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Campaign Finance Regulation: The Resilience of the American Model

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I. The American Model

Several characteristics of the American economic model influence American free speech law. Perhaps most obvious is the model's faith in the unregulated market to produce optimal results. In the context of free expression, this faith is reflected in the famous metaphor of 'the marketplace of ideas', according to which the largely unregulated competition of ideas in the public square yields truth, as better ideas gain adherents and triumph over less worthy ones. The marketplace metaphor – concentrating as it does on the general social benefits of speech, as opposed to the benefits accorded the speaker – favors protection of corporate speech as an additional competitor for the public's ultimate approval in the latter's search for truth.

Interestingly, it bears noting, if only briefly, that the current Court appears poised to embrace corporate speech even under a more speaker-centered theory of free speech. At oral argument in *Citizens United* Chief Justice Roberts, among others, questioned the argument that corporations were single-mindedly devoted to profit-making. He suggested instead that such entities, motivated by their shareholders, might have opinions about a diverse array of topics and a desire to express views on them. While the Chief Justice stopped short of embracing the idea that corporations enjoy self-fulfillment from speaking, this slight movement toward anthropomorphising them would allow the Court to paint them as simply another participant in democratic debate, possessing all the motives other speakers possess, rather than as entities whose political speech is motivated by a single instrumental concern for profit maximisation.

Return, though, to the marketplace theory of speech. In American campaign finance jurisprudence this unadulterated faith in expression – or rather, in citizens' response to expression – is reflected in the Court's growing skepticism about the argument that corporate political speech risks corrupting the political process by skewing debate. Most notably, Justice Scalia's dissenting opinion in *Austin v. Michigan Chamber of Commerce* (1990)

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derided the idea that government had a legitimate interest in ensuring that speech occurred only in rough proportion to the popular support enjoyed by the ideas it conveyed, calling it, in a play on the equality principle of 'one man, one vote', an "illiberal free speech principle of 'one man, one minute.'"

It is perhaps on the topic of corporate speech's potential to distort political discourse that the current Court's evolution has been most remarkable. In 1982, in *Federal Election Commission v. National Right to Work Committee*, the Court unanimously concluded that the economic advantages provided by the corporate form gave corporations unique power that justified special regulation of corporate campaign activities. Four years later, in *Federal Election Commission v. Massachusetts Citizens for Life* (*MCFL*) (1986), five members of the Court recognised these distortive effects but held that they did not justify regulation of a non-profit corporation that refused contributions from business corporations; the four dissenters would have allowed the government to regulate even those entities. Four years after *MCFL*, six Justices in *Austin* held that those distortive effects justified regulation of corporations' speech endorsing or attacking candidates for office. The fact that, as of this writing, the Court is now on the edge of deregulating corporate political speech illustrates the extent of this turnabout and the Court's skepticism about market distortion.

Following from this faith in unlimited expression is deep skepticism about government attempts to regulate speech in the name of equality. In the general business context this skepticism is evident in the enthusiastic American embrace of market relationships and outcomes and corresponding suspicion of wealth-transfer programs. In the speech context, this same skepticism is evident in the Court's emphatic and continuing rejection, as illegitimate, of a speech equalisation rationale for campaign finance regulation. This rejection is not a product of any evolution on the modern Court; at least since the seminal case of *Buckley v. Valeo* (1976) the Court has rejected the legitimacy of this justification for regulating political speech.

Finally, in perhaps the clearest link between the American model of business regulation and free speech, the Court has shown increasing skepticism of rationales for regulation of corporate speech that turn on a desire to protect shareholders. The basic idea is that shareholders have their own free speech interests in remaining free from involuntarily subsidissing corporate speech by having corporations they invest in use their general treasury funds for speech. Justice White forcefully advocated this idea in his dissenting opinion in *First National Bank v. Bellotti* (1978), the case that established at least a general right of corporations to engage in some political speech. In subsequent years, a majority of the Court embraced Justice White's principle in *MCFL* and *Austin*, discussed above.[1] Since then, however, the idea has

[1] Because *Bellotti* dealt with a complete prohibition on corporate speech with regard to a referendum, the Court in *MCFL* and *Austin* was able to distinguish that case on the ground

come under significant attack. In the oral argument in *Citizens United*, Chief Justice Roberts and others expressed palpable skepticism about this shareholder-protection rationale, largely due to its paternalistic nature. One can discern a clear link between that skepticism and a more generalised rejection of government regulation of the market aimed at protecting shareholders and other participants.

