

2000

## Regulation and the Decline of Grassroots Politics

Bradley A. Smith

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

---

### Recommended Citation

Bradley A. Smith, *Regulation and the Decline of Grassroots Politics*, 50 Cath. U. L. Rev. 1 (2001).  
Available at: <https://scholarship.law.edu/lawreview/vol50/iss1/4>

This Symposium is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact [edinger@law.edu](mailto:edinger@law.edu).

# ELECTION LAW SYMPOSIUM

## SPEECH

### REGULATION AND THE DECLINE OF GRASSROOTS POLITICS

*Bradley A. Smith*<sup>+</sup>

I want to begin by congratulating and thanking the Editorial Board of the *Catholic University Law Review* for hosting this symposium and, more importantly, for its commitment to devote one issue each year to election law. This decision both advances and validates the importance of election law as its own field of study.

Since *Baker v. Carr*<sup>1</sup> was decided in 1962, election law cases have been a growing staple of the Supreme Court's docket. In recent years, the Supreme Court has decided a host of high profile constitutional cases involving the Voting Rights Act,<sup>2</sup> term limits,<sup>3</sup> party rights,<sup>4</sup> ballot access rights,<sup>5</sup> campaign finance,<sup>6</sup> gerrymandering,<sup>7</sup> and patronage.<sup>8</sup> These deci-

---

+ Commissioner, Federal Election Commission; Professor of Law, Capital University Law School (on leave). This is a lightly cited version of the keynote speech delivered at the *Catholic University Law Review's* Election Law Symposium hosted on September 23, 2000. Victoria Wu assisted with editing and citations. The views expressed herein are to be attributed solely to the author and not to the Federal Election Commission or its Commissioners.

1. 369 U.S. 186 (1962).

2. *See, e.g., Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (1999); *Lopez v. Monterey County*, 525 U.S. 266 (1999).

3. *See U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995).

4. *See, e.g., Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986); *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981).

5. *See, e.g., Buckley v. American Constitutional Law Found.*, 525 U.S. 182 (1999); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Williams v. Rhodes*, 393 U.S. 23 (1968).

6. *See, e.g., Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897 (2000); *Colo. Republican Fed. Campaign Comm. v. FEC*, 459 U.S. 87 (1996); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

7. *See, e.g., Davis v. Bandemer*, 478 U.S. 109 (1986).

8. *See, e.g., Board of Comm'rs, Waubensee County v. Umbehr*, 518 U.S. 668 (1996); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *Elrod v. Burns*, 427 U.S. 347 (1976).

sions increasingly shape our political lives. Nevertheless, constitutional law courses devote less and less time to the important First and Fourteenth Amendment issues raised by these cases, and courses on legislation are too full to devote space to exploring the way in which the Court's decisions in this area of law shape our democracy. The creation of a regular forum to study this field, in one of the nation's top law journals, is an important step in assisting scholars, politicians, activists, and the Court itself to understand the impact that the Court has had.

We come together today in the midst of a presidential election in which we hope that the turnout among eligible voters will exceed fifty percent, but are less than certain that it will. Voter turnout in northern states has declined twenty percentage points since the end of the last century, and nearly fifteen percentage points just since 1960.<sup>9</sup> This is not cause for alarm in and of itself, and I for one do not look to voter turnout as a leading indicator of political health. In fact, as I have noted elsewhere, the United States has as strong a claim as any to be the healthiest democratic republic in the world.<sup>10</sup> Nevertheless, I will admit to nagging doubts about our political future, for I fear that these declining vote totals represent a steady disengagement of Americans from political life. It is a disengagement that I see in my students and in my neighbors. It is a disengagement that is summarized in the political clichés of our times: “all politicians are corrupt;” “they all do it;” “there’s not a dime’s worth of difference between the parties.” It is one thing—a healthy thing—for citizens to turn away from politics as the solution to all problems. But it is something else—and something unhealthy for a democracy—when disillusioned citizens turn away from informed political debate, discussion, and participation.

