Buttletproof Speech: Are Political Books beyond Litigation's Reach

Emily Kirstine Wacker

Follow this and additional works at: https://digitalcommons.law.villanova.edu/mslj

Part of the Entertainment, Arts, and Sports Law Commons, First Amendment Commons, and the Law and Politics Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/mslj/vol12/iss1/5

This Comment is brought to you for free and open access by the Journals at Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Jeffrey S. Moorad Sports Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
BULLETPROOF SPEECH:
ARE POLITICAL BOOKS BEYOND LITIGATION’S REACH?

"Seldom have bare-knuckled political diatribes enjoyed the kind of list-topping popularity they share at the moment."

I. INTRODUCTION

Hotly contested races and vicious campaigns dominate today’s political climate. Candidates must ply the electorate with effective commercials to gain votes. But political advertising has its share of problems: tight regulations and campaign finance reform legislation challenge current and would-be public servants.

Political books increasingly resemble slick campaign commercials. But stringent political advertising regulations effect political books. Thus, the political book can be an extremely effective tool in a savvy candidate’s hands. This Comment shows that the First Amendment places political books well beyond the realm of campaign finance reform regulation. Part II provides a background on the history of political books from the nation’s early history to to-


5. See, e.g., Howard Dean, Winning Back America (2003); John Kerry, A Call to Service: My Vision for a Better America (2003). For further discussion of 2004 Democratic presidential nominee hopefuls’ books, see infra notes 34-37 and accompanying text.


Part III analyzes the applicability of campaign finance reform to political books. Part IV concludes that a well-slanted book may be the ultimate form of untouchable political speech.

II. BACKGROUND

A. Political Books

American politics boasts a long history of candidate-authors, including John F. Kennedy, Barry Goldwater, and Jimmy Carter. In 1999, candidate and political books gained renewed notoriety with the release of John McCain’s hugely popular autobiography.

Today, bookstores are full of books by and about politicians, branded with lengthy subtitles and decorated in various incarnations of red, white, and blue. These political books are increasingly popular. Today, a slew of works from both the right and left

---

8. For a discussion of the history of political books, see infra notes 11-27 and accompanying text.

9. For a discussion of campaign finance reform, see infra notes 163-80 and accompanying text.

10. For a discussion of political books as speech, see infra notes 181-84 and accompanying text.


14. See Christopher Dreher, Gluttons For Politics; The appetite for liberal and conservative books is high, but the range of titles may soon be overwhelming, PUBS. WKLY., Oct. 13, 2003, at 18 [hereinafter *Gluttons*] (“This spring and summer, the proliferation of right-wing bestsellers was touted throughout the media, along with the creation
flood the market.\textsuperscript{15} Authoring one's partisan views is now almost a political rite of passage.\textsuperscript{16} Today's politicians campaign, legislate, and write books.\textsuperscript{17} Occasionally, lawsuits follow publication.\textsuperscript{18}

1. The "Republic of Letters"

Political writings have a long history in America. At the end of the 1600s, America was a homogenous colony.\textsuperscript{19} The majority of settlers were white English farmers living in rural areas.\textsuperscript{20} But Colonial America profited from a dynamic political and social climate.\textsuperscript{21} of conservative imprints at Viking and Crown."); see also Don O'Briant, \textit{Politics by the book}; Whether coming from the left or right, partisan authors find one common area: Strong sales, \textit{Atlanta J.-Const.}, Nov. 13, 2003, at 1D [hereinafter \textit{Strong Sales}] ("The political polarization of America hasn't helped the legislative process, but it's done wonders for book sales.").

15. See Jacqueline Blais, \textit{Left hooks and right jabs drive book sales}, USA TODAY, Nov. 4, 2003, at 1D ("The war of words – Liar! Slander! Lying liars! – is escalating on USA TODAY'S Best-Selling Books list. There's a bounty of political books with take-no-prisoners titles."); see also Christy Karras, \textit{Fighting Words}; Literary mudslinging stirs the political pot from the right and left; \textit{Political foes throw the book at each other}, SALT LAKE TRIB., Dec. 7, 2003, at D1 ("[L]ately, books have become weapons in a fierce and dirty battle between political ideals."); Gluttons, supra note 14, at 18 ("[I]n the past six weeks, a slew of liberal authors have dominated the bestseller lists. Now, as the 2004 election year approaches, a daunting number of books . . . will soon fill bookstores, more than even the most conscientious voter could be expected to read."). Political books are widely published, highly publicized, and sell very well. See \textit{Point in Print}, supra note 11, at C9; see, e.g., \textit{Hardcover Nonfiction}, N.Y. TIMES, Feb. 8, 2004 (listing best selling books), available at http://www.nytimes.com/2004/02/08/books/bestseller/0208besthardnonfiction.html. As of February 2004, nine of the top fifteen books on the \textit{New York Times} Hardcover Nonfiction Bestseller List were about politics or politicians. See id. For a full discussion of the political book boom, see \textit{infra} notes 28-64 and accompanying text.

16. See \textit{Point in Print}, supra note 11, at C9 ("[P]olitics and the business of publishing are once again locked in a tight embrace.").

17. See Patrick T. Reardon, \textit{The attack of the liberals}; Provocative authors storm bestseller list, CHI. TRIB., Oct. 22, 2003, at C1 [hereinafter \textit{Attack of the Liberals}] (noting massive liberal response to conservative books). Not everyone views this trend in a positive light. See Don't \textit{Judge A Book By Its Prizes}, PITT. POST-GAZETTE, Jan. 5, 2003, at B4 ("One sad trend in 2002 was the publication of slapped-together books allegedly written by a bunch of political partisans whose only claim to authorship was their celebrity.").

18. For a full discussion of book-related lawsuits, see \textit{infra} notes 79-103 and accompanying text.


20. See id. (describing state of America in late 1600s).

21. See id. (clarifying diversity present at Continental Congress). NPR Host Robert Seigel described:

[B]efore political independence was declared, Britain's American colonies had become independent in other ways. They had developed into a society that was no longer just an overseas extension of England. Many French Protestants, Scots and Scots-Irish, Germans, even some Jews from common areas at Viking and Crown."); see also Don O'Briant, \textit{Politics by the book}; Whether coming from the left or right, partisan authors find one common area: Strong sales, \textit{Atlanta J.-Const.}, Nov. 13, 2003, at 1D [hereinafter \textit{Strong Sales}] ("The political polarization of America hasn't helped the legislative process, but it's done wonders for book sales.").
By the eve of the American Revolution, "the society was really remarkably different."22 Literacy in general, and political writings in particular, marked the birth of the "republic of letters," an intellectual world within the sphere of Colonial America.23

The colonists drew on old sources to spawn new ideas.24 Some segments of society were very politically active, and colonial governments occasionally punished this political activism.25 Writs of assis-

the Caribbean, came to these shores in the century before independence.
So did African slaves, against their will.
22. See Revolutionary America, supra note 20 ("[W]hile a diverse society didn't bring about or cause the American Revolution, a diverse society very much ultimately shaped the kind of institutions that produced modern American democracy.").

Last Friday, the Day appointed for the Stamp Act[]taking Place in America, was similar to a Description in Addison Cato: — "The Dawn was overcast, and heavily in Clouds brought on the Day — the great, the important Day! big with the Fate of ruined Trade, and Loss of Liberty!
 — The drowsy Dawn ushered in the Gloomy[ ]Morn with a fable Veil!
 — wild Horror threaten[ ]the wide Vault of Heaven! — the glorious Sun was darkened, — and Nature seem herself to languish! — The Sons of Freedom sunk beneath the horrid Gloom, and every one was struck with the Melancholy, at the approaching Funeral of their departed, beloved Friend, LIBERTY! whose Obsequies Multitudes were now preparing to attend.
25. See, e.g., Charles W. Wolfram, Toward a History of the Legalization of American Legal Ethics, 8 U. CHI. L. SCH. ROUND TABLE 469, 476-78 (2001) (discussing crown's punishment of disbarment for those "politically out-of-step"). "Such was the fate, for example, of John Adams' good friend and fellow patriot Joseph Hawley, a leader of the patriot party in western Massachusetts who was disbarred (but as it turned out only temporarily) for publishing newspaper attacks on the royal judges." Id. at 476. See generally Revolutionary America, supra note 19 (observing Founders present at Continental Congress in Philadelphia "represented the diver-
tance allowed searches for, *inter alia*, "unauthorized books" and became a source of irritation, helping inspire revolution. The *Pennsylvania Gazette* served as the *New York Times* of the day, acting as a forum for news and political dialogue.

2. **The Modern Political Book**

Today political books abound and sell well. But sales do not necessarily translate into election results. Political books may be authored for any number of reasons. The books come in a variety

26. See Justin W. Ristau, Note, *Should Police Officers Conducting Routine Traffic Stops Be Required to Limit Their Questioning of Detainees to the Purpose of the Stop When Not Confronted with a Particularized Safety Concern?* – United States v. Holt, 229 F.3d 931 (10th Cir. 2000), 70 U. CIN. L. REV. 1201, 1222 (2002). After hearing a speech from James Otis, Jr. challenging writs of assistance, John Adams wrote: "Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance . . . . Then and there the Child Independence was born. In fifteen years, namely in 1776, he grew up to manhood, and declared himself free." *Id.* at 1203 n.10.


WHEREAS Ann, the Wife of John Adams, of this City, Porter, hath eloped from her said Husband, and run him considerably in Debt; this is therefore to give Notice to all Persons not to trust her upon his Account, for he will pay no Debts, contracted by her from the Date hereof. JOHN ADAMS.

*Id.*


29. See Chip Fleischer, *Reading, Writing and Running for President*, N.Y. Times, Dec. 23, 2003, at A27 [hereinafter *Running for President*] ("Political forecasts are about as reliable as book sales forecasts – which is to say, not very."). But using book sales "to predict political fortunes" may be a less reliable measure than other indicators such as fund-raising or grass-roots support. *Id.*

30. See Don Gregory, *An insider’s take on four administrations*, PROVIDENCE J.-BULL., Oct. 15, 2000, at 8 (reviewing David Gergen, Eyewitness to Power: The Essence of Leadership, Nixon to Clinton (2000)). Author David Gergen notes that some books are “kiss-and-tell” memoirs "revealing intimate conversations from within,” but others may be simply “an attempt to settle old scores.” *Id.*

Published by Villanova University Charles Widger School of Law Digital Repository, 2005
of forms, including after-the-fact insider looks.\textsuperscript{31} Other books by former staffers have more in common with juicy tell-all tales.\textsuperscript{32} Still other books resemble virtual love letters to favorite politicians.\textsuperscript{33}

Writing a book seemed a prerequisite to entering the 2004 Democratic Presidential primary elections.\textsuperscript{34} Seven of the nine candidates had books for sale during the fall of 2003.\textsuperscript{35} Three of these books covered narrow topics, and the remaining four were "pure campaign fodder," trumpeting the candidates' achievements and qualifications.\textsuperscript{36} In 2000, George W. Bush released his pre-election book.\textsuperscript{37}

Political authors are not always candidates or former politicians. Television deserves at least partial credit for the surge of politically-minded titles.\textsuperscript{38} Popular political pundits are the next


\textsuperscript{34} See Doug J. Swanson, \textit{Read ‘Em and Weep}, \textit{Dallas Morning News}, Jan. 25, 2004, at 1H [hereinafter \textit{Read ‘Em}] ("Running for president of the United States these days apparently requires a book bearing the candidate’s name - in a space customarily reserved for the author - on the cover."). Swanson commented that a candidate-authored book is "[n]ot necessarily a good book. And not necessarily one actually written by the candidate." \textit{Id.}

\textsuperscript{35} \textit{See id.} (analyzing candidate-authored books as literary works).