II. The Limits of the Model

The limits of the American model of business regulation have become increasingly obvious over the last several years. Since this is a paper about expression and not business regulation these limits need not be examined in detail. However, as they relate to expression, suffice it to say that the current financial crisis has called into severe doubt Americans' (and others') faith that an unregulated market reliably generates optimal outcomes. Moreover, suspicion that the players at the apex of the financial pyramid will somehow survive the crisis far better than average stakeholders may generate more support for government regulation that seeks to protect such stakeholders.

Neither of these dynamics directly translates into public opinion about restrictions on corporate political speech, let alone judicial opinion about the constitutionality of such restrictions. At the same time, however, one should not minimise the extent to which empirical facts about business operations may provide an overall backdrop to judicial determinations about the importance of governmental interests justifying such restrictions. In the two seminal campaign finance cases, *Buckley v. Valeo* (1976) and *McConnell v. Federal Election Commission* (2003), the Court cited empirical facts about campaign finance abuses to justify upholding campaign finance regulations. Contemporary revelations about market manipulations and abuses of trust may well provide some counteracting force to the current Court's libertarian push toward broader political speech rights for corporations.

Still, despite the current economic crisis, characteristics more closely associated with American law and society may continue to keep its free expression law closely aligned with the more libertarian approach. Perhaps most fundamentally, the individualistic nature of Americans' self-perception keeps American free speech law from trending toward the more regulation-accepting, communitarian approach taken by many other western democracies. This characteristic arguably affects American free speech law on issues as disparate as the protected status of group libel or racial or religious 'hate speech' and regulation of the mass media, as well as the acceptability of a speech equalisation rationale for restrictions on corporate political speech. It should not be surprising, then, that American law on all of these free speech issues varies considerably from the law of other advanced democracies.

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that the latter cases considered limitations, but not prohibitions, on corporate speech in the context of candidate elections, not referendum campaigns.

The nature and history of authoritative sources of American speech law also feed the American skepticism about such restrictions. Most notably, the First Amendment to the U.S. Constitution is framed as an absolute prohibition on speech restrictions. The practical necessity for some speech restrictions has always contradicted the idea that the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech" in fact enshrines an absolute rule. Still, courts interpreting that command in light of practical realities have attempted to maintain the purity of that command by simply excising, as a matter of original meaning, some expression (for example, obscenity) from "the freedom of speech" protected by the First Amendment. When that tack has proved impossible, courts have insisted that speech restrictions either be content-neutral or narrowly tailored to meet a compelling government interest; both of these formulas aspire to avoid explicit balancing of speech and other goals, in the hope of maintaining the purity of the Constitution's command. This imperative has also led, perhaps less convincingly, to attempts to define some expression as simply not speech, despite its obvious expressive quality.

These moves, whatever their justification in constitutional history or logic, reveal a fundamental difference between American free expression law and the free expression law of other western democracies. The absolutist nature of the First Amendment, both as drafted and as interpreted by American courts, stands in stark contrast to the proportionality and interest-weighing explicitly embraced by a wide variety of other advanced western constitutional regimes. More fundamentally, the more hospitable reception other nations have accorded to government intrusion into private lives in the service of communal well-being contrasts with the generally more libertarian American approach.

Perhaps equally important in understanding this phenomenon is the absence, in American history, of a significant internal threat to democracy. This happy incident of the American story may play a role in the faith its law and people possess in the benign power of speech and, conversely, their unwillingness to accept governmental intrusion for the sake of protecting democracy. The differing reactions to Nazi speech in the United States and postwar Germany present only the starkest example of the power of a nation's history to spark different levels of appreciation for the dark, as well as the benign, potential of speech.

Flowing from the American faith in unregulated speech is faith in listeners' ability to sift truth from falsity. Justice Scalia's derisive characterisation of the majority in *Austin* as embracing the idea that "too much speech is an evil that the democratic majority can proscribe" can only be understood as an endorsement of the idea that listeners have the capacity to accept or reject ideas based on their intrinsic merits, and not on how frequently or cleverly those ideas are presented. This faith has consequences. Justice Scalia's view

does not necessarily imply rejection of a political equality justification for limits on political speech. However, it is only a relatively short progression to that further step: if the electorate is capable of accurately evaluating a political message regardless of how often it is repeated in the media, then nobody is denied an equal opportunity to participate in the political process simply because someone else can speak more. Conversely, however, if political outcomes *can* be distorted by inequalities in speech opportunities, then the right to equal participation in politics would seem to require, or at least benefit from, government action to ensure equality in political speech.

