

**From the Los Angeles Times**

**Dust-Up**

## **Campaign finance reloaded**

Did the Supreme Court go too far or not far enough in the Wisconsin Right to Life decision? All this week, Bradley Smith and Thomas E. Mann debate the future of campaign finance reform.

July 9, 2007

*Today, former FEC chairman Smith and Brookings Institution fellow Mann discuss the aftermath of the Supreme Court's ruling in an important campaign finance case. Later this week, they'll debate the real or perceived danger to the McCain-Feingold law, alternative methods of finance reform and more.*

60 years of law undermined

By Thomas E. Mann

This case is about the enforcement of a [60-year-old law](#) prohibiting the use of corporate and union general treasury funds for expenditures in federal elections. The law was undermined starting in the 1996 election cycle as corporations and unions found a huge loophole and used their treasuries to fund campaign ads that avoided express words of election advocacy or defeat, thereby earning them a safe legal harbor and the moniker "sham issue ads." The ads ran close to elections, attacked specific candidates and often barely mentioned issues. The McCain-Feingold Bipartisan Campaign Reform Act (BCRA) defined a new category of electioneering communications that supplemented the express advocacy test. A swath of empirical evidence available to Congress and the courts confirmed that virtually all of the ads meeting this definition were indeed campaign ads. The court in *McConnell* upheld the constitutionality of this provision but allowed for as-applied challenges to the law based on pure grassroots lobbying and issue advocacy. *Federal Election Commission vs. Wisconsin Right to Life, Inc. (WRTL)* was such an as-applied challenge.

My view is that the high court went both too far and not far enough in its *WRTL* decision. Not far enough in the sense that it was unwilling to look at anything other than the language of the ads, even though this was an as-applied challenge to a bright-line test of electioneering communications that had withstood a facial constitutional challenge four years ago. As a non-lawyer, I was bothered by the manufactured nature of the complaint shopped nationally by attorney James Bopp, by the absence of timeliness of the ostensible lobbying effort to the Senate schedule and by the various efforts of Wisconsin Right to Life to defeat Sen. Russell Feingold. I would have placed the burden on *WRTL* to demonstrate that its ads were designed solely to lobby its Wisconsin senators on judicial filibusters. And I would have allowed all relevant contextual information to be brought to bear in supporting or contesting that case.

The court went too far by using this as-applied case to effectively undermine a bright-line test that had already passed constitutional muster — to be sure, without (to Justice Antonin Scalia's consternation) explicitly overruling that provision of the law. It shifted the burden of proof by declaring the law may not apply to ads meeting the definition of electioneering communications unless no reasonable person would deny that the message advocates for or against a candidate's election. (Brad, you alone could exempt *WRTL*'s ads.) In my view, that substitutes a vague and subjective test for the bright-line test in the law, creates uncertainty and incentive once again to game the system, and is likely to hasten a return to corporate and union treasury funding of campaign ads. Even if it chose to side with *WRTL*, the court could have left the electioneering communications provision intact and approved an as-applied exemption based on *WRTL*'s nonprofit status and/or explicit and exclusive lobbying activity.

A shift of one justice has led to a dramatic reversal of course in only four years. And much more is likely on the way.

Look at the facts of the case  
By Bradley Smith

Tom,

Let's start by reviewing the actual facts of this case.

By the summer of 2004, Democrats in the U.S. Senate had been using the filibuster for months, and in some cases years, to prevent confirmation votes on a number of President Bush's judicial nominees. Republican Senate leaders vowed a major effort to break the filibusters after Congress returned from its summer recess, before the fall elections. Wisconsin Right to Life (WRTL), a nonprofit membership corporation, cared deeply about seeing these nominees — most of whom were believed to harbor pro-life views — take their places on the federal bench. So it wanted to run broadcast ads urging voters to contact Wisconsin's senators, Democrats Herb Kohl and Russ Feingold, to ask them to oppose further filibustering. The ads did not mention the position either senator had taken on filibusters; they said nothing about the senators' respective qualifications for office, or about any political party or any election. The ads were to be run congruent with the summer recess, when the senators were likely to be meeting with voters in the state, and with the run-up to the anticipated pre-election vote on filibusters. But because Sen. Feingold was seeking reelection, and this period fell within 30 days of Feingold's primary (in which he was unopposed) and later within 60 days of his general election, the McCain-Feingold campaign finance law prohibited WRTL from airing the ads.

