

## BE CAREFUL WHAT YOU WISH FOR

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Constitutional law, like law generally, is hardly autonomous. It largely reflects past political events as well as past and present material and social conditions. Thus, to trace the driving forces in our constitutional history, we should pay less attention to such matters as the adoption of particular phrases or the outcome of contested cases than to such events as the invention of the cotton gin, the assassination of President Lincoln, and the rise of the corporation.<sup>1</sup> Nonetheless, we cannot discount the impact of such second-order phenomena as text, cases, and appointments. Doctrinal structures in a body of law that develops on a case-by-case basis will obviously exhibit considerable path dependence. Reasoning by analogy from clear-cut case 1 to intermediate case 2 to not-at-all-clear-cut case 3 will often produce a different result from considering case 3 directly. Compounded over time, small perturbations have large effects. Indeed, this phenomenon is omnipresent, so that it seems unfair sport to ask how our constitutional landscape would differ had, for example, Oliver Wendell Holmes, Jr., been killed on a Civil War battlefield, as he nearly was (three times). The challenge posed by this symposium is to identify dramatic changes that follow quickly on the heels of a less momentous event. I take up the challenge here in the context of campaign finance.

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In *Buckley v. Valeo*,<sup>2</sup> the United States Supreme Court invoked the First Amendment's protection for freedom of speech to invalidate substantial portions of the 1974 amendments to the Federal Election Campaign Act of 1971. In the ensuing years,

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1. For an excellent effort to link American legal history to broader material, social, and intellectual developments, see Morton J. Horowitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (Oxford U. Press, 1992).

2. 424 U.S. 1 (1976) (per curiam).

many prominent First Amendment liberals have publicly decried *Buckley* for taking too literally the metaphor of the “marketplace” of ideas.<sup>3</sup> On this view, *Buckley* erased our democracy’s best effort to curb the corrupting influence of money on politics, and stands as a blockade to further efforts. However, in defense of *Buckley*’s invocation of First Amendment principles, it can be argued that serious campaign finance limitations necessarily endanger free speech because of, among other things, “the inseparability of campaign speech from ordinary political discourse.”<sup>4</sup> I have not studied the issue sufficiently carefully to say which side in this debate I believe to be correct. I will say, however, that the last 23 years would have unfolded rather differently had *Buckley* sustained rather than struck down the Federal Election Campaign Act.

Let us consider just one provision invalidated in *Buckley*. It provided that no Presidential “candidate may make expenditures from his personal funds, or the personal funds of his immediate family, in connection with his campaigns during any calendar year for nomination for election, or for election, to [the office of President] in excess of . . . \$50,000.”<sup>5</sup> If this provision had remained in effect, it might well have altered the outcome of the 1992 Presidential election.<sup>6</sup> In the general election campaign that year, third-party candidate Ross Perot spent over \$60 million of his own money—more than the total amount of money spent by either of the two major party candidates—and won 19 percent of the popular vote.<sup>7</sup> Then-Governor Bill Clinton garnered 43 percent to President George Bush’s 38 percent, and the fiscally conservative Perot probably drew more support from voters who would otherwise have cast ballots for Bush rather than Clinton. Even if one thinks Perot drew support more or

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3. See, e.g., Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 *Colum. L. Rev.* 1281, 1281 (1994) (referring to fundraising “methods borrowed from the marketplace that can only be described as demeaning”); Ronald Dworkin, *The Curse of American Politics*, N.Y. *Review of Books* 19, 23 (Oct. 17, 1996); Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 *St. Louis U. L.J.* 789, 795-97 (1998).

4. Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 *U.C. Davis L. Rev.* 663, 687 (1997). Moreover, the Supreme Court has generally adhered to *Buckley*. See, e.g., *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996); but cf. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

5. 18 U.S.C. § 608 (a)(1), reprinted in *Buckley*, 424 U.S. at 187-88.

6. I shall somewhat unrealistically assume that other events between 1976 and 1992 would have unfolded without substantial change.

7. *Perot Outspent Clinton, Bush*, *San Francisco Chronicle* A2 (Nov. 5, 1992), available at 1992 WL 6288362.

less equally from the Bush and Clinton camps, "in the end, Mr. Perot probably helped Democrat Bill Clinton take the White House from President Bush, if only by distracting the public enough . . . to give the Arkansas governor a chance to get back on his feet after a brutal primary season, and stirring up a call for change."<sup>8</sup> There is thus substantial if not overwhelming reason to believe that a different result in *Buckley* would have led to a second term of the Bush Presidency.<sup>9</sup>

A second Bush term would almost certainly have led to more progressive legislation than we saw enacted during the first Clinton term. Bush could have indulged the moderate streak he had long submerged, first as the loyal lieutenant to President Reagan, and then as a Republican candidate who needed to court the party's right wing. Freed of the burden of running for re-election, Bush might have reverted to the liberal views on, for example, family planning, that characterized his political youth.<sup>10</sup> He certainly would not have signed the draconian Welfare Reform Act of 1996, in part because he would not have confronted the extremely conservative Congress that was elected in 1994 largely in response to Clinton's perceived overreaching on health care reform.

National fiscal policy also would have been dramatically altered by a second Bush term. President Clinton was able to achieve substantial deficit reduction by the enactment of a tax increase early in his first term.<sup>11</sup> According to the conventional wisdom this deficit reduction in turn played an important role in fueling the phenomenal economic growth of the mid to late 1990s. However, because second-term President Bush had almost (in our counter-history) paid the ultimate price for breaking his "no new taxes" pledge in his first term, he would have

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8. Susan Baer, *Significance of Perot's Independent Bid for Presidency Debated by Analysts*, Baltimore Sun 24A (Nov. 5, 1992), available at 1992 WL 9547347.