Several culprits are offered for this state of affairs. Perhaps the most ubiquitous is high spending and the alleged corruption of “big money” in the system. Others, however, blame negative campaigning, or the lack of third party alternatives (or more refined, the absence of third party candidates from nationally televised debates). Still, others blame the educational system or broad cultural shifts. All of these factors may play a role. However, I would like us to consider placing a portion of the blame on a somewhat different culprit: regulation, and, in particular, campaign finance regulation.

---

9. See FEC, *National Voter Turnout in Federal Elections: 1960-1996* (visited Oct. 12, 2000) <<http://www.fec.gov/pages/htmlto5.htm>>.

10. See Bradley A. Smith, *Some Problems with Taxpayer-Funded Political Campaigns*, 148 U. PA. L. REV. 591, 591 (1999).

Before I get into particulars, however, I want to note that the growth of regulation generally, or more precisely, the growth of the administrative state, is itself smothering democracy in America, not only in its particulars, but in its general, ubiquitous presence. For example, in the 2000 fall election, control of the United States House of Representatives is up for grabs, with the two major parties racing neck and neck to gain a majority. A difference of just a few seats will mean a difference of who sets the agenda, who chairs the committees. Yet the elections generate little enthusiasm. The lack of enthusiasm is not, as some claim, because there is no difference between the parties. There is substantial difference between the parties, on issues as diverse as gun control, healthcare, social security reform, education policy, taxes, and more. Furthermore, party voting is more reliable now than it was forty years ago, when the great decline in participation began. Tell me a congressman's position on a half dozen issues, and with considerable accuracy I can tell you his party.

Yet voters may be correct if they anticipate no significant difference in the policies that might result from Democratic or Republican control of the House and Senate. The rise of the administrative state has not rendered Congress irrelevant, but it has rendered Congress of secondary importance in terms of actual governance. Tens of thousands of career bureaucrats effectively control the nation's government. When elections are made relatively unimportant by the handing off of power to an unelected bureaucracy, should we be surprised that voter turnout falls?

Let us consider, for example, one matter of particular interest to those of us here. On September 28, 2000, the Federal Election Commission (FEC), at an open meeting, discussed an in-progress rulemaking that would ban so-called "soft money" through the Commission's regulations. Now, in each of the last several sessions of Congress, bills have been carefully considered and voted on to do just that. These bills have not passed. This bit of rulemaking began with a petition for rulemaking from five members of Congress who favor such a ban but have been unable to achieve their goals in Congress. Let me read from the comments submitted to the FEC by Representatives Shays and Meehan, the primary sponsors of the House Bill to ban soft money, and two of the Congressmen asking the FEC to act: "[w]hile we have been working to enact meaningful campaign finance reform through the legislative process and intend to continue pursuing this, our efforts should not hinder the FEC from moving forward simultaneously. The 'soft money' system should be ceased in any way possible."<sup>11</sup>

---

11. Representatives Campbell, Meehan, Moran, and Shays, and the Brennan Center

In other words, having failed to secure the legislation they would like through the legislative process, they came to us, the unelected bureaucracy, and asked us to pass the legislation for them. But if the losing side in Congress can enact its will simply by turning to the unelected bureaucracy, why should citizens bother to vote for members of Congress?

Of course, it might be argued that we at the Federal Election Commission are appointed by the President, subject to the consent of the Senate, so that even if what I say is true, at least the presidential races still ought to matter. Yet the presidential appointees at the top of the alphabet soup of federal agencies also have little power to affect change. For example, at my little agency, the FEC, we have about 350 full time equivalents. But just sixteen of these employees, if I've counted correctly, are directly accountable to the Commissioners.<sup>12</sup> Virtually all the work is done by permanent staff, and the system all but assures that most policy determinations will be made by that staff. All that the agency heads can do is hope to catch a handful of egregious cases that run most directly counter to the policy goals of the administrators, or periodically engage in the cumbersome rulemaking process—a process that will ultimately yield new rules to be largely interpreted and enforced by the professional staff. It is not that the staff is incompetent, or venal, or even that it tries to frustrate the policy goals of the administrators. It is simply that the staff is dominant.