\textsuperscript{36} \textit{See Running for President, supra note 29, at A27 (discussing candidate sales figures). Howard Dean, John Kerry, Dennis Kucinich, and Al Sharpton wrote campaign books. \textit{See id.} Wesley Clark, John Edwards, and Joseph Lieberman published on other topics. \textit{See id.} (appraising field of currently available political books).

\textsuperscript{37} \textit{See Read ‘Em, supra note 34, at 1H (discussing recent candidate-authored books).

\textsuperscript{38} \textit{See Strong Sales, supra note 14, at 1D (claiming “the book boom has been fueled by high-profile talk-show hosts”); \textit{see also Point in Print, supra note 11, at C9 (discussing origins of modern interest in political books).}
generation of hybrid celebrity-authors.\textsuperscript{39} Political talk shows are everywhere, and television celebrity is a “bankable” commodity on the book market.\textsuperscript{40} Conservative talk-show hosts like Fox News Channel’s Bill O’Reilly of \textit{The O’Reilly Factor}\textsuperscript{41} and Sean Hannity of \textit{Hannity & Colmes}\textsuperscript{42} have authored a number of books.\textsuperscript{43} Liberal television personalities James Carville and Paul Begala, hosts of CNN’s \textit{Crossfire}, have written bestsellers of their own.\textsuperscript{44}

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Strong Sales}, supra note 14, at 1D (referring to political talk show personalities); see also \textit{Point in Print}, supra note 11, at C9 (asserting “current best-seller lists show that celebrity polemics sell well, particularly when their cable-news employers provide a built-in publicity machine”).
\item See \textit{Point in Print}, supra note 11, at C9 (calling Bill O’Reilly, James Carville, and Paul Begala “celebrity commentator-authors”).
\end{enumerate}
\end{footnotesize}
Political books are less likely to benignly chronicle a subject than take a clear, firm partisan stand. The exception to the partisan tone of political books may be historical manuscripts, which are generally neutral and currently very popular. But even these books may be sensationalized, as biographers are under continual pressure to put new and damaging slants on their subjects.


Both Carville and Begala serve as hosts on CNN’s Crossfire. See Crossfire Homepage, CNN.com, at http://www.cnn.com/CNN/Programs/crossfire/index.html (last visited Dec. 2, 2004) (“Broadcast in front of a live audience and featuring daily political guests, ‘Crossfire’ examines the political and social issues impacting the United States.”); see also Shouting, supra note 40, at 38 (crediting CNN’s Crossfire with creating political talk show genre).

45. See Larry Lee, Reading the Seattle Manifesto: In Search of a Theory, 78 N.Y.U. L. Rev. 2305, 2307 (2003) (“A political book has a different function than an academic analysis.”). The divided nature of political books may simply reflect the climate of the day. See Hansen Marc, ‘Two Americas’ stand divided in grocery parking lot, Des Moines Reg., Feb. 24, 2004, at 1B (“Everywhere you turn, people are wringing their hands about deeply divided America - the most divided since the Civil War, or at least since Vietnam.”).

46. See Michael A. Ross, In the name of a Father, Times-Picayune (New Orleans), July 20, 2003, (Books), at 6 (observing interest in historical biographies). The article states:

[With the remarkable commercial success of David McCullough’s “John Adams” and Joseph Ellis’ “Founding Brothers” (both of which remained on best-seller lists for months), that axiom [“that books about America’s Revolutionary era had limited commercial potential”] was discredited and the floodgates have now opened. During the past few years, the shelves of bookstores have filled with biographies of our nation’s founders.]

Id.; see also Bob Minzesheimer, Author Jeff Shaara joins the John Adams revolution, USA Today, July 3, 2001, at 1D (discussing popularity of historical biographies by best selling authors as Jeff Shaara, David McCulloch, and Joseph Ellis).

47. See Andy McSmith, Building A Library: Post-War Political Biography, Indep. on Sunday (London), May 4, 2003, (Features), at 13 (“There is market pressure out there for new insights which show the subject in a wholly new light, preferably destroying his reputation.”).
The reigning political bestsellers follow a common thread. They do not detail substantive issues or catalog campaign promises. Rather, they tell you “what a bunch of S.O.B.s the other guys are.” Inflammatory rhetoric is king in political publishing.

This “polarization of politics” draws dramatic partisan lines. Increasingly, political authors’ attitude is: “[G]o for the jugular.” Publishers have found consumers “believe so strongly about their team, the left or the right, that they’re willing to spend $30 to read about it.” Thus, the publishing world produces a multitude of heavily slanted political books.

Partisanship is good for publicity and better for sales. Conservatives can settle in with titles like Ann Coulter’s Treason: Liberal

48. See James Poniewozik, The Rise of the Anger Industry, TIME, Dec. 1, 2003, at 38 (“What do these political voices have in common? They’re not political—not in the ‘vote for my side and we’ll do X, Y and Z for you’ sense anyway. They don’t emphasize the substantive matters that define one as liberal or conservative—tax policy or affirmative action or abortion.”).

49. Id. Poniewozik also notes that, “by themselves, these broadsides make politics less about issues than tactics. They’re long on ad hominem and short on substance.” Id.

50. See id. (asserting that “[a]t heart, the anger business is show business”); see also Jack Shafer, Liar, Liar, SLATE, at http://slate.msn.com/id/2087591 (August 27, 2003). Shafer notes that the first trick of political pundit is to call their opponents liars, and that “your next fallback is to call your foe depraved, unpatriotic, or immoral.” Id.

51. See David Mehegan, 2004 Cast Books are Back, and Their Pages are Filled With Politics, Biography, and History, BOSTON GLOBE, Jan. 1, 2004, at G1 [hereinafter Cast Books] (discussing strength of partisan feelings); see also Emily Eakin, Ideas & Trends; Among Best-Selling Authors the Daggers are Out, N.Y. TIMES, Oct. 5, 2003, § 4, at 3 [hereinafter Daggers] (discussing shouting matches between liberals and conservatives); Repps Hudson, Liberals Take Up the Pen to Counterattack Conservatives, St. LOUIS POST-DISPATCH, Nov. 9, 2003, at C3 (“[O]ne cannot help but be dismayed at the tone of what passes for political debate in this country today. The more inflammatory the commentary, the more popular it has become.”).

52. Cast Books, supra note 51, at G1; see also Oh George, ECONOMIST, Jan. 3, 2004, at 54 (“Overt hatred was once rather unseemly in the literary world. Now it sells books by the shelf-load.”).

53. Cast Books, supra note 51; see also Lee, supra note 45, at 2307 (observing that sometimes “the rhetoric goes overboard and compromises the credibility of the book”); Attack of the Liberals, supra note 17, at C1 (stating partisans buy political books to show support for their party). For a discussion of books with cross-party appeal, see infra notes 72-73 and accompanying text.

54. See Cast Books, supra note 51, at G1 (observing “extremely partisan political books” abound).

55. See id. (discussing demand for partisan books); see also David Carr, Blond Lightning On the Far Right, N.Y. TIMES, July 20, 2003, § 9, at 1 (profiling Ann Coulter). Extremely partisan political personalities such as Ann Coulter gain their following by taking extreme positions. See id. (quoting acquaintance as saying Coulter “is a product. If she was reasoned and balanced, she knows no one would care. By being completely outrageous, she has created a broad spectrum of people who follow her.”).
Treachery from the Cold War to the War on Terrorism,” David Frum’s *The Right Man: The Surprise Presidency of George W. Bush,* or David Limbaugh’s *Persecution: How Liberals are Waging War Against Christianity.* Democrat readers may identify with Alan Colmes’ *Red, White, and Liberal: How the Left is Right & Right is Wrong,* Michael Moore’s *Dude, Where’s my Country?*, or Clint Willis’ subtly titled *The I Hate Republicans Reader: Why the GOP is Totally Wrong About Everything.*

Books about famous and first families also generate publishing revenues. The Kennedy family remains a favorite subject for authors. The Clintons inspired an entire sub-genre of books.

56. (2003). Coulter’s “aim is to depict... liberals generally as traitors.” Jacob Heilbrunn, *McCarthy in a Mini*, L.A. TIMES, July 13, 2003, at R11. Heilbrunn argues that Coulter’s “farrago of a book pilfers the latest scholarship in the hopes of creating some shock and awe about an immense liberal conspiracy that has functioned since the Roosevelt administration to paralyze the United States.” Id.


62. See Jacqueline Cutler, *Kennedy only needed a camera*, CHI. TRIB., Feb. 29, 2004, at C3 (“After all these years and all the books, it seems impossible anything is left to uncover about President John F. Kennedy.”). Yet another Kennedy book, set to debut soon, claims that JFK Jr. planned to run for the Senate seat currently occupied by Hillary Rodham Clinton. See Keith J. Kelly, *JFK Jr. Mad at Hill Senate Run*, N.Y. POST, Mar. 16, 2004, at 35 (claiming JFK Jr. was upset when Hillary Clinton decided to run).

63. See *Popular Presidential Prose*, USA TODAY, Feb. 4, 2004, at 1D (counting 474 books about Bill Clinton); see also William Kennedy, *The Turtle on the Fence Post*, N.Y. TIMES, Mar. 24, 2002, § 7, at 8 (observing a “score” of books have been written about the Clintons); Kathy Kiely & Bob Minzesheimer, *Hillary’s ‘History’ about to be unveiled*, USA TODAY, June 3, 2003, at 1A (“The publishing industry has made a
Likewise, George W. Bush is on the way to his own section at Barnes & Noble.64

3. No Such Thing As Bad Publicity

While famous families might not always enjoy the spotlight, the old adage “there’s no such thing as bad publicity” usually holds true in the publishing world.65 Hillary Clinton’s 2003 autobiography, Living History, generated an enormous amount of mainstream press as well as the usual quips.66 The book was a runaway bestseller.67 Surprisingly, Living History’s phenomenal sales are only partially at-

fortune on books about the Clintons.”); Peter Roff, The Peter Principles: Train wreck, United Press Int’l, June 13, 2003 (asserting “books about the Clintons . . . make money”). Jay Leno remarked on the proliferation of Clinton-themed books: George Stephanopoulos’s book has knocked Monica Lewinsky’s book, boom, right off the best-seller list. It’s now number one. Yeah, yeah. And they have a lot in common. Both were seduced by Clinton’s charms. Both worked in the White House. And whenever they’re with Bill Clinton, both of them come up to about here (at the waist) on him. Late Night Political Humor, BULL’S FRONTRUNNER, Mar. 19, 1999.


