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This Symposium is cast as addressing questions about twentieth century free speech *theory*. The Conference brochure announces that "[d]uring the 20th century, the Supreme Court articulated at least three major theories that undergird the freedoms of speech and press," namely the marketplace of ideas theory, the self-government theory, and the individual self-realization theory.[1] The brochure claims that these "theoretical models have driven the Court's development and application of . . . free speech law," and the agenda it sets is to "examine whether these theoretical models remain valid and compelling bases for the continued development of free speech law in . . . the modern age."[2] More specifically, my fellow panelists and I were asked to consider whether "[i]n light of the mushrooming costs of running a political campaign and other dynamics of the modern election process . . . free speech theory [should] continue to disfavor campaign spending limits and strict contribution caps."[3] I quote from the brochure because it seemed to me important to try in my comments to answer the question that I was asked to address. And the more I thought about the issue as it was posed for this panel, the more forcefully did it seem to me that the issue as framed implies deep skepticism about the continuing relevance of twentieth century theory. It evinces doubt that twentieth century theory embodies permanent or enduring values. It suggests instead that twentieth century theory has become outmoded—just as have some twentieth century

* David A. and Mary Harrison Distinguished Professor, University of Virginia Law School. Thanks to Anand Patel, University of Virginia Law School Class of 2010, for research help. These slightly edited symposium remarks make no claim to either originality or scholarship. They are more akin to an exhortation, reflecting my judgment that a determined embrace of first principles might be an appropriate antidote at a symposium with an agenda devoted to questioning their continuing relevance.

1. Pepperdine University School of Law Presents: *Free Speech & Press in the Modern Age: Can 20th Century Theory Bear the Weight of 21st Century Demands?*, http://law.pepperdine.edu/symposia/freespeech.html (last visited Jan. 14, 2009) (Pepperdine Law Review Symposium) [hereinafter *Free Speech*].

2. *Id.*

3. *Id.*

technologies, like rotary phones or the VCR. But as so understood, the issue only intimates the depth of the challenge that the high costs of political campaigns and "other dynamics" of present day politics pose. That challenge is not just to twentieth century marketplace, or self-government, or individual self-realization theories; rather, it is a challenge to political freedom itself and to free political speech in particular. For it is freedom of political speech and the doctrines that the Court developed in the twentieth century to protect that freedom, and not the theories that were offered in support of them, that modern developments put at risk.[4]

My central claim in response to the issue that has been posed for this panel is that free political debate has, in fact, not outlived its usefulness. I concede that free political debate is under siege, as of course I must in view of the pressures that ever-more-insistent calls for ever-more-draconian regulation of campaign finance practices put upon it. But in what follows, I make three brief points in support of my central claim that if freedom succumbs to these pressures, it will not be because it has become "outdated" or that in principle it cannot "bear the weight of 21st century demands."[5] It will be because it will have lost out to the advocates of regulation—or, if you will, of "reform"—in what has been and will continue to be an ongoing battle of ideas and values.

First, I will suggest that, for purposes of the campaign finance debate, what is most relevant about free speech law in the twentieth century are the doctrines that the Court gradually evolved, beginning with its first encounters with speech-restricting legislation in the early years and culminating in three seminal decisions in the 1960s and 1970s.[6] The rules embodied in these decisions provided free political debate with both direct and strategic protection from legislative inhibition, threat, or manipulation. Second, I will suggest that, because the Court perceived that restrictions of independent campaign expenditures and draconian contribution limits both aim at and hit free political debate, it announced rules that disfavored them.[7] It did this well-knowing that the costs of political campaigns would continue to rise. Third, and most important, I will claim that the battle over campaign finance regulations in the twentieth century was—and in the twenty-first century continues to be—a debate that will remain relevant and timely between proponents of *freedom* of political debate from legislative

4. *See infra* notes 13–28 and accompanying text (discussing cases that shaped free speech doctrine).

5. *Free Speech*, *supra* note 1.

6. *See infra* notes 9–26 and accompanying text (discussing early free speech decisions but designating as three "seminal" cases: Brandenburg v. Ohio, 395 U.S. 444 (1969); N.Y. Times v. Sullivan, 376 U.S. 254 (1964); Cohen v. California, 403 U.S. 15 (1971)).