If the rise of the administrative state has generally taken much of the meaning out of politics, the specific regulation of politics has also been geared toward discouraging public participation. For example, gerrymandering makes districts less competitive, giving voters less reason to go to the polls. Although gerrymandering has been with us from the earliest days of our Republic, advancements in computer technology have made it more ubiquitous and effective in recent decades. Perhaps all this is unavoidable. But in addition, we now have the Voting Rights Act, which actually encourages gerrymandering in order to create safe "majority-minority" seats. In other words, in order to assure minority representation in the legislature, we have created a system that all but

---

for Justice at NYU School of Law, Comments at a Hearing on Soft Money, Federal Election Commission (Nov. 18, 1998).

12. Each of the six Commissioners has two personal staff positions—a law clerk and an administrative assistant. The Chairman and Vice-Chairman each get a second law clerk, and a majority of the Commissioners may vote to hire and fire the Agency's General Counsel and Staff Director. Two Commissioners, including the author, have tried to bolster policymaking and research capability by foregoing an administrative assistant and hiring a second (underpaid) lawyer in the position.

requires state legislatures to make more districts electorally noncompetitive. Given the lofty goals of the Voting Rights Act and its success in increasing the number of racial minority members in Congress, perhaps this is a price worth paying.

Can the same be said, however, of ballot access or, especially, campaign finance regulation? State laws regulating ballot access still remain far more restrictive than any legitimate state interests would require.<sup>13</sup> These laws reduce the options available to voters and require independent and third party candidates to devote substantial resources to the effort to qualify for the ballot, rather than to discussions of the issues that might actually bring voters to the polls.

Campaign finance regulation is doing even more damage to our system. The fact is, this regulation is having a devastating effect on grassroots political activity in this country. A short time ago I had lunch with James Buckley, the last United States Senator elected on a third party ticket, and the lead plaintiff in *Buckley v. Valeo*.<sup>14</sup> Absent the *Buckley* decision, of course, campaign speech would be much more heavily regulated than it is. *Buckley*, fortunately, struck down limits on both candidate and independent expenditures,<sup>15</sup> and limited the reach of regulation to contributions and expenditures that explicitly advocate the election or defeat of a candidate for federal office—as opposed to the original language of the 1974 Amendments to the Federal Election Campaign Act, which would have regulated any speech “relative to” a candidate for office, a vague standard that could have been used to regulate most all political discussion in America.<sup>16</sup> Nevertheless, *Buckley* left intact many of the core portions of the FECA, most notably disclosure requirements and contribution limits,<sup>17</sup> plus a tax-financed system of presidential elections that allows governments to stack the deck in favor of candidates who “voluntarily” agree to limit their spending.<sup>18</sup>

What Mr. Buckley drove home to me over lunch, however, was that a campaign such as he ran in 1970 for a U.S. Senate seat from New York—

---

13. See generally Bradley A. Smith, *Judicial Protection of Ballot Access Rights*, 28 HARV. J. ON LEGIS. 167 (1991).

14. 424 U.S. 1 (1976) (per curiam).

15. *Id.* at 58-59.

16. *Id.* at 44 & n.52 (describing the express advocacy standard).

17. *Id.* at 84 (upholding the disclosure requirements).