You may disagree, Tom, but I suspect that relatively few Americans would oppose the holding of this case, which upheld WRTL's right to run these ads. If the 1st Amendment does not protect the right of a nonprofit membership group to attempt to persuade other citizens of the rightness of its position at the time when an issue is reaching a climax, what does it mean? So in that most basic respect, the case did not go too far.

Meanwhile, the ruling still leaves groups such as WRTL (or Planned Parenthood, if you prefer) with fewer speech rights than before McCain-Feingold was passed (your talk about the "60-year-old law" notwithstanding, there is no doubt that this ad would have been legal prior to McCain-Feingold), and with less constitutional protection for their speech than the Supreme Court gives to internet pornography, liquor ads, flag burning, cross burning in a minority neighborhood or the dissemination of illegally acquired information. Under this decision, such a group must still request permission from the Federal Election Commission to run such ads, or risk prosecution and hope to win in court. I would say, therefore, that in the broadest sense the decision doesn't go nearly far enough.

Nevertheless, precedent should not be lightly overruled, nor should judges decide more than is presented to them. The challenge was, as you note, a narrow, as-applied challenge to the application of the law in this particular instance. So I'd have to conclude that the high court got it just about right.

## Dust-Up

# Smarter ways to fix the system?

Are there campaign finance reform methods that are not vulnerable to 1st Amendment challenges? All this week Bradley Smith and Thomas E. Mann debate the future of campaign finance reform.

July 11, 2007

*Today, former FEC chairman Smith and Brookings Institution fellow Mann discuss broader campaign finance solutions. Previously they debated the [real or perceived dangers to the McCain-Feingold law](#) and the [quality of the Supreme Court's ruling](#) in the Wisconsin Right to Life case. Later this week, they'll debate public financing and more.*

United States lags the rest of the world  
By Thomas E. Mann

Brad,

A free flow of information among citizens, groups, candidates for public office and political parties is vital for healthy democratic politics. The right to speak diminishes in significance without the financial resources

needed to be heard. Ensuring that parties and candidates have adequate resources to compete effectively in elections is problematic given the inevitable tension between the ideal of political equality and the reality of economic inequality. Efforts to prevent concentrations of wealth from undermining political equality may conflict with bedrock freedoms of speech and association. Every democracy struggles to reconcile the need for political money with the problems it begets. Policy makers across the globe work with the same set of political finance tools — public subsidies, limits on contributions, expenditure controls, disclosure, and regulation of campaign activity — to grapple with these problems but they often arrive at very different solutions.

The United States is an outlier in this comparative world of campaign finance, in that its powerful 1st Amendment speech guarantee precludes tools routinely used in other democracies. For example, many countries prohibit paid campaign broadcast ads, limit expenditures by parties and candidates, and ban independent spending by outside groups. None are possible in this country. In fact, cries of speech suppression in America as a result of campaign finance regulation must utterly bewilder the citizens of the United Kingdom, France and scores of other democracies. By virtually every indicator available, political speech is alive and well after the enactment of McCain-Feingold, richly registering the values, beliefs and interests of a very large and heterogeneous society.

As applied by the courts to campaign finance regulation, the 1st Amendment has limited reformers primarily to disclosure, restrictions on the size and source of political contributions, and various forms of public subsidies, alone or as part of a voluntary system to entice candidates to accept caps on expenditures. But even these regulatory approaches have attracted constitutional challenges. For example, some critics believe disclosure may not be required of outside groups unless they engage in express advocacy. Campaign finance reform efforts since the passage of the [Federal Election Campaign Act Amendments of 1974 \(FECA\)](#) have been devoted almost entirely to maintaining or recovering the credibility and effectiveness of laws already on the books. It has been largely a defensive strategy, one with a mixed record of success and failure. Party soft money is gone, but so too in most respects is the [presidential public financing system](#).

Approaches to reform least vulnerable to 1st Amendment challenges include diversifying the sources of political contributions and lowering the costs of campaigning. Small donor contributions have increased markedly in recent years, thanks to the Internet and initiatives taken by political parties and presidential candidates. Matching small donations with public funds could play a constructive role. More ambitious forms of public financing now being tested in cities and states around the country also offer a route around 1st Amendment obstacles to campaign finance regulation. The costs of campaigning may be reduced by free air time for candidates and parties as well as by successful private efforts to harness various inexpensive forms of digital communications. If we are lucky, the latter could one day substantially reduce the problems of money and politics.

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More solutions in search of a problem  
By Bradley Smith

Tom,

Speaking of the glories of France and "scores of other democracies," where is the beef? Where, suddenly, is the vaunted "empirical evidence" that campaign speech restrictions lead to better government?