7. *See infra* notes 27–36 and accompanying text (discussing decisions examining campaign finance legislation in light of free speech jurisprudence).

regulation and advocates of legislative *regulation* of political debate (regulation that would reduce freedom in pursuit of other objectives).[8] Because I am a proponent on the freedom side, I will urge the advocates of regulation to offer more specific descriptions than they have offered to date of the evils their proposals supposedly cure. I will appeal to them to spell out more clearly what exactly persuades them that more regulation of the political process will accomplish the goals they posit for it, and I will ask them to acknowledge that—and to explain why—they think free political speech is dispensable.

With respect to my first point, it is of cardinal significance to debates about the regulation of campaign finance practices that the substantive law of the First Amendment that the Supreme Court developed in the twentieth century provided direct and strategic protection to free political debate.[9] Take the Court's word for it: "[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."[10] It is important, I think, to note that the Court spoke of protecting "free" political debate, not "intelligent" political debate and not political debate uninflected with passion or purged of all hints of self- or special-interest.[11] A complete summary of the cases which implement this practically universal agreement is clearly beyond the scope of this essay,[12] but several seminal cases so readily come to mind that they deserve mention here. First were the early cases—*Masses*,[13] *Gitlow*,[14] and *Whitney*,[15] for example—in which Judge Learned Hand (in *Masses*) and Justices Holmes and Brandeis (in *Gitlow* and, most particularly in *Whitney*) articulated in a variety of ways a fundamental connection between representative democracy

8. *See infra* notes 37–46 and accompanying text (discussing freedom of political debate versus regulation of political debate in campaign finance regulation).

9. By direct protection, I refer to protection of political debate from legislation that in terms prohibits, punishes, or restricts political debate; by strategic protection, I refer to rules regarding the permissible limits of direct prohibitions, punishments, or restrictions that are deliberately crafted to minimize the possible chilling effects that any remaining prohibitions, punishments, or restrictions might have on speech.

10. Mills v. Alabama, 384 U.S. 214, 218 (1966).

11. *Cf., e.g.*, Barry P. McDonald, *Campaign Finance Regulation and the Marketplace of Emotions*, 36 PEPP. L. REV. 395 (2009) (implicitly claiming that political speech that is animated by emotion instead of reason ought to be susceptible to regulation).

12. *See* Geoffrey Stone, *Free Speech in the Twenty-First Century: What We Learned in the Twentieth Century*, 36 PEPP. L. REV. 273 (2009) (summarizing ten judgments about the meaning of the First Amendment made in the 20th century).

13. Masses Pub. Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917).

14. Gitlow v. New York, 268 U.S. 652 (1925).

15. Whitney v. California, 274 U.S. 357 (1927).

and free political debate.[16] Justices Holmes and Brandeis, moreover, made a point of insisting that the Court had an indispensable role to play in protecting free political speech from over-wrought legislative efforts to regulate it and that the Court had a constitutional obligation to decide whether the particular speech that the government sought to punish in a particular case had created a sufficiently clear and present danger of substantive evil that it could be punished consistently with the commands of the First Amendment.[17] Their efforts bore final fruit in *Brandenburg v. Ohio*,[18] in which the Court announced a hard and fast rule that precluded states from even "forbid[ding] or proscrib[ing]"—much less from punishing—"advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[19] Thus, the Court in *Brandenburg* announced a rule that, in order to protect the kind of political speech that was most important, deliberately left some dangerous, probably unintelligent and perhaps irrational, speech unpunished and unpunishable.[20] And with *Brandenburg*, the Court steadfastly embraced a First Amendment tradition that had been developing since Justices Holmes and Brandeis first signaled its birth: a tradition of the Court announcing and applying intentionally speech-protective rules.

Another seminal case along these lines is, of course, *New York Times v. Sullivan*,[21] in which the Court, for plainly strategic reasons, offered constitutional protection to *false* statements of fact about public officials in the performance of their public duties. The protection for false speech was necessary, the Court thought, to protect "uninhibited, robust, and wide-open" debate on public issues.[22] More importantly, perhaps, is the fact that in the *Times* case the Court delivered, in no uncertain terms, a belated death-knell to the Sedition Act of 1789, "because . . . the restraint it imposed upon

16. *Cf.* Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment:* Masses Publishing Co. v. Patten, 61 U. COLO. L. REV. 1, 5 (1990) (Hand's reliance on democratic theory in *Masses*, and the premises from which he reasoned, became "basic, though often unacknowledged, features of modern [F]irst [A]mendment analysis," and had a "pervasive, and . . . profound" influence on Justices Holmes and Brandeis, among others.).

