice Brennan emphasized it in the landmark opinion of *New York Times Co. v. Sullivan*:⁶ the central principle of the First Amendment is that the citizenry is the master and the government is the servant.⁷ In England, citizens were the King's loyal servants,

1. 424 U.S. 1 (1976).

2. Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

3. *Id.* at 1018 n.68.

4. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion).

5. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 308 (1972).

6. 376 U.S. 254 (1964).

7. *Id.* at 274-75.

and the prohibition against unseemly comments by the populace, that which we call sedition, was a logical entailment of the master-servant relation. Our system of government is supposed to be different: officeholders are the servants and citizens are the masters; citizens have free speech so that they can censure their servants.

Justice Brennan did us a great service in reviving Madison's version of the guarantee of freedom of speech. Harry Kalven did what he could to emphasize the importance of what Brennan had revived.⁸ Without claiming any originality, I would like to set forth the argument that Madison had a theory of the First Amendment that differs from Holmes's theory, a difference relevant to the campaign financing question.

When the guarantee of freedom of speech was first discussed in the House of Representatives on August 15, 1789, Madison was not the first speaker. Representative Sedgwick of Massachusetts wanted to eliminate the language about assembly on the grounds that it was unnecessary, and Representative Tucker of South Carolina wanted to add a provision for instructing representatives.⁹ As soon as Madison got the floor, he explained the guarantee with these words:

The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government; the people may therefore publicly address their representatives[,] may privately advise them, or declare their sentiments by petition to the whole body; in all these ways they may communicate their will.¹⁰

A few years later, on November 27, 1794, the House was debating whether it would be proper to pass a resolution censuring someone for words of criticism. Madison stated: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people."¹¹

Given these comments, the words of Madison in his report on the Virginia Resolutions against the Sedition Act of 1798¹² must be judged as expressing his consistent position on this matter, and not as special pleading for the occasion. In that report, Madison based his theory of the First Amendment on the nature of republican government, stating at greater length what he had already said in 1789 and 1794. In particular, he rejected the restrictive common law definitions of freedom of speech by stressing the difference between the government of the United States and that of Great Britain. To quote merely one passage:

In [Great Britain], it is a maxim, that the king—an hereditary, not a responsible magistrate—can do no wrong; and that the legislature,

8. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 204-10.

9. 1 ANNALS OF CONG. 760-61 (Gales & Seaton eds. 1789).

10. *Id.* at 766.

11. 4 ANNALS OF CONG. 934 (1794).

12. *Madison's Report on the Virginia Resolutions*, in IV J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 546 (Washington, D.C. 1836).

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which, in two thirds of its composition, is also hereditary, not responsible, can do what it pleases. In the United States, the executive magistrates are not held to be infallible, nor the legislators to be omnipotent; and both, being elective, are both responsible. Is it not natural and necessary, under such different circumstances, that a different degree of freedom in the use of the press should be contemplated?¹³

I hope that the distinction between Madison and Holmes is clear enough; I would now like to argue that Madison is right. The best way to begin is to advert to Madison's famous *Federalist No. 10*,¹⁴ which, as Judge Wright correctly notes,¹⁵ is misused by the advocates of pluralist theories. In that great essay, Madison did not argue that a free marketplace of ideas was a guarantee of democracy. Indeed, he argued it might foster political combinations in restraint of trade—he called them factions—and he saw the great problem in constitution-making as the construction of practical ways of checking the tendency of factions to take unfair advantage of their strength.

I may be unduly influenced by the history of our century, but Madison's pessimism seems realistic. The problem is recapturing his optimism that we can check the evil consequences of our human nature without being able to change it. Interestingly enough, Madison's prediction in *No. 10* that the structure of the federal government would prevent the formation of national factions has been verified. Our national parties are temporary holding companies put together to win an election; they do not have the discipline characteristic of European-style parties. One may deplore this state of affairs, but one must admire Madison for his prescience.

We need to preserve that spirit of public censure of which Madison spoke, but I fear that we will not be able to unless we are as realistic about politics as Madison was. I share with Judge Wright his fear that the ideology enshrined in the *Buckley* opinion is dangerous, in that it can lead us to forget what we are about. We ought not worry about whether our servants have enough money to propagandize us; we ought to worry about how to ensure that our servants remain our servants.

How can we use Madison's censure theory to analyze limitations on campaign expenditures? The premise that the citizen is the master and the politician is the servant implies that it was wrong for the *Buckley* Court to speak *simpliciter* of the First Amendment rights of politicians.¹⁶ Politicians do not have a First Amendment right to be elected to office; citizens do have a First Amendment right to have representatives of their choosing hold office. Thus it makes no sense to talk of a restriction on politicians as a restriction on First Amendment rights unless the restriction on the politician hinders a citizen's ability to censure those officials who displease her. Given this more precise statement of the abstract premises,

13. *Id.* at 570.

14. THE FEDERALIST No. 10 (J. Cooke ed. 1961).

15. Wright, *supra* note 2, at 1020 n.72.

16. See 424 U.S. at 21-22, 32-35.

the question narrows to the following: does a limit on campaign spending by politicians hinder the citizen's ability to choose? The question is one of legislative fact as to which the judiciary must make an independent assessment, tempered by respect for legislative findings. A letter is no place to argue this question of fact; let me simply say that I judge limitations on politicians' spending to be constitutional and that I would draw upon the same writings that Judge Wright cites in arguing the case.¹⁷

So far, I have offered merely a different theory with which to arrive at Judge Wright's results, but the difference is not merely academic since Madison's theory leads me to disagree with Judge Wright on the constitutionality of the independent expenditure limitation. I have no trouble saying that we can limit the amount of money that a candidate can spend. I do have trouble, however, saying that we can limit the amount of money that citizens can spend. The ceiling on independent expenditures is a restriction that was intended to, and that in fact would, limit the quantity of speech and, by definition, it is citizen speech that would be limited. This limitation seems to me to impinge on the citizenry's capacity to censure officeholders and, therefore, to violate the First Amendment as Madison so compellingly construed it.

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17. See Wright, *supra* note 2, at 1017 n.59.

Dedication

On March 19, 1957 the United States Senate confirmed the appointment of William J. Brennan, Jr. to the Supreme Court of the United States. In the subsequent twenty years, the Court entered an ambitious era of judicial activism, perhaps best characterized by the effort to translate the lofty principles of the Bill of Rights into a practical code of fair procedures. Often during this era Justice Brennan spoke for the Court with a characteristic eloquence that challenged us to remember in the confusion of those times the idealism and compassion on which this Nation was founded.

As the participants in this symposium demonstrate, we have entered a new era in the history of the Supreme Court and a new jurisprudence is ascendant. Justice Brennan often finds himself in disagreement with the directions of the Burger Court, including those highlighted in this symposium. Yet Justice Brennan remains for the Court and the legal profession generally a source of conscience. He constantly reminds us that in the quest for judicial economy we not forget to afford justice, and that in our manipulation of legal doctrine we remain sensitive to the needs of the people who stand behind the case names. With deep admiration for his twenty years of service on the Court, the Editors of the Yale Law Journal are proud to dedicate this Issue to Justice Brennan.



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