18. *Id.* at 99 (upholding voluntary limits on public funding); see also Office of Secretary of State Rebecca McDowell Cook, *Proposed “Proposition B”, Missouri Initiative Petition, Fall, 2000* (visited Oct. 20, 2000) <<http://mosl.sos.state.mo.us/sos-elec/campref.html>> (petition to penalize candidates who opt out of public funding by crediting participating candidates amounts equal to that of the nonparticipants).

one of the most expensive states in which to run, of course—would be impossible today. It is nearly impossible for a third party candidate to raise the money needed to be competitive with today's contribution limits, unless the candidate is self-funded, as with Ross Perot. Third parties, almost by definition, begin the campaign lacking the broad base of support of the major parties. Thus, they find it especially difficult to raise enough money in small contributions to reach the mass of voters.

Furthermore, campaign finance regulation has limited the time available for the type of grassroots politicking that Mr. Buckley engaged in. The time that candidates must devote to fundraising—due to low contribution limits—cuts into their ability to campaign on the trail.

Moreover, the web of regulation we have spun cuts down the truest grassroots activity. Mr. Buckley related to me how, back in those heady, "corrupt," pre-FECA days, his campaign would sometimes swing through a small town in upstate New York, and find a "Buckley for Senate" headquarters totally unknown to the campaign itself. Enthusiastic conservatives, on their own initiative, would have rented a small storefront, written to the Buckley campaign for literature, and set up their own "Buckley for Senate" operation in their town or city.

Today, such activity would require these politically motivated individuals to hire a lawyer, establish themselves as a political committee, and begin filling out burdensome reports to the Federal Election Commission. These reports require the tracking not only of cash contributions, but of cash advances—for example, to rent a hall—that are later repaid, and of many in-kind contributions. The required disclosure means that donors would lose their anonymity—often highly valued if for no other reason than to keep other fundraisers at bay—in the process. Contributions from individuals are limited, and from corporations banned. Use of corporate premises for any purpose, even in the case of small, family owned corporations, can ensnare the corporation in a web of regulation and enforcement. The careless volunteer who passes the hat at a meeting places both the Committee and the donor in potential difficulty if anonymous contributions exceed \$50<sup>19</sup> or any cash contributions top \$100.<sup>20</sup> On top of all this, the unwise individual who might volunteer to serve as treasurer for such a committee is *personally* liable for violations of the FECA by the Committee or its volunteers.<sup>21</sup> Is it any wonder that there is a shortage of spontaneous grassroots political activ-

---

19. See 2 U.S.C. § 441g (1994), 11 C.F.R. § 110.4(c)(3) (2000).

20. See 2 U.S.C. § 432(c)(2) (1994), 11 C.F.R. § 110.4(c).

21. See 11 C.F.R. § 104.14(d).

ity?

For these same reasons, the campaigns themselves will discourage local volunteer activity. Volunteers tend to be ignorant of the regulations. Thus, to assure compliance and avoid enforcement actions and penalties, campaigns centralize their activity, and this centralization snuffs out local activity and concentrates the campaign into television and radio advertising, which can be controlled from the headquarters.

The destruction of local politicking is at its worst in presidential campaigns, in which publicly funded candidates also agree to overall spending limits. Because they have done so, no fundraising takes place locally. Thus, in this year's presidential race, many states will see little campaigning. States such as Utah, Nebraska, and Texas, where Republican nominee George W. Bush has a lock on the electorate, or Massachusetts and Rhode Island, where Al Gore is an overwhelming favorite, will see little of the presidential campaign. In the old days, by contrast, state parties would run their own campaigns in support of the national ticket, and local party activists and volunteers had an incentive to "show their stuff" even if the national campaign was ignoring the area. A similar problem exists in the presidential primaries, where local volunteers are denied funds in order for the national campaign to concentrate them in states deemed more essential. I have heard local directors and volunteers complain that they could raise funds in their states to campaign, but are unable to do so due to the restrictions on the fundraising and expenditures and the centralized decisionmaking that results.