17. These latter points were a major implication of the disagreement between Justices Holmes and Brandeis, and Justice Sanford's opinion for the majority in both *Gitlow* and *Whitney*. Moreover, when Chief Justice Vinson in *Dennis v. U.S.*, 341 U.S. 494, 507 (1951), noted that by that time there was "little doubt that subsequent opinions [to *Gitlow* and *Whitney*] [had] inclined toward the Holmes–Brandeis rationale," he was clearly referring to the Holmes–Brandeis view of the Court's role in policing the application of the clear and present danger test to make sure it conformed to First Amendment imperatives.

18. 395 U.S. 444 (1969).

19. *Id.* at 447.

20. *Id.* at 447–48.

21. 376 U.S. 254 (1964).

22. *Id.* at 270.

criticism of government and public officials was inconsistent with the First Amendment."[23]

My final example of the Court's commitment in the twentieth century to keeping government within stringent limits when it attempts to suppress particular forms of public discourse about public affairs is *Cohen v. California*,[24] the case in which the Court famously overturned a conviction for wearing a jacket with "FUCK THE DRAFT" emblazoned on the back. In doing so, the Court acknowledged that free public discussion may indeed produce "verbal tumult, discord, and even offensive utterance,"[25] but it embraced such results because it thought them "in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve."[26]

My second point is that the Court in the twentieth century (and early in the twenty-first) concluded that restrictions of independent expenditures and draconian limits on contributions to political candidates both aim at and hit free political debate. I do not here intend to offer a rehash of the long-standing debate about this conclusion.[27] The Court quite unequivocally held in *Buckley v. Valeo* that "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities."[28] It recently reaffirmed this conclusion with respect to contributions, in *Randall v. Sorrell*,[29] and with respect to expenditures in *Federal Election Commission v. Wisconsin Right to Life*.[30] I acknowledge that advocates of regulation continue to make variations of the argument that such restrictions are merely regulations of "money"[31] or "property"[32] or "conduct"[33] or of "devices of

23. *Id.* at 276.

24. 403 U.S. 15 (1971).

25. *Id.* at 24–25.

26. *Id.* at 25.

27. *See* Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045, 1055–1060 (1985) (summarizing and responding to arguments that campaign giving and spending limitations do not involve important First Amendment concerns because they regulate only conduct and do not regulate speech directly).

28. 424 U.S. 1, 14 (1976).

29. 548 U.S. 230 (2006).

30. 127 S. Ct. 2652 (2007).

31. *See, e.g.*, J. Skelley Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005–06 (giving money to and spending money on political debate are forms of conduct related to speech and not pure speech).

32. *See, e.g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) ("Money is property; it is not speech.").

33. *See, e.g.*, Brief for Senators Hugh Scott and Edward M. Kennedy as Amici Curiae Supporting Respondents at 24, Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (limitations on

democracy" akin to such strategies for coordinating democratic processes as polling places and dates for elections.[34] They insist that such restrictions represent relatively insignificant incursions on First Amendment values. I insist to the contrary that though it is true that contribution and expenditure limitations literally aim at and hit only "money" or "property" or the "conduct" or the "device of democracy" of giving or spending money or property, the more salient fact about them is that the money or property or device that they aim at—and hit, to the extent the Court sustains them—is exclusively and designedly that which is given to or spent on or engaged in with reference to the *conduct* of "discussion of public issues and debate on the qualifications of candidates [which] are integral to the operation of the system of government established by our Constitution."[35] Moreover, like the Court in *Buckley*, I do not doubt that "the constitutional guarantee [of free political debate] has its fullest and most urgent application precisely to the conduct of campaigns for political office."[36]

My third point is not a controversial one—at least I hope it is not controversial—since it purports to do no more than describe what the battle over the First Amendment and campaign finance regulations has always been and continues to be, at bottom, all about. My characterization of what is and has been at stake is at least a plausible one, despite its being painted here with a broad brush and without analytical nuance. Fundamentally, the battle is between two very different world views, two ways of understanding our political system and of thinking about the power and capacity of the legislature to reconfigure its workings. I have previously noted that the two sides of this debate at present occupy "*no* common First Amendment ground."[37] On one side of the debate are those who think both that freedom—negative freedom, that is—works, that it is a constitutional value of enduring significance, and that legislators are more inclined to regulate politics so as to protect incumbents rather than to encourage genuine political competition.[38] These advocates believe that freedom of political speech necessarily includes freedom to spend money to support candidates and discuss issues.[39] On the other side of the First Amendment chasm are

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campaign contributions and expenditures "deal only with conduct, [or] with the transfer or use of money or other material resources").