To me one of the interesting things about proponents of campaign finance regulation is that they don't even try to connect their proposed or enacted restrictions on political speech to better substantive government, whether measured by economic growth, unemployment, educational standards, health indicators, tax burden, public confidence in government, or anything else. In fact, by the one serious measurement effort I have seen, [Governing magazine's effort to rate state government management](#), the best governed states are [Virginia](#) and [Utah](#), states without limits on campaign contributions.

The 1st Amendment is not the bizarre, nearly inexplicable libertarian barrier to badly needed regulation that you seem to think it is. It represents a thoughtful, conscious "regulatory" decision that it is better to keep government out of this arena; that it is dangerous to give government the power to decide who has spoken too much or too little, or whose expressed concerns are a "sham" and whose concerns are "genuine."

Against this background, campaign finance restrictions are subject to challenge because they don't work and because there is little empirical evidence to support them. There is virtually no serious evidence that campaign contributions are a source of legislative corruption or "buy votes" of legislators. There is virtually no serious evidence that restrictions improve political competition. Indeed, the evidence tilts fairly strongly in the opposite direction.

Thus, the government will always have a difficult time in demonstrating a compelling need to suppress political speech — and as a former FEC commissioner who had to make real decisions to fine real people real money for their political activities, I know that there is a real cost in political speech and freedom. These people would be "utterly bewildered" by your assertions that there is no speech suppression in the regulation of political campaigns.

Even disclosure is and should remain vulnerable to challenge, at least at the current low thresholds that force disclosure of minor contributions. Imagine the outcry, for example, if the president were to introduce the "Patriot II Act," including a provision to create a database of citizen political activity, and empowering the government to ask citizens with whom they have spoken about politics, in order to make sure that terrorist money isn't influencing our politics. Yet what is compelled disclosure of campaign contributions if not a database of personal information and political activity on U.S. citizens? And the first thing that happens in any investigation of alleged infractions — which can be opened with virtually no evidence that the law has been violated — is that the government begins to demand of citizens, "With whom did you speak about politics? What did you speak about? Did they agree?"

As I [noted in Tuesday's post](#), the Supreme Court has been trying for some time to thread the needle between our traditions of political freedom and the desire of some to restrain those freedoms. These judicial efforts have not been very successful. Perhaps the court would do better to take a more originalist view — after all, our nation's politics are more heavily regulated now than at any time in history, with little to show for it. We live in a time when truthful campaign speech gets less protection than topless dancing, internet porn, liquor ads or defamation. That seems to turn the 1st Amendment on its head. So let's hope there are more successful constitutional challenges.

## Cash or charged?

Is money in politics a problem at all, or is unregulated spending the most effective way to ensure citizens have the power to speak to their government? Bradley Smith and Thomas Mann conclude their debate on the future of campaign finance reform.

Times Staff Writer

July 13, 2007

*Today, former FEC Chairman Smith and Brookings Institution fellow Mann discuss the essential tension between political speech and campaign finance regulation. Previously they debated [public financing of campaigns](#), [broader campaign finance solutions](#), [real or perceived dangers to the McCain-Feingold law](#) and [the quality of the Supreme Court's ruling in the Wisconsin right-to-life case](#).*

Two versions of the singularity

By Thomas E. Mann

Brad, for the final installment in our debate, let's assume your policy preferences on campaign finance regulation are realized. By court action or legislation, laws regulating the contribution and expenditure of funds in federal elections are ruled unconstitutional or repealed. Corporations and unions are free to draw on their general treasury funds to participate in federal election campaigns. Individuals and PACs can make unlimited contributions to candidates and parties. Political parties can accept contributions from any source and of any size, and spend those resources as they see fit. The presidential public funding system dies of its own weight or by explicit repeal, and no other forms of public subsidies are enacted to replace it. The Federal Election Commission remains in place but with a vastly reduced jurisdiction, primarily to oversee whatever disclosure requirements are retained. Bribery and extortion statutes remain on the books and become the sole mechanisms for preventing and punishing corruption. I presume IRS restrictions on [501\(c\) organizations](#) regarding political activity would also be retained (or would those be repealed as well?).

I expect you and other deregulation adherents would welcome the end of restrictions on political speech and the bureaucratic interference involved in policing those restrictions, the likely increase in funds available to enable that speech, the possible emergence of donors willing and able to generously finance challengers to entrenched incumbents and the development of a citizen-run marketplace to discipline the role of money in politics. Sounds pretty attractive.