9. Note that in the Bradbury tale that inspired this symposium, the most dramatic effect of the protagonist's accidental killing of a butterfly is to change the outcome of a Presidential election 60 million years later. See Ray Bradbury, *A Sound of Thunder*, in *Twice Twenty-Two (The Golden Apples of the Sun)* 110 (Doubleday, 1966).

10. "During his four years in Congress, Bush devoted so much time to family planning policy that House Ways and Means Committee Chairman Wilbur Mills gave him the nickname 'Rubbers.'" Marjorie Williams, *What We Know About George*, Washington Post Magazine 7 (Aug. 16, 1992), available in 1992 WL 2172251.

11. See Jackie Calmes, *Budget Deficit Shrinks to Lowest Level In Two Decades, a Boon for Clinton*, Wall St. Journal A2 (Oct. 29, 1996), available at 1996 WL-WSJ 11804057 (crediting "the multiyear tax increases and spending limits of both Mr. Clinton's 1993 deficit-reduction package and President Bush's 1990 budget compromise").

continued to run large deficits.<sup>12</sup> Thus, (again crediting the conventional story) by 1996, the economy would have been experiencing at best anemic growth. This factor, coupled with the Republican Party's nomination of incumbent Vice-President but political lightweight Dan Quayle, would have resulted in a Democratic Presidential victory in 1996.

In the meantime, how would constitutional law have been affected? During Clinton's first term he filled Supreme Court vacancies created by the retirement of Justices White and Blackmun. Perhaps one or both of them would have remained on the Court through the end of a second Bush term in the hope that a Democrat would name their successors, but this seems remote. Although White was appointed by a Democrat, by the end of his tenure he was—with a few notable exceptions<sup>13</sup>—casting reliably conservative votes. By the end of Justice Blackmun's career, he probably identified more as the liberal voice of the underdog than the tough-on-crime appointee of President Nixon,<sup>14</sup> yet he too would have been unlikely to let Presidential politics dictate the timing of his retirement. He stated publicly that he opposed a "litmus test" for his successor.<sup>15</sup> Moreover, contemplating having to remain an active Justice past his 88<sup>th</sup> birthday, Justice Blackmun would have very likely taken his chances that President Bush's last pick would be more like Justice Souter than Justice Thomas.

Justice Blackmun would have been mistaken in this calculation. Justice Souter was probably, from President Bush's perspective, a mistake. Bush Chief of Staff John Sununu hoped Souter would be a "home run" for conservatives at the time of his appointment,<sup>16</sup> but Sununu had simply confused New Hampshire Senator Warren Rudman's esteem for Souter with ideological kinship. President Bush placed a fairly low priority on judicial appointments; in his second term he would have been

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12. Martin Kasindorf, *Political Economy Bush Speech Spells out Plan for a Boost to \$10T*, *Newsday* 7 (Sept. 11, 1992), available at 1992 WL 1552686 (quoting President Bush as saying, "No more tax increases . . . I'm not going to do it again - never, ever.")

13. See, e.g., *Shaw v. Reno*, 509 U.S. 630, 658 (1993) (White, J., dissenting); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 550 (1990).

14. Compare *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting), with *Gregg v. Georgia*, 428 U.S. 153, 227 (1976) (Blackmun, J., concurring in the judgment).

15. Tony Mauro, *Blackmun's Legacy on the Line*, *USA Today* 4A (Apr. 7, 1994), available at 1994 WL 11090697 (noting that Blackmun asked President Clinton "not to use a litmus test").

16. Ethan Bronner, *Sununu Likened Souter Choice to Home Run, Conservative Wrote*, *Boston Globe* 23 (Aug. 22, 1990), available at 1994 WL 11090697.

likely to delegate the task to aides, and would not have been inclined to spend much political capital fighting the right wing of his party on this issue.

After the experience of the Thomas confirmation hearings, second-term President Bush (or rather, his aides) would have sought easily confirmable conservative Justices. To replace Justice White, he would have named Kenneth Starr. Although Starr will undoubtedly be remembered as the man who educated the nation about thong underwear and a certain blue dress, as a D.C. Circuit judge and as President Bush's Solicitor General, Starr was widely respected for his intellect and integrity. He would have been confirmed fairly easily, especially as the Bush White House would have argued that replacing the conservative White with the conservative Starr would not alter the balance on the Court. As a Justice, Starr would have been a reliable conservative, probably occupying the ideological ground between Justices Kennedy and Scalia. And with Starr on the Court rather than in the role of Independent Counsel, the nation would likely have been spared the impeachment spectacle of Clinton's second term, even if Clinton were the Democrat to recapture the White House in 1996.

President Bush's final Supreme Court appointment would have presented a matter of some delicacy. Justice Blackmun's successor would have been widely and correctly perceived as the swing vote on abortion, and anyone Bush named would have faced fierce opposition in the Senate. Under these circumstances, the political tactics of the Thomas nomination would have been instructive; Democrats who would have opposed Thomas for his outspoken conservative views were muted somewhat by their wish to avoid alienating his many African-American supporters, the Democrats' most loyal constituency. A conservative Latino woman would have suited nicely under the circumstances or, failing that, President Bush could have nominated Utah Senator Orrin Hatch, knowing that, absent some scandalous revelation, the Senators would have been reluctant to reject one of their own.

With a solid conservative majority, the newly constituted Supreme Court would have overturned *Roe v. Wade*, enforced an even more robust principle of federalism than we have seen in recent years, and dramatically increased the scope of the Takings Clause. And with property rights in the ascendance, the Court would have overruled (the hypothetical opposite of)

*Buckley v. Valeo*, finding that money really is speech after all.<sup>17</sup>  
Plus ça change, plus c'est la même chose.

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17. Cf. John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. Chi. L. Rev. 49 (1996)