

# INTRODUCTION: CAMPAIGN FINANCE AND MEDIA INFLUENCE

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I was asked to moderate the Symposium's first session on Campaign Finance Laws and the Constitution. We are, of course, in the middle of a hot Presidential contest that gives us a reason to think about campaign finance and all of the limitations upon it, constitutional and otherwise. This is not a new topic. I ran across a seminar that occurred nearly thirty years ago in 1971. This was, of course, pre-Watergate, pre-the current campaign finance laws, pre-*Buckley v. Valeo*,<sup>1</sup> which you will hear a lot about.

At that time, Herbert Alexander pulled together a distinguished panel consisting of Alexander Bickel, Paul Freund, Archibald Cox, and Ralph Winter to discuss this issue.<sup>2</sup> I was struck, in rereading those proceedings, how the major themes that will probably be touched on—the limitations on and distinction between expenditures and contributions, the problems of individual action versus the actions of an agent, and even the question of the role of the press in limitations on campaign speech—all were brought up at that time, though in a much more theoretical framework.

Even at that time, some of the professors, such as Professor Bickel, thought that it might be possible to regulate the content of magazines and newspapers within a campaign context,<sup>3</sup> and Professor Freund, while saying that television advertisements were minimally protected by the First Amendment, indicated

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\* Judge, United States Court of Appeals for the Sixth Circuit. This essay is a revised version of remarks delivered at the Federalist Society Nineteenth Annual Student Symposium on "Law and the Political Process" at Harvard Law School, March 3-4, 2000.

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

2. See Herbert Alexander, *Studies in Money in Politics*, Citizens Research Foundation, monograph #15, FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS (Princeton, N.J. 1974).

3. See *id.* at 66.

that he had some considerable doubt about the matter.<sup>4</sup> By and large since then, that distinction, that puzzlement about the ability to control the press, has faded as a major issue. I want to put that back on the table. The speakers you will hear from will all have their own takes on that issue, but I want to put it on the table because I don't think it has been properly considered.

The question, as raised by Professor Powe of the University of Texas School of Law twenty years ago, was, "Why should Congress be able to limit the ability to influence the outcomes of elections of everyone, except for those fortunate enough to be the owners of mass media?"<sup>5</sup> A decade later, Professor Sanford Levinson, now also of Texas, writing on the same subject, said, looking back, "One would have thought that in the ensuing years supporters of campaign finance limitations . . . might have attempted to answer Powe's query, but that has not occurred."<sup>6</sup> He said that in 1989.

In 1999, Professor Richard Hasen of Texas, looking back, said, "Well, you would think somebody would have addressed this question," and again found that no one had, so he then seized the ball and, in a very good article in the *Texas Law Review*, said that the way to reconcile control of contributions and lack of control of the press is to control the press.<sup>7</sup> He gives a very good example as to why he thinks you should do it in that Law Review article.<sup>8</sup>

I want to put that on the table and hope that someone will pick it up. As a person who, before taking the Bench, had been involved in politics, my colleagues and I always knew that free media was three times more important than paid media. We knew that news coverage by and large swamps your own advertising, and we knew that the effect of newspapers, magazines, books, radio, and television on public discourse and campaigns is larger than that of paid commercials. If one percent of the media's expenditures affects public thoughts about elections, then that is more than all the spending on all

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4. See *id.* at 74.

5. L. A. Scot Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243, 267-68.

6. Sanford Levinson, *Electoral Regulation: Some Comments*, 18 HOFSTRA L. REV. 411, 412-13 (1989).

7. See Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627, 1629-30 & n.21 (1999).

8. See *id.* at 1649-62.

the elections for all the offices in the United States.<sup>9</sup>

Now, let's look at our very distinguished panel. Professor, President, and Dean Derek Bok will be our first speaker. He has held each of those offices. He's been on the faculty here since 1961, and he's been the Dean of Harvard Law School. He's been the President of Harvard University. He has taken an active role in the social policy of our country. His recent book with President Bowen of Princeton, *The Shape of the River*,<sup>10</sup> surely was worth more than a thousand dollars to candidates across the country who were interested in the issues of affirmative action.