34. *See* Frederick Schauer, *Judicial Review of the Devices of Democracy*, 94 COLUM. L. REV. 1326 (1994).

35. *Buckley*, 424 U.S. at 14. I have defended my conclusion on this point elsewhere, and I will insist on this point rather than undertaking to defend it again here. *See* BeVier, *supra* note 28, at 1055–60.

36. *Buckley*, 424 U.S. at 15 (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

37. Lillian R. BeVier, *First Amendment Basics Redux:* Buckley v. Valeo *to* FEC v. Wisconsin Right to Life, 2006–07 CATO SUP. CT. REV. 77, 106 (2007).

38. *Id.* at 107.

39. *Id.* at 110.

those who, with respect to the political process, are suspicious of the value of freedom as it is traditionally understood,[40] who think that legislators ought to be entitled to considerable deference when they pass legislation under the banner of "reform" of the political system, and who believe that electoral politics can and ought to be made to work more rationally and more fairly.[41] These advocates support and defend regulations of campaign contributions and expenditures because, though such regulations reduce freedom, they believe that the regulations pursue objectives that they deem more worthy.[42] They think freedom undermines the accomplishment of these objectives; whereas appropriate, well-designed regulations can effectuate them—objectives such as the prevention of corruption and the appearance of corruption,[43] equalizing the relative ability of individuals and groups to influence the outcome of elections,[44] and attaining "political integrity."[45] The latter objective is one which, according to Justice Souter is "second to none in a free society."[46]

The freedom of political speech that I think is at stake is, quite simply, the *absence* of regulations or laws that explicitly either restrict the citizenry's ability to spend or contribute money to express its views about candidates and issues or regulate the content of what may be said.[47] While one might take the position—and many do—that *democracy* is enhanced by

40. *See, e.g.*, Ian Ayres, *Symposium Commentary: Taking Issue with Issue Advocacy*, 85 VA. L. REV. 1793, 1793 (1999) ("The maximization of negative liberty . . . is not an attractive normative benchmark.").

41. *See* BeVier, *supra* note 37, at 110.

42. *Id.*

43. Here, "corruption" refers to the corruption of candidates "too compliant" with the wishes of particular constituents, or of an electoral process itself which may become distorted by "the corrosive and distorting effects of immense aggregations of wealth." Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000) (noting that preventing corruption is "a concern not confined to bribery of public officials, but [one that extends] to the broader threat from politicians too compliant with the wishes of large contributors"); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990).

44. *See, e.g.*, Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L.J. 789, 801 (1998) (asserting that participation of the wealthy in election campaigns ought to be limited in order to assure the "optimal operation of" our electoral process).

45. Fed. Election Comm'n v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2689 (2007) (Souter, J., dissenting).

46. *Id.* There is irony in Justice Souter's claim that it is "political integrity," and not freedom itself, that has value "second to none in a free [*free?*] society."

47. *Cf.* Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political and Constitutional Analysis*, 85 VA. L. REV. 1761, 1762–64 (1999) (describing negative freedom and contrasting it with the First Amendment conception that understands the Constitution to confer power on legislatures to attempt to maximize "rational democratic deliberation among political equals in disinterested pursuit of the public interest").

restricting free political speech in a variety of ways,[48] the meaning that I embrace rejects the claim that *freedom* can be enhanced by being restricted.[49] Anyway, it does not seem to me that "freedom" is, on the face of it, an ambiguous term—at least as the term is traditionally understood. Thus, I do not think that I need further to clarify the reality to which I refer by my claim that "freedom" is the value embraced by those on one side of the campaign finance debate.