66. See Molly Knight, Must Great Unread Books haunt the gift-giving season?, Balt. Sun, Dec. 7, 2003, at 12F (claiming Clinton’s book was released “in a blizzard of publicity”); see, e.g., The Late Show With David Letterman, Top Ten Things Heard in Line to Buy Hillary Clinton’s Book, at http://www.cbs.com/latenight/lateshow/top_ten/archive/ls_top_ten_archive2003/ls_top_ten_archive_20030611.shtml (June 11, 2003). David Letterman joked: “At last we’ll cut through the lies and get to the embellished, politically motivated truth.” Id.

tributable to Republican readers: Hillary fans and haters alike lined up to buy her book.\textsuperscript{68} Senator Clinton’s book also sold very well abroad, especially in China.\textsuperscript{69} Some speculate that the book is setting the stage for a 2008 Hillary presidential bid.\textsuperscript{70} Bill Clinton’s own book, \textit{My Life}, was released on June 22, 2004, amidst a flurry of promotion.\textsuperscript{71}

Also profiting from enormous publicity, the novel \textit{Primary Colors} told the fictionalized story of a Clinton-esque politician’s rise to power.\textsuperscript{72} Initially published anonymously, the work became “an embarrassing black eye” both for its author, journalist Joe Klein, and his employer, \textit{Newsweek.}\textsuperscript{73} Klein repeatedly denied writing the book, but the \textit{Washington Post} eventually revealed him as the author.\textsuperscript{74}


\textsuperscript{68} See, \textit{e.g.}, Jane Palmer, \textit{Clinton book is doing well in GOP land}, \textit{OMAHA WORLD-HERALD}, June 14, 2003, at 2E ("Heavily Republican Nebraska appears as interested as the rest of the country in what former first lady Hillary Rodham Clinton has to say in . . . ‘Living History.’"). But Senator Clinton’s bipartisan sales cut both ways. See Eliza Newlin Carney, \textit{Hillary Inc., NAT’L J.}, Oct. 18, 2003, at 42 (claiming Hillary inspires Republicans to donate to their party).

\textsuperscript{69} See Joseph Kahn, \textit{Clinton ‘History’ Doesn’t Repeat Itself in China}, \textit{N.Y. TIMES}, Sept. 24, 2003, at A1 (calling Clinton’s book “a major best seller”). Nevertheless, the book was censored before it was sold in China. Senator Clinton remarked that she was “amazed and outraged” at the changes. \textit{Id.} The Chinese publisher countered that the changes were merely “minor, technical” adjustments. \textit{Id.}

\textsuperscript{70} See Renee Tawa, \textit{Will their writing woo the voters?; Presidential candidates are penning books, using an old strategy to boost campaigns}, \textit{L.A. TIMES}, Dec. 3, 2003, at E1 ("Sen. Hillary Rodham Clinton’s memoir, ‘Living History,’ was interpreted widely as an attempt to test the waters for a White House run in 2008.”). \textit{See generally} Mark W. Davis, \textit{The Once and Future President}, \textit{AM. SPECTATOR}, Aug. 2003 (considering 2008 Clinton presidential bid).


\textsuperscript{72} \textit{ANONYMOUS, Primary Colors: A Novel of Politics} (1996).


\textsuperscript{74} \textit{See id.; see also} Joel Garreau & Linton Weeks, \textit{‘Anonymous’ Sleuths Get a Byte Fishing by Computer: Is the Author About to Be Reeled In?}, \textit{WASH. POST}, Feb. 16, 1996, at F1 (reporting plagiarism researchers identified Klein as Primary Colors author); William F. Powers, \textit{A Final Brush With Vermeer}, \textit{WASH. POST}, Feb. 13, 1996, at C7 (suggesting Joe Klein authored Primary Colors); David Streitfeld, \textit{Anonymous’ Undone by His Own Hand?}, \textit{WASH. POST}, July 17, 1996, at A1 (linking Klein’s handwriting samples with handwritten changes to \textit{Primary Colors} manuscript).
with nine weeks at number one. The movie rights sold for $1.5 million. Klein followed up with a second volume and a factual biography of President Clinton. But Klein’s success is a mixed bag, demonstrating that political books may reflect poorly on the writer.

Authors, famous and anonymous, generated enormous press for Living History and Primary Colors, respectively. But other political books have garnered media attention from lawsuits. Sometimes the “no such thing as bad publicity” adage simply “isn’t true for lawsuits.”

Joe Klein suffered Primary Colors embarrassment when he faced a lawsuit. A librarian sued Klein for including a “recognizable cameo of her in a tryst with the fictional counterpart of President Clinton.” A similar lawsuit involved former Clinton aides James Carville and George Stephanopoulos. In 1999, Gennifer Flowers sued Carville, Stephanopoulos, and publisher Little, Brown & Company for defamation, seeking “unspecified punitive and compensatory damages.” Flowers alleged Stephanopoulos, through his

75. See End of Game, supra note 73, at 74. The paperback rights also proved profitable, they were sold to Warner for $1.5 million. See id.

76. See id. The film version of Primary Colors originally cast Tom Hanks as the lead, with Jack Nicholson and John Malkovich in supporting roles. See id.

77. See The Running Mate (2001); The Natural: The Misunderstood President of Bill Clinton (2003).

78. See, e.g., CNN Inside Politics 16:00, What is the Status of Bush Administration Policy on Middle East? Who is Favored in the Upcoming Elections?, Transcript # 040100CN.V15 (CNN television broadcast, Apr. 1, 2002) (noting Bill Clinton has not spoken to author Joe Klein since release of Klein’s book The Natural). Klein went on to qualify his remarks:

In 15 years of covering this guy [President Clinton], he has never told me once what he thought of anything I had written about him. He’s talked about things that I had written about other people, but he remains pretty mysterious in that regard, but I imagine he is not too pleased with the way I handled his foreign policy.

Id. Apparently, Clinton and Klein are now on better terms. See Klein, supra note 71, at 26 (discussing a 2004 Klein interview with President Clinton).

79. Lawrence Schiller & David Mandell, Cape May Court House, 77 FLA. BUS. J. 91, 91 (2003) (claiming “the adage that there is no such thing as bad publicity isn’t true for lawsuits”).


81. Id.


83. See id. (providing factual basis of Flowers’ suit). In a subsequent opinion, Ninth Circuit Judge Alex Kozinski described the Flowers/Clinton debacle:

In the heat of the 1992 presidential primary campaign, the Star — that ubiquitous supermarket source for celebrity scandal — ran a story claim-
book *All Too Human: A Political Education* and Carville through *All's Fair: Love, War and Running for President* made defamatory statements relating to a 1992 taped conversation between her and President Clinton. The case lingered in the courts until March 8, 2004, when U.S. District Judge Phillip M. Pro dismissed Flowers's suit, ruling no jury could find the malice necessary to uphold a defamation suit. James Carville's attorney praised the judgment, calling the suit both "frivolous and politically motivated." Lawsuits against political books can also benefit authors, lifting them to new heights of fame and increasing sales. In such a case, Fox News Channel sued Al Franken and Penguin Publishing on August 8, 2003, to enjoin distribution of Al Franken's book *Lies and the Lying Liars Who Tell Them: A Fair and Balanced Look at the Right.* Fox alleged Franken's use of Fox's trademarked phrase 'fair and

---


84. (1999).

85. (1994). Carville's book was co-authored with his wife, conservative Mary Matalin. See id. Despite her work on the book, Matalin was not named party to the suit. See *Defamation Lawsuit,* supra note 83.

86. *See Flowers,* 112 F. Supp. 2d at 1207 (providing factual basis of Flowers' suit). Flowers' suit also referred to comments both men made on *Larry King Live.* *See Defamation Lawsuit,* supra note 83. The defendants asserted that they based their comments on reliable news sources. See id. (quoting audio experts doubting tapes' authenticity).

87. *See Defamation Lawsuit,* supra note 83 ("U.S. District Judge Philip M. Pro ruled that no reasonable jury could find 'clear and convincing evidence' that James Carville and George Stephanopoulos acted with malice.").

88. See id.

balanced’ “infringed and diluted” its rights.90 Fox also balked at a cover photograph of Fox News Commentator Bill O’Reilly.91

U.S. District Judge Denny Chin denied Fox’s motion.92 He called the lawsuit an “easy case” and held that Franken’s book fell firmly within the protection of the First Amendment.93 Chin elaborated, saying it was “highly unlikely” anyone would mistake Franken’s book for sanctioned Fox News material, stating “[i]t’s evident from the word ‘Lies’ in big red letters across the top” that the book is not associated with Fox News.94 Chin used similar logic with the picture of Bill O’Reilly.95 Noting that the book also pictured President Bush and Vice President Cheney, Chin asked, “[i]s someone going to think they’re affiliated with Fox?”96 Franken choose to have sex with another man, and a third man’s right to choose to film them.” Id.

90. See Levy & Rothstein, supra note 89, at S5. Fox’s objection to the “fair and balanced” reference was based on copyright law:

Fox News relied on §133 [use of name or address with intent to deceive] to assert infringement of its trademark rights in the mark “Fair & Balanced.” In doing so, Fox News identified its federal trademark registration for the mark “Fair & Balanced,” which registration covers “entertainment services in the nature of production and distribution of television news programs.” Fox News also relied on General Business Law §360-1, claiming dilution of its trademark under New York state law. Id. The network believed that Franken’s use of ‘fair and balanced’ could “lead readers to somehow believe the conservative network was affiliated with the liberal comic’s book.” Robert Gearty & Maki Becker, Fox Suit Now Lies in Trash, DAILY NEWS (New York), Aug. 23, 2003, at 2 (discussing Fox lawsuit) [hereinafter Fox Suit].

Some argue that trademarked materials should protect political use of slogans. See Raena L. Smith, Note, Commercial Slogans: The First Amendment Should Shield Their Use in Campaign Speech, 8 WM. & MARY BILL. RTS. J. 241, 243 (1999) (arguing commercial slogans should be available for political slogans if origins are clear).

