Commentary

Regulating Election Speech Under the First Amendment

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Campaign finance reform has become the Vietnam of First Amendment theory and doctrine. Or perhaps, in deference to the sensibilities of my generation, I should say that it has become the Kosovo, since the beneficence of our intentions in the latter case is so much more apparent. With the best of motives, we have created a quagmire.

My own untutored inclination would be to approach the issue of campaign finance reform by focusing on floors rather than ceilings.[1] Instead of restricting expenditures, it would seem to me easier and more efficacious to require each broadcast licensee, as a condition for its license, to reserve a fixed amount of time for the speech of bona fide candidates during an election. Such an approach would endow candidates with the opportunity to participate meaningfully in public deliberation. It would be simple and efficient. It would diminish the elaborate, intrusive, and expensive regulatory regime that we presently endure. I very much doubt that after *Red Lion*[2] there could be any serious First Amendment objection to such a scheme,[3] and, although the scheme might be challenged as a taking of the property of broadcasters, my guess is that such a challenge would not prove insuperable.

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1. *See, e.g.*, Joel Fleischman & Pope McCorkle, *Level-Up Rather Than Level-Down: Toward a New Theory of Campaign Finance Reform*, 1 J.L. & POL. 211, 215 (1984) (urging the imposition of a level-up approach that would increase the amount and diversity of political speech over a level-down theory that would merely impose spending restrictions).

2. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

3. *See, e.g.*, Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 670 n.30 (1997).

For whatever reason,[4] however, neither Congress nor the academy has elected to explore this approach, choosing instead to pursue egalitarian goals by imposing ceilings on contributions and expenditures during elections. But because these regulatory efforts have been torn apart by constitutional distinctions between contributions and expenditures,[5] between corporations and persons,[6] between vagueness and clarity,[7] between issue advocacy and candidate advocacy,[8] they have turned nightmarish in their complexity and futility.

Both Richard Briffault's *Issue Advocacy: Redrawing the Elections/Politics Line* and Frederick Schauer and Richard Pildes's *Electoral Exceptionalism and the First Amendment* attempt to cut through the Gordian knot of these entanglements. They seek to do so by distinguishing the First Amendment doctrine applicable to political speech from the First Amendment doctrine applicable to elections. Somewhat along the lines of Edwin Baker's pioneering work,[9] Briffault argues that because elections have a distinct sociological structure and purpose, speech in elections ought to be protected by a constitutional regime that flows from values appropriate to elections, rather than by a regime that embodies the values of political speech generally. Schauer and Pildes argue that such a domain-specific application of First Amendment doctrine would be no embarrassment to First Amendment theory, "because exceptionalism in the First Amendment is the rule and not the exception."[10]

In the past, I have argued that First Amendment jurisprudence in fact protects constitutional values inherent in particular social structures, rather than communication per se,[11] and so I find the general approach of

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4. For some of the reasons offered against a government-enforeed extension of broadcast time for candidates, see Lillian A. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1266 (1994) (arguing that expanding the role of government in allocating political resources will lead inevitably to greater factionalism as groups seek to manipulate strategically lawmakers and the lawmaking process); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 225, 226-27 (Geoffrey R. Stone et al. eds., 1992) (averring that from government ensuring resources for viewpoints to be heard, "it is but a short step to suppression pure and simple"); and Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 98 (1997) (asserting that the First Amendment's language makes clear that public discussion was to be fostered by protecting individual liberties, "not through an activist government role in political debate").

5. *See* Buckley v. Valeo, 424 U.S. 1, 12-59 (1976).

6. *See* Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

7. *See Buckley*, 424 U.S. at 42.

8. *See* Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEXAS L. REV. 1751 (1999).

9. *See* C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 3 (1998) (taking the position that campaign speecb should be viewed as part of the institutionalized electoral system rather than belonging to the wider realm of political speech).

10. Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEXAS L. REV. 1803, 1835 (1999).

11. *See* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1279 (1995).

Briffault, Schauer, and Pildes highly congenial. What is necessary to make the approach convincing, however, is a detailed appraisal of what constitutionally would be gained, and what lost, by demarcating elections as a separate domain of First Amendment doctrine.

Schauer and Pildes in principle repudiate the necessity for any such appraisal. They believe that the illusion of this necessity flows from the mistaken view that "election-specific First Amendment principles . . . are inconsistent with essential features of the First Amendment itself."[12] From the bare fact that the First Amendment "is not a monolith," Schauer and Pildes seek to draw the conclusion that "developing distinct principles for electoral speech" is constitutionally unproblematic.[13] But implicit in such an argument is the view, intimated by Schauer elsewhere,[14] that there are no First Amendment principles by which the question of exceptions can itself by evaluated.