Meanwhile, in the press, and in the offices of special interest lobbying groups such as Common Cause, the FEC is often derided as a toothless tiger. Some of this is intentional overstatement intended to dramatize the purported need for the type of heavy-handed regulation such groups and many reporters favor, but much of it is honest perception. I can tell you, however, that this is not the perception that exists out beyond the Washington beltway, where local candidates and campaign managers and treasurers often find the FEC to be quite a fierce beast.

In the heated reporting of the press over who has raised how much, and how very awful it is that people affected by government policy might actually support a candidate financially, we tend to overlook what this sort of regulation means to most Americans. For example, shortly after I joined the FEC, we were presented with the General Counsel's recommendation in MUR 4978,<sup>22</sup> involving a candidate for Congress down in

---

22. MUR stands for "Matter Under Review," the designation the FEC gives to complaints under investigation.

Texas by the name of Mac Warren. Warren is a retired Army officer and veterinarian who had the gall to run for Congress this spring. In his campaign, he spent approximately \$40,000, of which about \$20,000 was his own money, and he finished fourth in a four-way race, with about eighteen percent of the vote. About \$5,000 was spent on two pieces of campaign literature: a brochure that stated in bold letters, "Vote Mac Warren," and listed the campaign's address, and a card that listed the campaign's address in two places and asked for contributions to "Mac Warren for Congress." But neither piece included the disclaimer required by 2 U.S.C. § 441d(a), clearly stating who paid for the communication and whether it was authorized by the candidate or his committee.

As is typically the case, we received a transparently phony complaint about these pieces from a "concerned citizen," who wrote, "I would like to know who is really funding this." The campaign's only defense was inexperience, haste, and a plea for leniency. The General Counsel's office recommended a \$2,500 fine. Although I was unsuccessful in urging my colleagues on the Commission to vote for no fine at all—seeing no deterrent effect here—the Commission did settle this matter for \$1000. It was our way of saying, "Thank you, Mr. Warren, for participating in American democracy. Here's your bill."

This is not an atypical case. For example, in another recent matter, not yet public, a candidate borrowed several thousand dollars from a bank and then loaned the amount to his campaign. However, because his spouse had co-signed the note, the law attributed half of the contribution to her, placing both her and the campaign in violation of the \$1000 limit on contributions. Of course, if we're going to get serious about preventing spouses from corrupting candidates, we probably need to give the Commission far more power, including the authority to enjoin spouses from sleeping together.

I could go on and on in this vein. But I would summarize by saying that what I've seen at the Commission in my first three months are a number of complaints that don't violate the law; many that may violate the law; and some that definitely do violate the law. What I have not seen are many, if any, cases having anything to do with preventing corruption, or even the appearance of corruption—which, if you remember *Buckley*, is the compelling state interest that allows any of these speech restrictive measures to withstand constitutional scrutiny at all.<sup>23</sup>

Indeed, most complaints that we receive are filed by political partisans. One of the problems with all this regulation is that the regulation itself

---

23. *Buckley*, 424 U.S. at 80.

has become a campaign weapon. Charges and litigation are used to harass opposing candidates and make political hay with the press. Needless to say, incumbents and national committees, who have more experience, use these tactics most effectively against inexperienced candidates. But they also use them against each other. For example, at this time of year we can see each of the major parties systematically filing charges against many of the other party's nominees in those fifty or so House races that are truly competitive. Many, if not most, of these cases end up being dismissed, but not without distracting the campaigns and using up their resources. Just as the impact of these charges and countercharges falls most heavily on inexperienced candidates, it also falls more heavily on small campaigns and groups than it does on big business, which may help explain why some big business groups have joined the cry to regulate the speech of their friends, neighbors, and countrymen.