91. See Levy & Rothstein, supra note 89, at S5.

92. See id.

93. See id. The court dismissed the suit as “wholly without merit,” and Franken gloated that since then Fox News has used their motto of “fair and balanced” much less. Nick Kepller, Franken Tackles Bush, Hanukkah in Hussein’s palace, U. WIRE, Feb. 23, 2004 [hereinafter Franken Tackles] (detailing Franken’s visit to Iraq). Franken suggested that it was “because the judge gave them a new motto: ‘FoxNews: Wholly Without Merit.’” Id.

94. Fox Suit, supra note 90, at 2 (describing half-hour hearing). Conventional wisdom seemed to agree that Fox’s lawsuit was asinine. See, e.g., Laura Dempsey, O’Reilly Outfoxed by Lawsuit?, DAYTON DAILY NEWS, Sept. 7, 2003, at F7 [hereinafter Outfoxed] (“It [Fox’s lawsuit] was ridiculous from the get-go, and succeeded only in drawing huge amounts of attention to Franken’s work.”). See generally Ben McGrath, The O’Reilly Factor, NEW YORKER, Sept. 1, 2003, at 28 [hereinafter O’Reilly Article] (calling Fox’s lawsuit “widely ridiculed for its legal shortcomings and tactical wrongheadedness”).

95. See Fox Suit, supra note 90, at 2 (discussing hearing).

96. Id. (reporting Fox attorney retorted “I think Mr. Franken thinks they are”).
stated that he had not worried about the lawsuit, as “satire is protected speech, even if the object of the satire doesn’t get it . . . .”

The publicity resulted in increased sales: to date, Lies sold 848,000 copies. Although Fox decided not to appeal the decision, it defends its suit. Conversely, Bill O’Reilly, whose image suffered during the controversy, said he regrets the episode.

Franken candidly admits that the lawsuit has “been great for business.” Playing into the trend, Franken plans to call his new radio show The Franken Factor, a take-off on Bill O’Reilly’s show, The O’Reilly Factor. As Franken says, “[a]ny reason to have him sue us again.”

97. Franken Tackles, supra note 93 (detailing Franken’s visit to Iraq).


99. Fox Suit, supra note 90, at 2 (“After the ruling, Fox spokesman Paul Schur defended his network’s fight to stop the book, . . . [saying] ‘we don’t care if it’s Al Franken, Al Lewis, or Weird Al Yankovic, . . . We’re here to protect our trademark and our talent.’”).

100. See Heidi Pauken, He Is The Eggman, Am. PROSPECT, Mar. 2004, at 6 (suggesting O’Reilly should apologize “for going on the Today show and bragging that he sold more books than Al Franken the week Franken’s mother died”). In the wake of the Franken feud, O’Reilly’s public image did not fare well. See id.

101. See Rant at Me, supra note 98, at 74 (noting Franken is “poised to ride the crest of this election year to a new level of national stardom”). Franken has publicly thanked Fox News and its lawyers “for filing one of the stupidest briefs I’ve ever seen in my life.” Fox Suit, supra note 90, at 2. Fox’s complaint called Franken “increasingly unfunny,” “shrill and unstable” and possibly “deranged.” O’Reilly Article, supra note 94, at 28.

102. See Rant at Me, supra note 98, at 74. Progress Media, the new liberal arm of Air America Radio, will carry the show. See id. Slated to begin March 31, 2004, Franken and his co-host, Katherine Lanpher, will go “head to head for three hours against Rush Limbaugh on more than 600 stations.” Id. Progress Media hopes to compete with right-wingers in the talk radio market. See Mark Francis Cohen, Money Talks, WASHINGTONIAN, Mar. 2004, at 3 (listing future hosts as Franken, Robert F. Kennedy, Jr., and former Mondale speech writer Martin Kaplan). Bill O’Reilly states that such left-wing radio programming is “not going to work. It’s going to be laughed right out of the dock.” The O’Reilly Factor (Fox News Channel television broadcast, Feb. 26, 2004). O’Reilly went on to differentiate Franken’s offending show from Rush Limbaugh’s, stating that unlike left-wingers, Limbaugh “doesn’t tell you how to think. He tells you how he thinks and why he arrived at that conclusion, you know, and sometimes he has good insights.” Id.

103. See Rant at Me, supra note 98, at 74 (discussing O’Reilly’s opinion of Franken lawsuit).
4. Right Wing Conspiracies and the Clinton News Network

The Franken-O’Reilly skirmishes represent an ongoing political debate. In media bias arguments, like everywhere else in politics, finger-pointing abounds. Conservatives slam liberals, liberals criticize conservatives, and everyone argues about media bias. Hillary Clinton famously alleged “a vast right wing conspiracy” operated behind the media.\textsuperscript{104} Meanwhile, Republicans regularly accuse the “Clinton News Network” of biased reporting.\textsuperscript{105}

Conservatives allege the publishing world in particular “is a bastion of liberal bias.”\textsuperscript{106} Nonetheless, liberals do not have a large publishing house, and conservative publishers “appear to be better

\textsuperscript{104} See Walter Kirn, Persecuted or Paranoid? A look at the motley characters behind Hillary Clinton’s ‘vast right wing conspiracy,’ TIME, Feb. 9, 1998, at 62 (noting Clinton’s defense of herself and President Clinton by alleging a “vast right wing conspiracy”). Mrs. Clinton has been repeatedly mocked for her accusation. See, e.g., Bill Straub, Hillary Clinton gives unintended boost to right-wingers, SCRIPPS HOWARD News SERVICE, June 9, 2003 (discussing “Clinton-bashers, a/k/a ‘the vast, right wing conspiracy’”); see also Anika Binnendijk, Will “Vast Right Wing Conspiracy” Clobber Jeffords’ “Vermont Saps?”, WASHINGTONIAN, Aug. 2001, at 8 (reporting Congressmen Joe Scarborough, Ed Schrock, and Ric Keller’s softball team is named ‘The Vast Right Wing Conspiracy’). But Senator Clinton’s conspiracy theory has been at least partially vindicated. See Richard Cohen, . . .Harrying Hillary, WASH. POST, Sept. 19, 2000, at A23 (discussing Clinton’s Senate campaign). “As for the ‘vast right-wing conspiracy,’ there was one.” Id. In fact, the ‘conspiracy’ may still exist. See Susan Threadgill, Who’s Who, WASH. MONTHLY, July 1, 2003, at 60 (reminding readers that those involved in the alleged conspiracy “didn’t fade away once the Clintons left the White House”); see also Matthew Yglesias, liar, liar, AM. PROSPECT, Mar. 2004, at 62 (“[T]he right-wing hate machine is alive and well.”). But see R. Emmett Tyrrell, Jr., Cybersex Salon, AM. SPECTATOR, June 1998 (“There is no ‘vast-right-wing conspiracy,’ only a growing number of journalists and political observers who perceive the Clintons as corrupt.”). Senator Clinton herself revisited the spirit of the “vast right-wing conspiracy” accusation, if not the phrase itself. See Joel Connelly, In the Northwest: Sen. Clinton is tough, on-messaged and disciplined, SEATTLE POST-INTELLIGENCER, at http://seattlepi.nwsource.com/connelly/133798_joel06.html (Aug. 6, 2003) (quoting Clinton as alleging part of anti-Clinton press is “a truly organized effort, with allies in the media, to whip up people”).

\textsuperscript{105} See Lyn Nofziger, A ‘Crossfire’ host ponders next steps, “self revealers”, Wash. TIMES, Sept. 21, 2003, at B8 (stating “since the last eight years of the 20th century [CNN] has been known in Republican circles as the Clinton News Network”); see also Ken Auletta, Vox Fox: How Roger Ailes and Fox News are changing cable news, NEW YORKER, May 26, 2003, at 58 (observing former Speaker Newt Gingrich’s tendency to refer to CNN as “Clinton News Network”). Compare Media Jokes: Late-Night Jokes About the News Media & Media Scandals, at http://politicalhumor.about.com/library/blmediajokes.htm (last visited Dec. 2, 2004) (“The election is in full swing. The Republicans have taken out round-the-clock ads promoting George Bush. Don’t we already have that? It’s called Fox News.”) (quoting Craig Kilborn).

\textsuperscript{106} See The Write Stuff, DAILY VARIETY, July 2, 2003, at 2 [hereinafter Write Stuff] (noting no large liberal publishing house exists).
organized, better funded and, arguably, better at whipping up public sentiment.”

Conservative publishers argue that no large liberal publishing house exists because it would be redundant. Steve Ross, publisher of conservative imprint Crown Forum states: “[l]iberal authors have never had difficulty getting published,” but conservatives have. Another conservative publisher elaborated: “[t]here’s been far too few comfortable homes for conservatives in New York publishing, . . . [b]ut I won’t go so far as to say conservatives have been shut out.” In fact, the emergence of conservative publishing houses indicates the right may be making a comeback, if not dominating the business.

Critics of conservatives argue there is no liberal bias. Eric Alterman, author of What Liberal Media? The Truth About Bias and the News, believes “[w]e have a right-wing movement in this country . . . . We don’t have a left wing movement.” Time Magazine went further, reporting: “[c]onservatives know their power in talk

107. See id. Nonetheless, “small and mid-size presses like Nation Books, the New Press and Seven Stories produce a regular stream of left-leaning books.” Id.


109. Id.

110. Id. The slated first release for Penguin’s imprint is Mona Charen’s USEFUL IDIOTS: HOW LIBERALS GOT IT WRONG IN THE COLD WAR AND STILL BLAME AMERICA FIRST. See id.

111. See Nicole LaPorte, Book Biz Turns Right, DAILY VARIETY, May 21, 2003, at 16 (noting new houses entry into conservative publishing indicates broadening conservative market). But see Christopher Dreher, Political Mavericks; Left-leaning presses vie for political advantage as the 2004 races heat up, PUBLISHERS WkLY., Jan. 19, 2004, at 19 (noting increased output of liberal books from independent houses); Daggers, supra note 51, §4, at 3 (“For the first time in recent memory, The [New York] Times’ [bestseller] list, the nation’s most influential barometer of book sales, is pitting liberals and conservatives against each other in roughly equal numbers, ending what some publishing executives say is nearly a decade of dominance by right-wing authors.”).

112. See Write Stuff, supra note 106, at 2; see also Mike Drew, Answering Charges of Liberal Bias, MILWAUKEE J. SENTINEL (Wis.), Apr. 4, 2002, at 2E (blaming conservatives for biased-media image).