Critics of deregulation (myself included) anticipate a different set of consequences. With no restrictions on what they can receive in political contributions (short of quid pro quo agreements), elected officials gain enormous power over those whose economic fates are influenced by public policy decisions. An informal "pay to play" system, once restrained by limitations on contributions and a ban on party soft money, flourishes in a deregulated system. Campaign money becomes even more the coin of the realm in Washington, D.C., the focus of enormous time and energy by politicians and the basis of leadership advancement and influence in Congress. Large economic interests invest heavily in one party or both, drowning the voices of those less well endowed. Electoral competition further erodes as incumbents seize the fundraising opportunities afforded those in charge of government, and no public subsidies are available to level the playing field. The discipline of the political marketplace fails as citizens find it too daunting to acquire the necessary information and to calculate a basis for differentiating between candidates or parties based on their contributors that would override other important motivations for their vote, and private interests hedge their bets by investing in both sides. The legitimacy of the democratic process is threatened by the free flow of unimaginable sums of money from private interests to public officials.

Whose scenario is more likely? My views and yours are certainly shaped by our broad philosophical views, which to some extent color our reading of the empirical evidence that can be brought to bear on this debate. At the same time, we both sincerely believe that we are making responsible judgments and forecasts based on the realities of money in politics. [What do the readers think?](#)

*Thomas E. Mann, the W. Averell Harriman chair and senior fellow in governance studies at the Brookings Institution, was an expert witness in the constitutional defense of the McCain-Feingold campaign finance law. He is co-author of "The New Campaign Finance Sourcebook" and "The Broken Branch."*

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Give speech a chance  
By Bradley Smith

Tom,

You conclude by trotting out all the hoary old arguments against deregulation, as if we don't have lots of real world experience to evaluate.

Prior to 1907, there was no regulation at the federal level (and virtually none in any state), yet our Republic survived. By the 1850s the same arguments about money we hear today were being made, yet we managed to come up with Abe Lincoln and later [Grover Cleveland](#), weathering a momentous Civil War to become the most dynamic country on Earth — and one of the freest. We then elected Teddy Roosevelt on the strength of what today would be seven-figure contributions in inflation-adjusted dollars.

Even after [1907](#), campaign finance remained far less regulated than today — as a de facto matter, there was virtually no regulation until passage of the [Federal Election Campaign Act amendments of 1974](#). It was a tough century, to be sure, with two world wars and a Great Depression, but we managed to elect Franklin Roosevelt, Harry Truman and Dwight Eisenhower and see it through, even managing the civil rights revolution along the way. How did we ever survive?

Today, we have laboratories all across the country: states such as Virginia and Utah with no limits on contributions; states that allow even — gasp! — unlimited corporate contributions. Yet these are growth states, states people are moving to, not fleeing from.

How real is your apocalyptic vision? I laughed, literally, to read about, "an informal 'pay to play' system, once constrained by a ban on soft money," as if such a ban has always been in effect. There was no ban on soft money until 2002 — has there really been a constraint on "pay to play" since? I doubt many think so.

Politicians do indeed spend more time fundraising now — under contribution limits, it takes much longer to raise cash and demands much more personal involvement by the candidate. As Jack Kemp once said, contribution limits make funding a campaign like filling a swimming pool with a spoon, requiring much more

of a candidate's time. [Incumbency reelection rates](#) and funding advantages have risen under the regulatory regime introduced in 1974. What factual basis is there for your speculation that further regulation would solve the problems that past regulation seems to have exacerbated?

Of course, even if you lack my confidence that freedom works, we can and ought to deregulate. We've spent a century moving step by step in the direction of more regulation, and the alleged problems of money and politics seem to keep getting worse. It's time to reverse course. You and I agree that parties should be allowed more flexibility to coordinate their activities with their candidates. Let's start there. Next, if we merely raise contribution limits to the inflation-adjusted equivalent of where they were when enacted in 1974, we would roughly double individual giving limits and raise other limits by even more. Then, if your parade of horrors has not come to pass, we can deregulate more.

With apologies to John Lennon, all we are saying is, give speech a chance.

*Bradley Smith served as commissioner on the Federal Election Commission from 2000 to 2005, and as chairman of the commission in 2004. Currently professor of law at Capital University Law School in Columbus, Ohio, and chairman of the Center for Competitive Politics, he is the author of "Unfree Speech: The Folly of Campaign Finance Reform" (Princeton University Press, 2001).*