Such an extremely nominalist view of the First Amendment is highly implausible. If First Amendment jurisprudence is truly nothing more than a collection of exceptions, then it is merely an empty label, useful only as a bald and conclusory justification for judicial meddling with legislative determinations. A First Amendment that offers no principles by which the boundaries and nature of "exceptions" are to be determined would be intellectually superfluous and without independent significance.

This way of putting the matter, however, is misleading. Schauer and Pildes are certainly correct to notice that there are vast fields of communication whose regulation is untouched by First Amendment doctrine, so that it makes little sense to conceive of the First Amendment as staking out general principles for the protection of all expression.[15] And they are also correct to notice that once we abandon the aspiration to

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12. Schauer & Pildes, *supra* note 10, at 1836.

13. *Id.* at 1835.

14. *See* Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 107 n.106 (1998). It is not so clear, however, that Richard Pildes, in his other writings, holds this view. *See, e.g.*, Richard H. Pildes, *Against Balancing: The Rule of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 727-29 (1994); Richard Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, XXVII J. LEGAL STUD. 725, 729-44 (1998). Perhaps this accounts for a certain internal tension within *Electoral Exceptionalism and the First Amendment*. The primary thesis of the article seems to be that the very existence of domain-specific First Amendment principles refutes "the argument that election-specific First Amendment principles that are the necessary condition for campaign finance reform are inconsistent with essential features of the First Amendment." Schauer & Pildes, *supra* note 10, at 1836. Yet in occasional passages the article seems to make the quite different point that, although "there is no one general value or interest that free speech protects," *id.* at 1819, "[g]eneral principles and values associated with the First Amendment of course remain relevant" in ascertaining the constitutional meaning of "ongoing social practices," *id.* at 1819, 1816, like elections. This latter point seems to me correct, but if it is true then some analysis of these principles and values would appear to be necessary in order to determine whether election speech ought to be deemed a distinct domain of First Amendment doctrine. Yet no such analysis appears in *Electoral Exceptionalism and the First Amendment*.

15. *See* Post, *supra* note 11, at 1255.

such general principles, the complementary image of "exceptions" must also be jettisoned. But it does not follow from either (or both) of these premises that the First Amendment is therefore reduced to a nominalist collection of doctrines applicable only to particular contexts, and that the First Amendment must lack relevance for the issue of how we pick and choose our doctrines and our contexts.

It is more plausible to view the First Amendment as bearing distinctive constitutional values that seek to realize themselves in discrete social domains. Most pertinent for the subject of this Symposium, the First Amendment defines and safeguards the communicative dimensions of the social practice of democratic self-governance.[16] The First Amendment ensures that legal regulation of "public discourse" is not inconsistent with the constitutional value of collective self-determination.[17] The restrictions imposed by the First Amendment on the regulation of public discourse are qualitatively different from those imposed by the First Amendment on the regulation of speech in other social fields, as for example on the regulation of speech within managerial domains, where speech is routinely subordinated to the attainment of instrumental ends.[18]

The question of whether election speech should be characterized as within such a managerial domain, or instead as within public discourse,[19] is a question that affects the meaning and scope of public discourse. For that reason it is a question that impacts First Amendment values, and it is inaccurate to assert, as do Schauer and Pildes, that because the First Amendment has domain-specific applications, there is nothing more constitutionally to be said about the question of whether election speech ought to be hived off from public discourse. The reach and significance of public discourse is preeminently a First Amendment question.

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16. *See, e.g.*, Robert Post, *Between Democracy and Community: The Legal Constitution of Social Form*, *in* DEMOCRATIC COMMUNITY: NOMOS XXXV, at 163 (John W. Chapman & Ian Shapiro eds., 1993).

17. *See* Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1122 (1993) [hereinafter Post, *Meiklejohn's Mistake*]. As part of their effort to establish the "rule" of exceptions within First Amendment doctrine, Schauer and Pildes seek to demonstrate that constitutional protections for "political speech" are "institution dependent." But what their argument actually establishes is that speech with political content can be regulated according to the domain in which it occurs. The argument does not impair the relevance of "public discourse" as a pertinent and puissant category of First Amendment analysis, because the boundaries of public discourse are not defined by reference (merely) to the content of speech; they are set instead by constitutional apprehension of the meaning and reach of the practice of self-determination. For a fuller discussion of the boundaries of public discourse, see Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 667-84 (1990).

18. *See, e.g.*, Robert Post, *Between Management and Governance: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1775 (1987).