114. Write Stuff, supra note 106, at 2. Alterman alleges that conservatives “couch themselves as the alternatives to the ‘liberal mainstream’ when in fact there’s nothing liberal about the mainstream.” Id. He states that the conservative attitude is “a combination [of] victimization, psychosis and smart political strategy.” Id. Compare Jonathan Alter, Rush, To Judgment, NEWSWEEK, Oct. 20, 2003, at 50 (“For several years, they [the conservative media] have succeeded not because of some right-wing conspiracy in network-executive suites but because their ‘production values’ are simply superior to those of liberals. They know how to grab and hold an audience.”).
radio, cable television and publishing, and they exult in it."\textsuperscript{115} Through their efforts zealous conservatives have even managed to turn "liberal" into a dirty word.\textsuperscript{116}

Liberals have worked to broaden their communications network, using both existing outlets and planning to launch new ones.\textsuperscript{117} Two liberally slanted radio networks are set to debut.\textsuperscript{118} They hope to counter engrained rampant conservatism of talk ra-

\textsuperscript{115} Karen Tumulty, \textit{I Want My Al TV: Liberals look to break the conservative stranglehold on talk radio and TV. But will anyone tune in?}, \textit{Time}, June 30, 2003, at 59 [hereinafter \textit{Conservative Stranglehold}]. "Conservatives still argue – garnering huge and sympathetic audiences in the process – that the traditional media giants lean left. But these days, that familiar spiel is done more for rhetorical effect." \textit{Id. But see John Leo, A surprising jog to the right}, \textit{U.S. News & World Rep.}, Nov. 24, 2003, at 64 ("The conservative side is far from winning the culture wars, but the debate is broader and fairer now.").

\textsuperscript{116} See Geoffrey Nunberg, \textit{The Liberal Label: The substance is alive and well, but the brand is in trouble}, \textit{Am. Prospect}, Sept. 2003, at 36 (discussing consequences of negative liberal label). "There's no more impressive example of using language to alter substance than the right's success in turning liberal into a disparaging word." \textit{Id.; see also Keith Powell, What it means to be a liberal politician}, \textit{U. Wire}, Aug. 26, 2003 ("To call a politician a liberal in this country is to insinuate that he or she is weak and someone hell-bent (for whatever reason) on destroying the country from the inside out.").


"One of the things that Democrats are trying to do is build a broader communications infrastructure that includes existing issue groups, new projects like Podesta's think tank, new efforts at book publishing," explained a Democrat. "Once we decided on the strategy, there were a lot of people we got to buy in on it: authors like [Joe] Conason and [Al] Franken and David Corn and other people; various kinds of commentators and talking heads. I think that the subject of Bush's credibility has continued as a theme for well over a year in a variety of mediums." Another insider mentioned coordination with the Democratic-leaning MoveOn.com Web site and its daily "mislead" campaign, which brings regular attention to Bush's "credibility gap."

\textit{Id.} The article goes on to note that "[a]lthough the Democratic strategy did not hit pay dirt immediately, over time it has proven hugely successful." \textit{Id.}

\textsuperscript{118} See Russ Smith, \textit{Bring on Big Media}, \textit{N.Y. Sun}, Feb. 24, 2004, at 18 (noting upcoming launch of nonprofit Democracy Radio and another network, Progress Media). But not all liberals view this development as positive. See Anna Quindlen, \textit{Why Even Try The Imitation?}, \textit{Newsweek}, July 28, 2003, at 64 (arguing liberals need not stoop to right-wing talk radio levels). Quindlen, herself an unapologetic liberal, asks:

Would it be worth the trade-offs to mimic the [right-wing talk radio] form? While it's fine for Al Franken to call his upcoming book on the right "Lies and the Lying Liars Who Tell Them," you don't want an entire network of that sort of invective. Bottom line: you can't out-Coulter Coulter and still maintain any standing as someone who is in favor of really illuminating the issues. Is it worth spending millions trying to mimic a technique that's too often just a grown-up version of nah nah nah nah nah nah nah? Nah.
dio. A liberal television news network may soon be available. And big conservative media may be afraid. But the ultimate success or failure of the liberal media movement will depend on both dollars and sense.

Nonetheless, philosophical differences may explain differences of opinion over media bias. Geoff Kloske, executive editor at publishing giant Simon & Schuster, believes “[c]onservatives are very suspicious of the media. They tend to think that the only way to win is a well funded, well organized and well armed group that’s something like a militia.” Conversely, “[l]iberals believe in the First Amendment . . . .” Alternatively, media bias could be the result of sensationalizing. Regardless, liberal authors have been very successful in using mainstream publishing houses and may not need specialized publishing houses as much as conservatives.

B. Political Advertisements

Political books could be used to thwart campaign finance laws, because these regulations are not aimed at books, but at traditional

119. See Paul Starr, Reclaiming the Air, AM. PROSPECT, Mar. 2004, at 57 (“Conservative domination of talk radio seems so well entrenched that many take it as an unalterable part of the political landscape.”); see also Hendrik Hertzberg, Radio Daze, NEW YORKER, Aug. 11, 2003, at 23 (observing that in New York City, “[a]s in the rest of the country, political talk radio here is dominated by the hard right”).

120. See Conservative Stranglehold, supra note 115, at 59 (reporting “former Vice President Al Gore has been exploring the idea of creating a cable-television network”).


122. See Conservative Stranglehold, supra note 115, at 59 (“Whether there really is a market for entertaining liberal media is a question mark.”). The article also notes:

Many Democrats are convinced, however, that if someone can build a network to showcase their point of view, the ratings will come. As evidence of an appetite for liberal media, they point to the fact that Hillary Clinton’s just-released memoir is on track to becoming the fastest-selling nonfiction work of all time.

Id.

123. See Tom Brazaitis, It takes a little bias to find it in others, PLAIN DEALER (Cleveland, Ohio), June 8, 2003, at H5 (“[B]ias, like beauty, is in the eye (or ear) of the beholder.”); see also Stephanie Salter, Bias depends upon where you sit, SAN FRANCISCO CHRON., May 5, 2002, at D4 (arguing bias depends on point of view).

124. Write Stuff, supra note 106, at 2. Simon & Schuster has published books “by a number of Democratic consultants and pundits, including [CNN Crossfire hosts] James Carville and Paul Begala.” Id.

125. Id.


127. See Write Stuff, supra note 106, at 2 (citing Michael Moore and Arianna Huffington’s use of mainstream publishers).
advertisements.\textsuperscript{128} Publicity is essential to public servants. Politicians need to promote themselves during elections and must continually market their policies to the public.\textsuperscript{129} While some press is paid for, other “advertisements” may be free publicity from news coverage or other politicians.\textsuperscript{130} The Supreme Court held in \textit{Buckley v. Valeo}\textsuperscript{131} that “spending money in political campaigns is speech protected by the First Amendment,” subject to strict scrutiny.\textsuperscript{132} Under this framework, the government may restrict campaign contributions paid to candidates, but not the amount a single person may spend.\textsuperscript{133}

Regardless of who pays, political advertisements are integral to today’s campaigns.\textsuperscript{134} In the 2004 Democratic Presidential nomination race, candidates broke all the advertising spending records on the books.\textsuperscript{135} In his year long campaign, Howard Dean alone spent

\textsuperscript{128} For a complete discussion of campaign finance regulations, see infra notes 163-80 and accompanying text.

\textsuperscript{129} See David R. Mayhew, \textit{Politicians Don’t Pander: Political Manipulation and the Loss of Democratic Responsiveness}, \textit{Pol. Sci. Q.}, July 1, 2002, at 343 (evaluating argument that politicians don’t act based on public opinion but rather “figure out how to sell their own policies to the public”); \textit{see also} Edward Pratt, \textit{Politicians got a gift Wednesday}, \textit{Sat. State-Times/Morning Advocate} (Baton Rouge, La.), June 29, 2002, at 7B (describing political pandering when 9th Circuit Court of Appeals declared “under God” portion of Pledge of Allegiance unconstitutional). “Within minutes [of the ruling] it was political NASCAR.” \textit{Id}. The opportunity for pandering was so great that the paper referred to it both as a political Christmas gift and “Politicians Gone Wild.” \textit{Id}.

\textsuperscript{130} See Special Report with Brit Hume (18:13), \textit{Former Senator Bill Bradley Endorses Democratic Frontrunner Howard Dean for Presidency}, Transcript # 010602cb.254 (Fox News television broadcast, Jan. 6, 2004) (“Campaigns love when cameras show up. It means they get on television for free. When they have to pay for TV time to get their campaign commercials on the air, every second counts, and there is a vital mission to complete.”); \textit{see also} Glen Johnson, \textit{Primary Sweep Wisconsin; No Inroads Seen For Kerry Rivals}, \textit{Boston Globe}, Feb. 11, 2004, at A20 (stating economic forums sponsored by Wisconsin Governor Jim Doyle amount to free advertisements).


\textsuperscript{133} \textit{See id}. For various reasons, Justices Scalia, Kennedy, Thomas, and Stevens have criticized this system. \textit{See id}. For a discussion of campaign finance reform, see infra notes 163-80 and accompanying text.


\textsuperscript{135} \textit{See} \textit{Special Report with Brit Hume} (18:00), \textit{Political Headlines}, Transcript # 122301cb.254 (Fox News television broadcast, Dec. 23, 2003) (claiming Democratic presidential nominees have “shattered all previous records for either party for campaign advertisement spending”); \textit{see also} Howard Kurtz, \textit{Images in Ads Out-
over $40 million dollars.\textsuperscript{136} Such healthy budgets allow candidates to advertise in multiple states contemporaneously, potentially improving polling numbers and generating news coverage.\textsuperscript{137} Theoretically, this leads to better election results.\textsuperscript{138} But money cannot guarantee good poll showings, much less victory.\textsuperscript{139}

Despite the focus on advertising, campaign commercials may be least effective in states like Iowa and New Hampshire.\textsuperscript{140} Voters in early primary elections have ample opportunity to see the candidates, making them more likely to base their votes on personal experience than glossy marketing.\textsuperscript{141} But this does not stop candidates from purchasing massive amounts of advertising. Before the 2004 caucuses, Iowans were bombarded with an esti-

\textsuperscript{136} See Roland Watson, Big spender who reached for sky and fell to earth, TIMES (London), Feb. 5, 2004, (Overseas news), at 19 (detailing Dean campaign). Still, in spite of his failed Presidential bid, "Dr. Dean has already made an invaluable contribution . . . [in] fir[ing] up the party base, which is now flocking to the polls in record numbers." Id.; see also Nick Anderson, Dean a Resounding Winner in 'Money Primary', L.A. TIMES, Jan. 1, 2004, at A11 (crediting Dean's fundraising with "put[ing] him on the map"). "Since 1980, no major-party candidate who led in donations received by Jan. 1 of an election year has failed to clinch the nomination." Id.