The assumptions underlying the American approach to these issues contrast starkly with those of other nations, whose restrictions on political speech are based on equality concerns. For example, British law's restrictions on purchasing broadcast time to communicate political messages reflect concern about the skewing of political debate allegedly caused by unequal quantities of speech. Indeed, sometimes a concern for equality can lead to *un*equal distribution of communications resources. In Canada, for example, the election law grants parties free broadcast time during election periods, allocated based in large part on their existing political strength, and restricts purchase of additional time outside of that framework. This system, of course, leads to massive disparities in the amount of broadcast time available to the various parties. However instantiated, any such system of allocations and restrictions necessarily supposes that, in Justice Scalia's words, "too much speech is an evil that the democratic majority can proscribe," or, perhaps more to the current point, that relative allocations of speech are more important to an informed electorate than absolute amounts.

Are restrictions on corporate political speech acceptable? The answer turns largely on one's position on the 'absolute-amount-versus-relative-allocation' issue set forth in the last paragraph, with perhaps some additional consideration for one's view about the workability and fairness of any official system of speech restrictions and allocations. If one believes that political speech in itself is a good thing, regardless of its source and its relative allocation, then one should not be concerned if speech comes in unequal amounts from proponents of different views. Moreover, one would not be concerned if that speech came from non-members of the polity, such as foreigners and non-natural entities such as corporations. Simply put, if the value lies in the speech itself, then its origins should be irrelevant.

On the other hand, if speech is valuable because it reflects, in rough proportions, the pre-existing – and thus, presumably, undistorted – views of the electorate, then one should be concerned about both allocating speech in rough proportion to the political support it enjoys and ensuring that it emanates from members of the polity. For example, the Canadian government has defended its practice of allocating broadcast time among its parties in proportion to their electoral popularity on the ground that it is important for such allocations to favor broad-based national parties that have

a reasonable chance of winning the election and forming the government. Similarly, if one is concerned that repetition of speech has the effect of drowning out other voices, then restrictions may be appropriate in the service of preventing the skewing of debate, and hence outcomes.

III. Prospects for the Future

While it is always hazardous to predict the outcome of court cases, the oral argument in *Citizens United* suggests that an emerging majority of conservative justices will continue to put pressure on the current regime of limited toleration of limits on corporate political speech. This development means that American free speech law will remain at odds with that of its advanced democratic counterparts around the world. This divergence is probably of no great concern to many members of the Court, given their suspicion of borrowing from abroad when interpreting American constitutional law.

Perhaps more significant, then, is the potential contradiction *within* American law, between increased public acceptance of stringent government regulation of business's general operations, and the Court's push in the opposite direction with regard to the political speech engaged in by those same entities. Of course it must never be forgotten that, at least under one understanding, the U.S. Constitution draws a sharp distinction between regulation of businesses and regulation of the speech in which businesses engage. Most notably, while the Constitution imposes few limits on government regulation of commercial activity it severely limits government regulation of speech proposing that activity.[2] There is certainly no doctrinal inconsistency between tolerating government regulation of the economic marketplace and rejecting government regulation of the speech marketplace.

Conclusion

Regulation of business and regulation of the speech in which businesses engage raise some similar issues, such as the quality of the policy results produced by an unregulated regime and the ability of smaller stakeholders to protect their own interests (economic or speech) when large institutions so dominate the landscape. Changing perceptions of the correct answers to these questions in the context of general economic regulation may well

[2] See, for example, Justice Thomas's remark in his dissenting opinion in Glickman v. Wileman Brothers and Elliott (1997): "Although the Constitution may not 'enact Mr. Herbert Spencer's Social Statics,' and thus the Government has a considerable range of authority in regulating the Nation's economic structure, part of the Constitution – the First Amendment – does enact a distinctly individualistic notion of the freedom of speech, and Congress may not simply collectivise that aspect of our society, regardless of what it may do elsewhere." The reference to Herbert Spencer, and the internal quotation, are both from Justice Holmes's classic dissent in Lochner v. New York (1905), where Holmes dissented from the Court's second-guessing of a law mandating a maximum 60-hour work week for bakers.

influence perceptions of those answers in the context of speech regulation. Thus, it remains unclear whether Americans will continue to accept the discrepancy between the constitutional status of corporate economic regulation and corporate speech regulation. Should they come to question the emerging *laissez-faire* approach to corporate speech they may find lessons in how other advanced democracies approach the issue, now that the American model has revealed its weaknesses.