The idea that all this regulation is ending "corruption" or promoting "equality" is almost laughable on its face. Nobody seriously argues that special interests—whatever that term might mean—have less influence now than they did before we embarked on the path of political regulation thirty years ago. The old canard is that businesses must be getting quid pro quo favors, or why would they give to parties and campaigns? But businesses spend roughly ten times as much on lobbying as they do on campaign contributions, and they give away roughly ten times as much to charity as they spend on all lobbying and campaign giving combined—so perhaps we ought not to assume that there is no other explanation.<sup>24</sup> The plain and simple fact is that research shows, over and over, that campaign contributions just aren't that important.<sup>25</sup>

The end result is that regulation has helped the powerful who have the resources to cope with it, and created an ever more distant political class of fundraisers, consultants, accountants, and lawyers who know how to negotiate the web of restrictions and limits on political activity. This is one reason why Mr. Charles Kolb, current president of the Committee for Economic Development (CED), can say quite honestly, as he has,

---

24. Jeffrey Milyo et al., *Corporate PAC Campaign Contributions in Perspective*, in 2 BUSINESS AND POLITICS 75 (2000).

25. See, e.g., W.P. Welch, *Campaign Contributions and Legislative Voting: Milk Money and Dairy Price Supports*, 35 W. POL. Q. 478, 479 (1982) ("The influence of contributions is small, at least relative to the influence of constituency, party and ideology."); John R. Wright, *PACs, Contributions, Roll Calls: An Organizational Perspective*, 79 AM. POL. SCI. REV. 400, 411 (1985) ("[T]he ability of PACs to use their campaign contributions to influence congressional voting is severely constrained . . . . Of the numerous variables that influence the voting behavior of congressmen, the campaign contributions of PACs appear to take effect infrequently.").

that the type of big businesses represented by the CED don't worry about a loss of influence due to added restrictions on their giving. The other, as Mr. Kolb has made plain, is because their influence really comes from lobbying.<sup>26</sup> As I've noted, big business in the United States spends roughly ten times as much on lobbying as it does on all campaign contributions and soft money donations combined. But for the average person—or even the typical rich person—and for most smaller businesses, union locals, and decentralized associations, political giving is the primary method they have of participating in politics. And as we have seen, the political activity of grassroots groups often suffers most when we start regulating their activities.

For example, this spring the Congress hurriedly passed into law a bill intended to regulate what the regulatory lobby had dubbed “stealth PACs.” The labeling was a wonderful thing—people don't really know what PACs are, but they know from years of propaganda that PACs are very bad.<sup>27</sup> And stealth? Well, only burglars and sneaks are stealthy. So a “stealth PAC” must be very bad, indeed. The alleged problem here was that many people were able to talk about political issues without revealing their full identity—sort of like the writers of the *Federalist Papers*, who wrote under the pseudonym “Publius,” or Thomas Jefferson and Abraham Lincoln, who anonymously subsidized partisan newspapers, or other corrupt politicians from the dark days of unregulated, pre-FECA political speech: This spring's “527 legislation”—so called because it was aimed at groups operating under Section 527 of the Tax Code, which exempts the contributions and interest income of groups organized for political purposes from taxation—was intended to force these groups to disclose their donors.

The result, however, was not to snare big fish. Many of the biggest players simply used their money and expertise to reorganize under other sections of the Tax Code. However, nearly 10,000 groups—most of them small campaign organizations established for candidates for county clerks, state judges, and other state officials—have been forced to register and report on their activities to the federal government.<sup>28</sup>

Even when the big fish have kept their 527 status and filed reports, what have we really learned? We learned from the filing of the Sierra

---

26. See generally THOMAS GAIS, *IMPROPER INFLUENCE: CAMPAIGN FINANCE LAWS, POLITICAL INTEREST GROUPS, AND THE PROBLEM OF EQUALITY* (1996).

27. See Bradley A. Smith, *A Most Uncommon Cause: Some Thoughts on Campaign Reform and a Response to Professor Paul*, 30 CONN. L. REV. 831, 834 (1998).

28. See generally Lance Gay, *Campaign Finance Law Misses Target, Catches Small-town Politicians in Net*, WASH. TIMES, Aug. 25, 2000, at A8.