\textsuperscript{137} See Jill Lawrence & Jim Drinkard, Dean riding high even before Gore gets on board, USA TODAY, Dec. 9, 2003, at 8A [hereinafter Riding High] ("Dean has the resources to advertise in many states at once, and his poll success is earning him news coverage."); see also Mara Liasson, Howard Dean bows out of the Democratic race for the White House (NPR broadcast, Feb. 19, 2004) (observing Kerry's money will allow him to advertise everywhere, giving him an advantage in primary races).

\textsuperscript{138} See Riding High, supra note 137, at 8A (crediting Dean's fundraising for causing "a wave of momentum").

\textsuperscript{139} See Adam Nagourney, Conventional Wisdom (The Latest Version), N.Y. TIMES, Mar. 7, 2004, §4, at 1 [hereinafter Conventional Wisdom] ("Perhaps the most predictable thing about predictions in politics is that they tend to be wrong at least as often as they are right.").

\textsuperscript{140} See Charles E. Cook, Jr., Iowa is a Fine Place to Take the Candidates for a Test Drive, L.A. TIMES, Jan. 14, 2004, at B13 ("The strength and importance of the Iowa caucuses and New Hampshire primary is that the normally all-important television advertisements are much less influential in these contests.").

\textsuperscript{141} See, e.g., Patrick Healy, For Iowans, Caucuses Now an Oasis of Sanity, BOSTON GLOBE, Sept. 29, 2003, at A1 (detailing Iowa caucuses). One Iowa City, Iowa schoolteacher said "the one-on-one contact between politician and voter is crucial at a time when most politicians . . . reach voters through television only." Id.
mated 125-150 advertisements daily.\textsuperscript{142} In Massachusetts, the town of Exeter was so inundated with political signs that it forbade candidate postings on all but seventy-two feet of land near the town hall.\textsuperscript{143}

Advertisements may be used to acquaint voters with candidates or attempt to gain an edge in a close race.\textsuperscript{144} Other commercials confront specific problems with a candidate or a campaign.\textsuperscript{145} Youthful-looking presidential hopeful John Edwards deliberately announced his age (fifty) in some advertisements, hoping to convince voters he was old enough for the job.\textsuperscript{146} In another instance of throwing money at a problem, Governor Howard Dean spent $300,000 on in-state advertising the week before the Wisconsin primary in a last-ditch effort to carry a state.\textsuperscript{147}

Other advertisements simply attack opponents.\textsuperscript{148} These negative campaign commercials are popular, effective, and occasionally


\textsuperscript{144} See, e.g., Rachel Graves, \textit{GOP candidates turn to TV in 10th District}, \textit{Houston Chron.}, Feb. 29, 2004, at A34 (observing candidates use “television advertising in hopes of gaining an edge”); Mary Beth Schneider, Daniels takes message on air; GOP candidate’s 1st TV ad paints him as an outsider going after ‘crew’ in Statehouse, \textit{Indianapolis Star}, Jan. 22, 2004, at 3B (stating ad campaign introduces candidate’s vision).


\textsuperscript{148} See, e.g., Inside Politics (Sunday 10:00), \textit{Kerry Wins Caucuses in Nevada, D.C.; Interview With Bush-Cheney Spokesman Terry Holt}, Transcript # 021500CN.V01 (CNN television broadcast, Feb. 15, 2004) (quoting Republican National Committee Chairman Ed Gillespie alleging “[f]or the last 10 months, day after day after day, spending over $40 million in campaign ads attacking the president and supported by over $7 million from third parties, Democrats have used some of the most vicious rhetoric in the history of presidential politics”); see also Maria L. La Ganga & Mark Z. Barabak, \textit{The Race to the White House; More are Falling in Line Behind Kerry}, \textit{L.A. Times}, Feb. 14, 2004, at A17 (observing early Bush campaign advertisement criticizing John Kerry). The \textit{Times} quoted Senator Kerry as saying “I noticed...
brutal. The 2002 Georgia Senate race between Democratic incumbent Max Cleland and Republican candidate Saxby Chambliss was “especially vicious.” Senator Cleland, a triple amputee who lost both legs and an arm in Vietnam, lost to Chambliss, a House member with no military service record. Republican-purchased advertisements depicted Senator Cleland with terrorist Osama bin Laden and Saddam Hussein.

Negative campaigning gave Chambliss his desired result, a Senate seat. Nonetheless, negative commercials can also backfire on the candidate bankrolling them. Perhaps for this reason the first advertisement they’re running is a negative one, . . . No surprise.” Id. The Bush campaign released a “harsh” video calling Kerry “unprincipled” and “brought to you by the special interests.” See Mike Allen, Bush Campaign Releases Video Attacking Kerry, WASH. POST, Feb. 13, 2004, at A8 (discussing Bush attacks on Kerry).

149. See Evan Richman, Note, Deception in Political Advertising: The Clash Between the First Amendment and Defamation Law, 16 CARDOZO ARTS & ENT. L.J. 667, 668-69 (1998) (explaining cycle of negative advertisements). Negative campaign advertisements are highly effective. See id. at 668 (“Although political advertising, which presents a candidate in a positive light, is effective in converting undecided voters, negative advertising which criticizes one’s opponent is even more effective.”) (citing Bruce Horovitz, Marketing: Image Crafters; Candidates Signing up Top Advertising Firms, L.A. TIMES, July 14, 1992 at D1).


151. See id.

152. See id. Tapper postulated that 2004 will see an ugly presidential race, saying that if the Cleland smear campaign “is any guide, this year’s presidential campaign may reach new depths.” Id. A Cleland consultant called the campaign “some of the ugliest stuff I’ve ever seen, . . . taking lying to a new art form in that race.” Bob Dart, With stakes high, negative ads reign; attacks fill the airwaves in races across country, ATLANTA J.-CONST., Nov. 2, 2002, at 9A.; see also Jim Tharpe, Cleland, Chambliss trade patriotism barbs, ATLANTA J.-CONST., July 4, 2002, at 3B (“Cleland’s camp . . . circulated recent opinion columns pointing to Chambliss’ Vietnam War-era draft deferments. Chambliss’ campaign fired back, accusing Cleland strategists of peddling a ‘non-issue’ to hide the senator’s voting record.”).

2004 Democratic Presidential contest involved essentially no negative campaign commercials.154

But sometimes even seemingly innocuous advertisements can have disastrous effects. The media assailed President George W. Bush in March 2004, when he began a series of advertisements featuring "grim footage from Ground Zero" of the September 11th World Trade Center attacks.155 Spending over five million dollars for a week of advertising, President Bush’s campaign said the advertisements were intended to act as a "palate cleanser" after months of anti-Bush attacks by the Democrats.156 Some people were offended by these commercials and blamed the Republican party.157 Others credited Democratic party tactical maneuvers for the outrage.158 Democrats demurred from these charges and accused

154. See Jim Rutenberg, Missing Ingredient in 2004: Attack Ads by Democrats, N.Y. Times, Feb. 17, 2004, at A18 (“So far, this primary season has been like none other in a generation, with the fewest and tamest televised attack advertisements in at least three decades, political scholars and strategists said.”).

155. Conventional Wisdom, supra note 139, § 4, at 1 (noting “even a few Republicans were shaken” by the ad campaign); see also Myriam Marquez, Bush 9-11 Ads: Crass, Inappropriate, Tasteless, ORLANDO SENTINEL, Mar. 7, 2004, at G3 (accusing President Bush of “grub[bing] for votes”).

156. See Jim Rutenberg, The 2004 Campaign: Advertising; Bush Campaign Ready to Kick Off An Expensive Effort, N.Y. Times, Mar. 4, 2004, at A1 (discussing cost and scope of September 11th commercials). “The Bush campaign on Wednesday announced the start of what may be the most expensive advertising campaign in presidential history, with commercials devised to erase months of Democratic attacks by portraying President Bush as a plain-spoken leader who steadied the nation after the 2001 terrorist attacks.” Id. John Kerry’s campaign labeled the advertisements “revisionist history.” Id.

157. See Elisabeth Bumiller & David M. Halbfinger, Amid Criticism of Campaign Ad, Bush Will Visit a 9/11 Memorial, N.Y. Times, Mar. 6, 2004, at A11 (describing criticism of Bush 9/11 commercials as “intense”). John Kerry’s campaign quickly responded, calling the ads “a tactless coupling of a ceremony for the dead with a political fund-raiser.” Id. Kerry stated: “I don’t think the images are appropriate to political advertising.” Id. Others also criticized the President’s judgment harshly. See, e.g., Wayne Washington & Anne E. Kornblut, 9/11 Images in Bush Ads Hit Firefighters, Kin of Victims Complain, BOSTON GLOBE, Mar. 5, 2004, at A1 (“Bush strategists were not prepared for the outcry that followed the ad launch, which included front-page treatment in the New York newspapers and extensive coverage on television.”). But most news sources reported that reactions to the advertisements were mixed, with some viewers feeling deeply offended, and others working hard to justify the President. See, e.g., Trade Center Footage in Bush Ads Draws Fire, AZ. REPUBLIC, Mar. 5, 2004, at 1A; Scott Shepard, Bush ads on 9/11 attacked; Some Victims’ kin claim exploitation, ATLANTA J.-CONST., Mar. 5, 2004, at 3A (reporting negative response to Bush ads).

158. See Joe Klein, Return Of The Charm Offensive, TIME, Mar. 15, 2004, at 31 (observing in 2004 election Bush will “face a feistier Democratic Party – which last week succeeded in tarnishing the President’s rather innocuous attempt to use images from Sept. 11 in his first campaign ads”).

Published by Villanova University Charles Widger School of Law Digital Repository, 2005
Republicans of politicking. Several people pointed to Bush’s (now broken) promise not to use September 11th for his own political gain.

The Bush administration refused to pull the controversial advertisements, saying “[h]ow this administration handled that day, as well as the war on terror, is worthy of discussion.” Despite the controversy, these advertisements, broadcast early in the election season, may have little effect.

C. Campaign Finance Reform

The Bipartisan Campaign Finance Reform Act of 2002, known as the McCain-Feingold Act, attempted to close loopholes in campaign finance law. McCain-Feingold’s reforms pushed “to the fore the questions of whether and to what extent the First Amendment allows government to regulate the electoral activities of political parties.” Members of both the Democratic and Republican parties opposed McCain-Feingold. The legislation posed diffi-

159. See September 11 Families, Firefighters Rebuke Bush for 9/11 Images in Political Ads, Democratic National Committee, at http://www.democrats.org/news/200403050001.html (Mar. 5, 2004). The DNC quoted Republican Wright Salisbury, who lost a son-in-law in the attacks, disagreeing with allegations that the Democrats were using the commercials for partisan gain. See id. He stated: “I was a Republican up until I voted for Bush,” said Salisbury. ‘I will still vote for a good Republican, but not for Bush. To say this is Democrats doing this is another damn lie.” Id.