I do, however, think that the terms deployed by the advocates of regulation, who are on the other side, require clarification. The terms they use are rhetorically evocative, to be sure, and they imply that those who use them occupy the moral high ground. The precise nature of the reality to which they refer is, to say the least, hard to pin down. Considering, for example, the menu of evils identified by so-called reform advocates, question after question about what it is exactly that they seek to correct comes to mind. Let me offer just a few examples of the things that puzzle me. Reform advocates speak disparagingly of politicians who are "too compliant" with the wishes of particular constituents,[50] but their disparaging tone is an insufficient answer to the many questions that the very notion of being "too compliant" raises. Left wholly unspecified is what, exactly, it means to say that a politician is "too compliant" with some contributors' wishes. The idea of being "too compliant" with some constituents suggests that a politician ought to be *more* compliant with other constituents. But who or what those others might be is not identified. It is unclear whether a politician thought to be "too compliant" with one group of constituents is being compared to the general notion that faithful agency requires compliance with the wishes of all constituents, or is being compared to a politician who is "too compliant" with the wishes of a specific group of constituents rather than "just compliant enough." The reformers do not indicate how one would know when the Goldilocks "just right" amount of compliance has been achieved. Or consider the majority of the Court's description of corruption as "not only . . . *quid pro quo* agreements, but also as undue influence on an officeholder's judgment."[51] Again, the disparaging tone with reference to undue influence masks a number of issues of definition and criteria. It is easy to oppose the exercise of "undue

48. *See, e.g.*, CASS SUNSTEIN, THE PARTIAL CONSTITUTION 84 (1993) ("[C]ampaign finance laws might be thought to promote the purpose of the system of free expression, which is to ensure a well-functioning deliberative process among political equals.").

49. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1135 (2d ed. 1988) ("If the net effect of the legislation is to [enhance freedom of speech], then the exacting review reserved for abridgments of free speech may be inapposite.").

50. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000).

51. Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm'n, 533 U.S. 431, 441 (2001).

influence," but considerably more difficult to determine which factors render any particular amount of influence "undue," and to describe the source and amount of influence that would be "just right." If large contributions have influence that is "undue," the question arises of "undue as compared to what?" The reformers do not clarify whether the relevant measure of the influence is the size of the contributions, or the sources of the political influence—such as media coverage, celebrity endorsements, or "elite opinion" on certain issues. It is possible that the reformers mean to imply that the influence of large contributions will overbear the influence of the officeholder's own philosophical commitments, or her perception of what would best serve the interests of her constituents. But if this is their implication, they do not make it clear.

Finally, at least for the moment, the vision of "political integrity" that Justice Souter invokes begs for clarification.[52] He does not specify what he denotes when he speaks of political integrity, nor does he articulate what it is about devoting "money in self-interested hands to the support of political campaigning," that subverts it.[53] One wonders whether Justice Souter thinks that political integrity would be undermined by the simple fact of self-interest on the part of participants in political campaigns. The question arises whether he believes that the expenditure of money in "publicly-interested hands" would *not* subvert democracy to the extent that money in self-interested hands does. And this question in turn raises the issue of who decides whether money comes from "publicly-interested" or "privately-interested" hands. Another possibility suggests itself, however, which is that in Justice Souter's view devoting *money*—any kind of money, from any kinds of hands—to the support of political campaigning subverts political integrity. So that insofar as freedom itself consists of freedom to spend and contribute money to "the support of political campaigning," it is freedom itself that subverts political integrity.

To raise issues of definition, specification, and criteria that the rhetoric of reform leaves unanswered is not a mere academic sport. The questions are not mere quibbles. Instead they focus on crucial statements by Justices who have in the past voted to sustain campaign finance regulations, and they need to be asked of and answered by twenty-first century reformers for two reasons. One reason is that it is a near certainty that more regulations will be

52. Fed. Election Comm'n v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2689 (2007) (Souter, J., dissenting).

53. *Id.*

53. *Id.*

proposed in the coming years. A second reason is that the "reforms" that were enacted in the twentieth century have not had unequivocally benign effects on the political process. Far from it, despite Justice Stevens's confident insistence that Congress in the twentieth century is engaged in "steady improvement of the national election laws."[54] Indeed, the way politics is conducted today is, in many of its least attractive respects, a function of those very reforms. Last century's increasingly stringent regulations on political giving and spending strengthened the hand of Washington-based interest groups, protected incumbent officeholders from harsh criticism by independent groups, and made it harder than ever for effective challenges to be mounted against them because regulations made it more difficult to raise money—and anything that makes it more difficult to raise money bears more heavily on challengers than on incumbents. In addition, the regulations created a separate special-interest class of lawyers and advisers savvy about the maze of regulations, about what it takes to comply with them, and how to find the loopholes. This is a class of people whose comparative advantage now lies in their specialized expertise about this arcane body of rules and whose self-interest, accordingly, lies in the continuation—and perhaps even in the prospect of increasing the complexity—of today's regulatory regime. Whatever benign effects they may have had in addition to these malign ones, the regulations have done next to nothing to get the money out of politics. They have merely rechanneled its flow so that now it comes from less, rather than more accountable sources.[55] It has been reported, for example, that spending by independent Section 527 organizations could exceed $1 billion in 2008 for the first time in our history.[56] This latter reality should surprise no one. With a federal budget topping 3 trillion dollars and representing more than 20% of the GNP,[57] a health care crisis looming, the government's fingers in every domestic pie, a war being waged, and an unrelenting threat from terrorists bent on our destruction, the stakes have never been higher in the struggle for political power. In fact, considering the magnitude and importance of what is at stake in election contests, I wonder why fingers keep getting pointed at campaign spending and contributions as if these were motivated by wholly exogenous concerns rather than being a reflection of the enormity and variety of the issues confronting us. It seems plausible to

54. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 117 (2003).

55. *See, e.g.*, Rick Hampson, *George Soros Putting His Fortune Behind a New Cause: Ousting Bush*, USA TODAY, June 1, 2004, at 1A; Matthew Mosk, *ACT Fined $775,000*, WASH. POST, Aug. 30, 2007, at A05.

56. *See, e.g.*, T.W. Farnam & Brody Mullins, *Interest-Group Campaign Spending Nears Record: Figure for First Time Could Top $1 Billion; IRS Reports on 527s*, WALL ST. J., Feb. 5, 2008, at A13.

57. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOV'T, FISCAL YEAR 2008 (2007).

me that ever-increasing campaign expenditures and contributions are instead a quite predictable result of a government grown so big and so pervasive that it is worth spending resources to influence the outcomes of elections and thereby affect the future course of the nation.[58]

In fact, what I wish I could understand is what it is about freedom—meaning freedom *from* government regulation—that advocates of regulation find so repugnant, so expendable. Perhaps they would be loathe to acknowledge that they find freedom repugnant in principle, but when they describe the world they see for what freedom has wrought, they seem appalled.[59] And, while they are no doubt unwilling to jettison it entirely, the regulators clearly do not give freedom priority in their scale of values.[60] They are willing to trade large amounts of it in exchange for other objectives that they deem more worthy—again, to quote Justice Souter, it is "*political integrity* [and not free political debate that has] a value second to none in a[n otherwise] free society."[61]

I now offer my answer to the question of whether the twentieth century doctrines that the Court announced to provide both direct and strategic protection to free political debate have become outdated. These, of course, are the doctrines that the Court has deployed to strike down at least some restrictions of independent campaign expenditures and draconian contribution limitations, so the question really is: Has free political debate itself outlived its usefulness? And my answer is this: Freedom does not have a sell-by date. Freedom is a value we will either continue to embrace—or not. If we continue to embrace it, we must become comfortable with—or at least tolerant of—"the mushrooming costs of running a political campaign and other dynamics of the modern election process."[62] We will have to live with a political process that is messy, vibrant, volatile, sometimes ugly and often irrational, nearly always unpredictable, and—perhaps most disconcerting—*not within our control, and quite beyond our power to tame.*

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58. *Cf.* Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41 (1992) (arguing that the best way to cure the problem of money in politics is to restrain the growth of government and thereby reduce the returns to rent-seeking).

59. *See, e.g.*, C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV 1, 34 (1998) (asserting that the "dismal state of public discourse within existing electoral campaigns needs little demonstration").

60. *Id.* ("The primary purpose of electoral campaigns . . . 'is to elect public officials, not to serve as a general forum for political expression.'" (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 373 (1997) (Stevens, J., joined by Ginsburg & Souter, JJ., dissenting))).

61. Fed. Election Comm'n v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2689 (2007) (Souter, J., dissenting) (emphasis added).

62. *Free Speech*, *supra* note 1.

The struggle between political freedom and the urge to regulate has been going on for a long time. If in the twenty-first century we decide to trade more of our freedom for more regulation, it will not be "new and unprecedented demands" that will cause us to do so. Rather, it will be because the determined, politically astute, and dedicated commitments of the advocates for regulation win the day. They will have convinced us that values *other than freedom* are *second to none* in a free society. But make no mistake: If the advocates of regulation succeed, it will not be because they brought new twenty-first century ideas about the need for regulation to the table to trump old and outdated ideas of freedom of speech. It will be because, in the free marketplace of ideas, their ideas triumph over the idea of freedom.