Club, for example, (and by the way, there's a "stealth" group with a hidden agenda if I've ever seen one) that a gentleman from San Francisco named William Hambrecht gave the group \$50,000 in July. Could this be the same William Hambrecht who is head of the San Francisco investment banking firm, WR Hambrecht & Co., a six figure donor to the Democratic Party, and a major underwriter of the liberal on-line magazine *Salon* as well? And if so, don't we all feel better knowing the real agenda of the Sierra Club? I can look at the Sierra Club ads now with a more skeptical eye, knowing that they are really just shilling for the investment banking industry, and promoting a liberal agenda. I used to think that they were merely conservative environmentalists.

It is a sad fact of American jurisprudence that laws regulating flag burning,<sup>29</sup> topless dancing,<sup>30</sup> and internet porn<sup>31</sup> are now subjected to a higher standard of judicial scrutiny than political speech.<sup>32</sup> And for what? After a quarter century of heavy-handed regulation, voter turnout is down, special interest influence seems to be up, grassroots politicking is fading away, campaigns are longer than ever, candidates spend more time fundraising than ever, incumbents are more entrenched than ever, and political debate has been reduced to french-kissing one's spouse on national television and being Oprah's pal.<sup>33</sup> "But," say the purveyors of speech regulation, "if the results have not been good, it is only because the Herculean task has just begun. We must redouble our efforts. We must ensnare those groups that avoided our 527 regulation; we must regulate more. We must limit, fine, and penalize. And then all will be well. We will weed out corruption, and have true political equality." But I would suggest to you that campaign finance regulation is like Frankenstein's monster: well-intentioned, but hopelessly misguided and ultimately irredeemable, yet impossible to kill, and creating havoc wherever it goes.<sup>34</sup>

---

29. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989).

30. See, e.g., *Barnes v. Glen Theatre*, 501 U.S. 560 (1991).

31. See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997).

32. See, e.g., *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897 (2000); see also D. Bruce La Pierre, *Campaign Contribution Limits: Pandering to Public Fears About "Big Money" and Protecting Incumbents*, 52 ADMIN. L.J. 687 (2000).

33. See Caryn James, *When a Kiss Isn't a Kiss*, N.Y. TIMES, Aug. 20, 2000, at 4; Alison Mitchell, *The 2000 Campaign: The Texas Governor; Full of Banter, Bush Goes on the 'Oprah' Circuit*, N.Y. TIMES, Sept. 20, 2000, at 22.

34. See *The Man Who Ruined Politics*, Editorial, WALL ST. J., Nov. 16, 1995, at A20 (analogy to Frankenstein's monster); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049 (1996); *Nixon*, 120 S. Ct. at 914-16 (Kennedy, J., dissenting).

In my lifetime I have been fortunate enough to see socialism die as an economic theory. But the socialist impulse to control and to regulate remains powerful. Indeed, for many it remains the driving passion of life. But we know that socialist societies became more corrupt societies, not less corrupt societies, as power is often arbitrarily lodged in the hands of government officials. And we know that the effort to create economic equality merely impoverished all—all, at least, save a small elite at the top of society. So too, efforts to socialize our political dialogue through regulation are leading to increased corruption, added power for a select elite at the top, and an impoverished political life for the rest of us.

In the papers that follow, Dr. Edwards further discusses, in the context of “soft money,” some of the ways in which campaign finance regulation distorts and impoverishes our political life. Professor Eastman and Mr. Jowers demonstrate some of the errors in constitutional analysis that are creating these problems. And although I disagree with the conclusions that Mr. Kolb reaches, he too, brings important insights to the debate. Mr. Kolb suggests that the problem in campaign finance is that unethical politicians are threatening private actors, rather than that unethical special interests are threatening government. If he is correct—and to the extent there is a problem, I think that he is—then our approach to regulation, and indeed the entire rationale for constitutional tolerance of our existing regulatory regime, must be questioned. And that would be an important first step in rejuvenating American political life.