160. See CNN Saturday Morning News (07:00), Martha Found Guilty on All Charges; A Hitch in Iraqi Constitution (CNN television broadcast Mar. 6, 2004) (“President Bush said not long ago he would not use September 11 in his reelection campaign.”).

161. See Richard W. Stevenson & David M. Halbfinger, Bush Defends 9/11 Advertisements as Kerry Visits Texas, N.Y. TIMES, Mar. 7, 2004, § 1, at 24 (“President Bush on Saturday turned aside demands that he drop campaign advertisements showing scenes of devastation after the Sept. 11 terrorist attacks, saying his handling of that day and his leadership in the war on terrorism should be part of the political debate this year.”).

162. See John Simpson, Attacks on Bush’s 9/11 advert won’t have much effect, SUNDAY TELEGRAPH (London), Mar. 7, 2004, at 32 (“The attacks on President Bush probably will not have much effect, because this is not the stage at which real, lasting political harm can be done to either candidate.”).


165. See id. (discussing reaction to McCain-Feingold). Some Republicans helped bring a constitutional challenge against McCain-Feingold. See id. Meanwhile, “Democrats, while largely supportive in Congress, encouraged the Federal Election Commission to weaken the law’s effects through rule-making.” Id. The opposition to McCain-Feingold continues. See, e.g., George Will, Editorial, Campaign finance law breeds corruption, CHI. SUN-TIMES, Feb. 22, 2004, at 34 (“It is a constitutional obscenity that no one now knows — or, pending many more FEC and
cult questions of interpretation and caused a good deal of uncertainty and debate. In some quarters McCain-Feingold remains unpopular; one Republican introduced legislation to repeal the Act.

McCain-Feingold focused on three problems: "the increased importance of 'soft money,' the proliferation of 'issue ads,' and the disturbing findings of a Senate investigation into campaign practices related to the 1996 federal elections." Raised by political parties, so-called "soft money" contributions are not subject to limitation requirements. Soft-money donations increased from $21.6 million in 1984 to $498 million in 2000. Senator Russ Feingold of Wisconsin, the Bill's co-sponsor, lamented that soft-money contributions rose to a point at which "[i]t was the equivalent of hanging a 'For Sale' sign on our nation's capital."

In a five to four decision, the Supreme Court endorsed the majority of the McCain-Feingold Act. The Court upheld soft-money restrictions as serving "the government's important interest court rulings, can know - what political speech is legal in this nation where the First Amendment is no longer even pertinent to protecting such speech.


The inherent difficulties in statutory construction of the Act could cause mass confusion. See Dr. David Hill, Outsiders intercept play-calling, HILL, Dec. 10, 2003, at 14 (predicting confusion McCain-Feingold bill would cause); see also George F. Will, 1,600 Pages of Confusion, WASH. POST, May 8, 2003, at A31 (observing "special three-judge panel has produced four opinions totaling 1,600 pages attempting to decipher the McCain-Feingold campaign regulation law").

167. See End, supra note 4, at A16 (discussing efforts to repeal McCain-Feingold). Representative Roscoe Bartlett (R-MD) introduced the "First Amendment Restoration Act" which would repeal McCain-Feingold. Id.


170. See Chemerinsky, supra note 132, at 78 (citing McConnell, 124 S. Ct. at 649).


172. See McConnell, 124 S. Ct. at 706, 712, 719; see also Chemerinsky, supra note 132, at 78, 80 ("The ruling upheld many key provisions of the Bipartisan Campaign Finance Reform Act of 2002 (BCFRA).").

Published by Villanova University Charles Widger School of Law Digital Repository, 2005
in preventing corruption and the appearance of corruption."\textsuperscript{173} Provisions regulating issue advertisements paid for by unions, corporations, and interest groups also passed Constitutional muster.\textsuperscript{174}

Although advertisements remain an important part of campaigning, McCain-Feingold will greatly impact political financing.\textsuperscript{175} The Act may also help restore voter confidence, because some voters see issue advertising and large campaign contributions as undercutting the integrity of the political process.\textsuperscript{176} Even so, revenue-raising tactics, such as fly-around fund-raising dinners and speeches, skirt McCain-Feingold’s regulations.\textsuperscript{177} Senator John McCain calls these methods “despicable.”\textsuperscript{178}

But McCain-Feingold could be on unstable ground. Any changes in Justices could change the outcome of the Court’s five-to-four ruling.\textsuperscript{179} Regardless, the question of who pays for political advertisements remains controversial.\textsuperscript{180}

\begin{itemize}
\item \textsuperscript{173} Chemerinsky, \textit{supra} note 132, at 81 (quoting \textit{McConnell}, 124 S. Ct. at 659).
\item \textsuperscript{174} See id. (analyzing \textit{McConnell} decision). Chemerinsky states that McCain-Feingold seeks to regulate issue advertisements “that clearly are intended to support or oppose particular candidates.” \textit{Id.} at 81. Issue advertisements may not always seek to endorse a particular candidate. See Christopher J. Ayers, \textit{Survey of Developments in North Carolina Law and the Fourth Circuit, 2000: Perry v. Bartlett: A Preliminary Test for Campaign Finance Reform}, 79 N.C. L. Rev. 1788, 1788 (2001) (claiming issue advertisements “are designed to impact an election without endorsing or opposing a specific candidate”).
\item \textsuperscript{175} See, e.g., David Doak, \textit{How to Win My State; In Missouri, Hard Soil and Straight Talk}, N.Y. Times, Feb. 2, 2004, at A21 (citing quality of campaign advertising as voter’s deciding factor); \textit{see also} Chemerinsky, \textit{supra} note 132, at 81 (observing effects will be seen in 2004 elections).
\item \textsuperscript{176} See Richard A. Davey, Jr., Comment, “Buckleying” the System: Is Meaningful Campaign Finance Reform Possible Under Reigning First Amendment Jurisprudence?, 34 \textit{Gonz. L. Rev.} 509, 528 (1999) (claiming Americans are disillusioned with politics); \textit{see also} Anca Cornis-Pop, Republican Party of Minnesota v. White and the Announce Clause in Light of Theories of Judge and Voter Decisionmaking: With Strategic Judges and Rational Voters, the Supreme Court was Right to Strike Down the Clause, 40 \textit{Willamette L. Rev.} 123, 175 n.309 (discussing fears of judges being viewed as politicians).
\item \textsuperscript{177} See Andrea Mitchell, NBC Nightly News (6:30), \textit{Controversy over political ad campaign sponsorship} (NBC television broadcast, Feb. 12, 2004) [hereinafter NBC News] (discussing McCain-Feingold legislation).
\item \textsuperscript{178} See id. (quoting Senator John McCain).
\item \textsuperscript{179} See Chemerinsky, \textit{supra} note 132, at 81 (“[A] change in the Court’s composition could mean a future reconsideration of campaign finance and the First Amendment.”).
\item \textsuperscript{180} See NBC News, \textit{supra} note 177 (noting debate over sources of payment and sponsorship of campaign commercials).
\end{itemize}
The legislature is increasingly willing to impose – and the courts to uphold – restrictions on political speech. As politicians struggle under campaign financing restrictions, they search for new and innovative ways to maximize their exposure by working both within and around the framework of rules. Political books have enormous potential to further a candidate or party’s cause, increase notoriety, and generate press. The potential of political books as campaign tools has not been fully explored by public officials. Nonetheless, in the hands of a savvy politician, political books could be a powerful device.

Initially, political books are unlikely to be subject to McCain-Feingold regulations. They remain under the protection of the First Amendment and are guarded in two ways. First, political speech in general is a protected form of expression. Second, entertainment is also sheltered. Naturally, the First Amendment protects blends of entertainment and political speech as well. Political books could fall into this final dually-protected category.

181. See Eric L. Richards, The Emergence of Covert Speech and Its Implications For First Amendment Jurisprudence, 38 AM. BUS. L.J. 559, 560-61 (2001) (noting broad support for campaign finance reform since Buckley v. Valeo decision). “There have been growing concerns that Buckley and its judicial progeny ‘forced a substantial amount of political speech underground, as contributors and candidates devise[d] ever more elaborate methods of avoiding contribution limits.’” Id. at 561 (quoting Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 406 (2000) (Kennedy, J., dissenting)).


183. For a complete discussion of political books, see supra notes 29-64 and accompanying text.

184. For a full discussion of political books, see supra notes 29-64 and accompanying text.

185. See Seth F. Kreimer, Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law, 140 U. PA. L. REV. 1, 133 (suggesting “that government inquiries into the contents of one’s library, or the character of one’s vote, are constitutionally illegitimate”) (quoting United States v. Rumley, 345 U.S. 41, 46 (1953)).

186. See Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) (“Entertainment, as well as political and ideological speech, is protected . . . .”). Entertainment value alone may grant expression otherwise free of ideas a level of protection. See Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 390 (4th Cir. 1993) (“Expression devoid of ‘ideas’ but with entertainment value may also be protected because ‘the line between the informing and the entertaining is too elusive.’”) (quoting Winters v. New York, 333 U.S. 507, 510 (1948)).

187. See, e.g., Lebron v. Wash. Metro. Area Transit Auth., 749 F.2d 893, 896 (D.C. Cir. 1984) (holding exclusion of political poster from train station violated artist’s First Amendment rights). “Subject to a limited number of exceptions –
The First Amendment may not grant the same deference to all forms of speech, but political speech enjoys the very highest levels of protection. Freedom of political speech is the central tenet of the First Amendment. Core political speech includes distributing leaflets, evaluating candidates' qualifications, advocating change, and all manner of political debate. Infringements on this speech are subject to a stringent test. When laws seek to restrict core political speech, courts apply "exact ing scrutiny" and uphold the law "only if it is narrowly tailored to serve an overriding state interest."

most notably, reasonable time, place and manner regulations – political speech may not constitutionally be restricted in a public forum." Id.

188. See R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) (discussing protection granted different types of speech). Although the Court has never set political speech apart as a category, Justice Stevens favors that approach. See id. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I.

189. See R.A.V., 505 U.S. at 422 (Stevens, J., concurring) (stating "[c]ore political speech occupies the highest, most protected position"); see also Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 816 (1984) (noting "political speech is entitled to the fullest possible measure of constitutional protection"); Roth v. United States, 354 U.S. 476, 484 (1957) (asserting First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"); Kirk L. Jowers, Issue Advocacy: If it Cannot Be Regulated When it is Least Valuable, It Cannot Be Regulated When it is Most Valuable, 50 Cath. U. L. Rev. 65, 65 (2000) (arguing political issue advertisements should be protected at highest levels by First Amendment). For a brief criticism of granting core political speech higher protection than commercial speech, see Paul F. Eckstein, Tribute to Jack Edward Brown and the Creation of the Endowed Chair in his Name at Arizona State University College of Law November 7, 2002, 35 Ariz. St. L.J. 281, 290-91 (2003) (questioning Court's reasoning for differential treatment of core political and commercial speech).