Our second speaker will be John R. Lott, who is a Senior Research Scholar at Yale Law School.<sup>11</sup> He has a Ph.D. in Economics. He brings a real-world and numerical perspective to this issue. He has written widely and has been quoted widely on issues ranging from guns to sentencing to the effect of money on politicians. I presume that he has looked at the recent Supreme Court decision in *Nixon v. Shrink Missouri Government PAC*,<sup>12</sup> where Justice Souter was fairly skeptical of empirical evidence of any sort.<sup>13</sup> Souter said, in particular, that the amount of empirical evidence that you need varies up and down with the novelty and plausibility of the justification raised.<sup>14</sup> So presumably, if you raise an old, plausible argument that the Justice believes, you don't need much evidence. If you want to provide a new argument implausible to the Justice, you'd better have a lot of evidence, and we have seen Professor Lott provide a lot of evidence in many of his writings.

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9. Suppose one uses the gross domestic product of media industries for 1996, the last presidential election year, as an estimate of media expenditures. The printing and publishing industry had \$88.2 billion of "output," the radio and television industries had \$50.7 billion worth, and the motion picture industry generated \$24.6 billion. See Bureau of Economic Analysis, *Industry Accounts Data*, at <http://www.bea.doc.gov/bea/dn2/gpoc.htm> (last visited Nov. 17, 2000). One percent of this is \$1.635 billion worth of estimated influence. By comparison, campaign expenditures in all U.S. elections during the same year totaled approximately \$810 million. See [opensecrets.org](http://www.opensecrets.org), *Election Overview: The Story So Far*, at <http://www.opensecrets.org/2000elect/storysofar/sectors.asp> (last visited October 25, 2000).

10. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* (1998).

11. See John R. Lott, *Empirical Evidence in the Debate on Campaign Finance Reform*, 24 HARV. J.L. & PUB. POL'Y 9 (2000).

12. 120 S. Ct. 897 (2000).

13. See *id.* at 906-08.

14. See *id.* at 906.

Our third speaker, Frank Michelman, is the Robert Walmsley University Professor at Harvard Law School.<sup>15</sup> He has had a long and distinguished career on the Harvard Law faculty. He also served in the Kennedy Administration and served as a law clerk to Justice Brennan. Professor Michelman has a marvelous piece in the *Tel Aviv University Studies in Law* that refers partly to our topic, concerning the "tendenc[y] . . . in [First Amendment] jurisprudence towards . . . anti-statism . . ." <sup>16</sup> I must say I read that quote as being somewhat disapproving. We'll have to see whether that is the view that he would have on it as well. But he does say that he objects to *Buckley* on the ground that there should be a more "measured, tolerant, and particularized kind of judicial response" to campaign reform laws.<sup>17</sup> Surely, as a judge, I love that. I mean, I can't think of anything better to be than measured, tolerant, and particularized.

Our fourth speaker is Professor John O. McGinnis, pinch-hitting, but we are sure with great verve and vigor.<sup>18</sup> In previous sessions of this Symposium, he was the recipient of the Federalist Society's Paul M. Bator Award, given annually to an outstanding legal scholar under the age of 40. He is a product of Harvard College and Harvard Law School, has clerked for Judge Kenneth Starr, and has worked in the Justice Department's Office of Legal Counsel.

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15. See Frank I. Michelman, *The Constitutional Question*, 24 HARV. J.L. & PUB. POL'Y 17 (2000).

16. Frank I. Michelman, *Political Truth and the Rule of Law*, 8 TEL AVIV U. STUD. L. 281 (1988) (citing Owen M. Fiss, *Free Speech and Social Structure*, 8 TEL AVIV U. STUD. L. 249 (1988)).

17. *Id.* at 282.

18. See John O. McGinnis, *Against the Scribes: Campaign Finance Reform Revisited*, 24 HARV. J.L. & PUB. POL'Y 25 (2000).