190. See Frederick Mark Gedicks, A Two-Track Theory of the Establishment Clause, 43 B.C. L. Rev. 1071, 1082 (2002) ("Although the category of high-value speech is hardly exhausted by political speech, no other kind of high-value expression is so consistently placed at the 'core' of expression protected by the Speech Clause [of the First Amendment]."). Compare Theodore W. Ruger, "A Question WhichConvulses a Nation:" The Early Republic's Greatest Debate About the Judicial Review Power, 117 Harv. L. Rev. 826, 857 (2004) ("Political speech is an exercise in social persuasion - never more so than where, as here, the stakes are high, the polity is divided, and an election looms.").

191. See Gedicks, supra note 190, at 1082 n.42 (detailing approaches to core political speech).


The Supreme Court is concerned with the "chilling effect" that occurs when protected speech is discouraged by an otherwise proper regulation.\textsuperscript{194} This is especially true when the speaker is a candidate for political office.\textsuperscript{195} In theory, the Court allows regulation of core political speech only in extreme circumstances.\textsuperscript{196}

But political speech doctrine does not always win out. The Court's endorsement of McCain-Feingold's restrictions on campaign financing demonstrates that the First Amendment does not absolutely shield all forms of political speech from government regulation.\textsuperscript{197} Recent cases demonstrate that courts are upholding McCain-Feingold and similar state regulations. For example, in March 2004, the United States Court of Appeals for the Seventh Circuit upheld an Indiana law requiring identification of the sources of funding for campaign commercials.\textsuperscript{198}


\textsuperscript{195} See Weaver v. Bonner, 309 F.3d 1312, 1319 (11th Cir. 2002) ("A candidate's speech during an election campaign 'occupies the core of the protection afforded by the First Amendment.") (quoting McIntyre, 514 U.S. at 346). But candidacy is not determinative on the question of whether political speech is protected. See id.

\textsuperscript{196} See Gedicks, supra note 190, at 1082 n.42 (quoting Robert G. McGlone, The American Supreme Court 155 (3d rev. ed. 2000)). For an argument that core political speech is not universally protected, see S. Elizabeth Wilborn, Teaching the New Three R's - Repression, Rights, and Respect: A Primer of Student Speech Activities, 37 B.C. L. REV. 119, 120 (1995) (arguing core political speech is not protected in schools). At least one commentator has suggested that the Court recently acted entirely counter to democracy's interests. See Peter M. Shane, Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors, 29 FLA. ST. U. L. REV. 535, 585 (2001) (claiming that in Bush v. Gore "the Supreme Court penned an opinion in which our national commitment to democracy ... does not appear").

\textsuperscript{197} 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."). Justice Stevens argued:

Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results.

\textit{Id.}

\textsuperscript{198} See Majors v. Abell, 361 F.3d 349, 355 (7th Cir. 2004). Majors involved Indiana Code § 3-9-3-2.5 which proscribes the posting of political advertising without a notice of the paying party.
But courts are generally extremely skeptical of regulations on political speech.199 In the past, the Court demonstrated that it might be especially willing to strike down legislation that interferes with the interests of major parties.200

If books were subject to McCain-Feingold regulation, they would face the same tight restrictions as other aspects of campaign finance covered by the Act.201 But McCain-Feingold is primarily concerned with issue advertising and soft money contributions.202 Therefore, it is unlikely that books will be covered by McCain-Feingold, unless that Act is amended.203 Rather than being considered outright political advertising, the serious difficulties with political books could depend on who publishes them. If books are published by parties or political groups, a strong argument exists that they might be subject to the stringent regulations of McCain-Feingold.

Whether or not McCain-Feingold covers political books, an existing loophole in the Act offers political books the same opportunity to circumvent the rules on which soft-money donors are capitalizing.204 Currently, McCain-Feingold does not extend to political organizations that are tax-exempt under section 527 of the

199. See, e.g., Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (invalidating so-called announce clause forbidding members of judiciary from announcing views on disputed issues during campaigns). Compare LaFaro v. Cahill, 56 P.3d 56 (Ariz. Ct. App. 2002) (finding harassment statute not unconstitutional when construed to exclude political speech). Courts are also protective of publications such as flyers and brochures that toe the line between general publications and advertising. These matters have been litigated, with courts generally coming down on the side of the First Amendment. See, e.g., Doe v. State, 112 S.W.3d 532 (Tex. Crim. App. 2003); Faxon v. Mich. Republican State Cent. Comm., 624 N.W.2d 509 (2001), appeal denied, 639 N.W.2d 256 (2001). Generally, the Court "has long held that the distribution of political leaflets that advocate controversial viewpoints is the essence of First Amendment expression." Doe, 112 S.W.3d at 534 (citing Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992); Lovell v. City of Griffin, 303 U.S. 444 (1938)).


201. For a full discussion of the McCain-Feingold Act, see supra notes 163-80 and accompanying text.

202. See id.

203. See id.

204. See id.

https://digitalcommons.law.villanova.edu/mslj/vol12/iss1/5
Internal Revenue Service Code.205 After McCain-Feingold passed, fundraisers began funneling money into these organizations.206 Senator John McCain reported that political operators are dumping large donations into so-called “527s” in an attempt to circumvent campaign finance laws.207 He scorned these efforts, alleging that they “make a mockery of the law.”208 Nonetheless, the 527 gap can be exploited.209 If political books are published by 527 organizations, McCain-Feingold should not apply.

Senators McCain and Feingold are actively working to close this regulation gap. As recently as March 10, 2004, the Senate Rules


(e) Other definitions. For purposes of this section—

(1) Political organization. The term “political organization” means a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.

(2) Exempt function. The term “exempt function” means the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whatever or not such individual or electors are selected, nominated, elected, or appointed. Such term includes the making of expenditures relating to an office described in the preceding sentence which, if incurred by the individual, would be allowable as a deduction under section 162(a).

Id.; see also The Scope and Operation of Organizations Registered Under Section 527 of the Internal Revenue Code: Hearing of the Senate Rules and Admin. Comm., 108th Cong. (2004) (statement of Senator Russell Feingold (D-WI)) [hereinafter Feingold Testimony]. Senator Feingold observed “McCain-Feingold didn’t directly deal with this issue [of 527 organizations]. Our bill was concerned with the raising and spending of soft money by the political parties and with phony issue ads run by any organization in proximity to an election.” Id. The organizations registered under section 527 can “legally collect soft money, pay for issue ads, and encourage voter turnout.” See Aaron Bernstein et al., Inside The Dems’ Shadow Party, Bus. Wk., Mar. 22, 2004, at 105 [hereinafter Shadow Party] (stating downside is these organizations “cannot give to candidates or be directly connected to a political party.”).

206. See Shadow Party, supra note 205, at 105 (observing 527 organizations already raised over 100 million dollars).

207. See The Scope and Operation of Organizations Registered Under Section 527 of the Internal Revenue Code: Hearing of the Senate Rules and Admin. Comm., 108th Cong. (2004) (statement of Senator John McCain (R-AZ)) (lamenting use of 527s to thwart fundraising rules). Senator McCain criticized this run-around, saying that 527s “should not then be permitted to shirk their other obligation, including those under the campaign finance laws.” Id.

208. Id.

209. See Craig Gilbert, ‘Soft money’ sparks debate, complaints; Critics claim 527s are skirting election laws by operating as ‘shadow’ parties, MILWAUKEE J. SENTINEL, Mar. 21, 2004, at 18A (claiming 527 organizations will be unable to fundraise in same way in November). Thus, some evidence shows the loophole enjoyed by 527 organizations may already be closing. See id.
and Administration Committee held hearings to discuss the 527 organizations. If reform efforts are successful, materials published by 527s could be subject to stringent Federal Election Commission rules. Under those rules, the Supreme Court may be less willing to protect this "bought" speech.

Also, even protected political speech can go too far. The mere fact that speech is political will not save otherwise objectionable actions from consequences. More likely sources of proscriptions on political books remain the traditional routes of defamation or other tort liabilities.

But in a defamation context, the deferential standard of New York Times Co. v. Sullivan applies, making it difficult for a plaintiff to prevail. Under the current framework, a plaintiff must show actual malice for a defamation suit to proceed against a public figure. The burden is on the plaintiff to show malice with "convincing clarity." This is a very difficult task.

Even in the absence of specific regulations on political speech, media outlets may find a way to restrict speech that they simply do not like. For example, a recent advertising campaign by the online

210. See Feingold Testimony, supra note 205 (requesting Federal Elections Committee act in a manner consistent with McCain-Feingold Act's goals).

211. See id. (noting Federal Election Campaign Act of 1974, not McCain-Feingold Act, covers 527 organizations).


213. See United States v. Viehhaus, 168 F.3d 392, 395-96 (10th Cir. 1999) (distinguishing threats from political speech). "The fact that a specific threat accompanies pure political speech does not shield a defendant from culpability." Id. at 396; see also Price v. Indiana, 622 N.E.2d 954, 963-64 (Ind. 1993) (noting criminal and tort liability may arise as result of harmful political speech).


216. See Sullivan, 376 U.S. at 279-80. The Court defined "actual malice" as "knowledge that it was false or with reckless disregard of whether it was false or not." Id. For an application of the actual malice standard to political advertising, see Camp v. Yeager, 601 So. 2d 924, 926 (Ala. 1992) (holding political television commercial reasonably capable of defamatory meaning).


IV. CONCLUSION

There are no major obstacles to political books continuing to thrive and flourish in a hungry market. The political book offers candidates a unique forum in which to espouse their views, entirely free from the burden of stringent campaign finance reform laws. Political books could be used to write campaign promises, to satirically attack an opponent, or to publish the entire array of issue advertising forbidden by the McCain-Feingold Act. They could also generate media attention, the free advertising which many political candidates depend on heavily.

With the rising popularity of political books, it is only a matter of time before savvy politicians latch onto the opportunity to circumvent McCain-Feingold in this neat, tidy, and Constitutionally sanctioned way. Campaign finance reform cannot touch political books and the First Amendment shields them. Thus, the political book could serve as a powerful tool. Free from the ever-tightening noose of campaign finance reform and cloaked in First Amendment protection, the political book may truly be a bulletproof form of political speech.

Emily Kirstine Wacker

219. See Capital Report, Bernice Kanner, Author of "The Super Bowl of Advertising" Discusses Commercials Aired During the Super Bowl (CNBC television broadcast, Jan. 28, 2004) (debating Super Bowl’s policy of rejecting “advocacy” advertising). CNBC Anchor Alan Murray observed that MoveOn.org’s “anti-Bush campaign ad was deemed too controversial by the CBS sales department, and yet there are plans to run an ad about treatment for erectile dysfunction.” Id.