19. For a discussion of how the classification of election speech as within a managerial domain might affect constitutional analysis of permissible regulations, see Post, *Meiklejohn's Mistake*, *supra* note 17.

At present there are two distinct First Amendment accounts of the value of democratic self-government. The first derives from the work of Alexander Meiklejohn, and it stresses the importance of establishing the communicative preconditions for fair and informed collective decision-making. The second is what I shall call a participatory model, and it emphasizes instead the role of public discourse in establishing democratic legitimacy.[20] The participatory model focuses on speakers as participants in the autonomous construction of democratic identity; the Meiklejohnian model focuses on the capacity of citizens to receive and utilize information in deciding future action.

In the context of elections, the participatory model would require that public discourse remain sufficiently open to citizens and candidates as to serve for them the function of securing democratic legitimacy by enabling the reconciliation of individual and collective self-determination.[21] The Meiklejohnian model would require that communication within the context of elections be sufficiently rich and textured as to ensure electoral decisions that are fully informed of available alternatives and options.

It is striking that the egalitarianism which runs so fiercely through contemporary efforts at campaign finance reform[22] is alien to both these models. A central tenet of the Meiklejohnian tradition is that the First Amendment "does not require that, on every occasion, every citizen shall take part in public debate. . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said."[23] Within the Meiklejohnian model there is potential tension between egalitarian values and the overriding objective of producing an informed and educated electorate.[24]

The tension between egalitarian values and the participatory model is perhaps even sharper, for such values may conflict with the primary goal

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20. On the contrast between these models, see *id.* at 1117, 1123 (comparing Meiklejohn's communicative precondition model with the participatory model). *See generally* Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517 (1997) [hereinafter Post, *Equality and Autonomy*].

21. *See* Post, *Equality and Autonomy*, *supra* note 20, at 1538 n.41. It is ultimately this point that drives my preferred focus on floors rather than ceilings. *See supra* text accompanying note 1.

22. *See, e.g.*, Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1204 (1994) (proposing that the Constitution should contain a principle "that would guarantee to each eligible voter equal financial resources for purposes of supporting or opposing any candidate or initiative on the ballot in any election held within the United States"); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1382 (1994) (asserting that after exorcising superfluous reasons for reform the "objective that remains, as a potentially clear-cut goal of campaign finance reform, is equality"); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1399 (1994) (noting that redressing either economic or political inequalities is a proper role for government to play in our political system).

23. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948).

24. *See, e.g.*, Post, *Equality and Autonomy*, *supra* note 20, at 1528-29, 1537.

of establishing democratic legitimacy.[25] The Supreme Court quite succinctly articulated the perspective of the participatory model when it famously held in *Buckley* that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed . . . 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[26]

Kathleen Sullivan has shrewdly observed that the source of the egalitarian values so evident in the contemporary debate about campaign finance reform lies in the principle of "one person, one vote."[27] What is striking about this principle, however, is that it does not concern speech, but rather the aggregation of preferences for purposes of collective decision-making. It is not obvious how egalitarian principles of preference aggregation ought to relate to the design of a structure of communication. Yet the very predominance of egalitarian thinking in the campaign finance reform literature suggests the extent to which political speech, which was meant both to inform voting and to endow it with democratic legitimacy,[28] has become identified with and subordinated to the process of voting itself.

This order of priority is evident in Briffault's discussion, which builds on the twin premises that "[e]lections are our central form of collective political decision-making" and that "[c]ampaign communications are a crucial part of elections."[29] Briffault's article is entirely admirable and nuanced in its evaluation of relevant constitutional considerations. Yet it is fundamentally constructed upon a constitutional vision that imagines election speech as integral to "the role of the election as a mechanism for collective choice,"[30] and the articulation and defense of this vision passes by very quickly.

It is important to be clear that there is no simple "fact of the matter" here. It is surely the case that election speech affects elections, but so does all public discourse. If all that were necessary to bring speech within the authority of a managerial domain were that the speech produce effects on the domain, nothing much would be left of public discourse.[31] How we

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25. *See, e.g.*, *id.* at 1537-38.

26. Buckley v. Valeo, 424 U.S. 1, 49 (1976).

27. *See* Sullivan, *supra* note 3, at 671-75.

28. It is both practically and theoretically inaccurate to assume that democratic legitimacy can be secured by the mere fact of voting. *See* Post, *Equality and Autonomy*, *supra* note 20, at 1524 (voting is "merely a mecbanism for decisionmaking, a mechanism that can easily turn oppressive").

29. Briffault, *supra* note 8, at 1763.

30. *Id.* at 1802.

31. The Court has certainly recognized this point. In *Pickering v. Board of Education*, 391 U.S. 563 (1968), for example, the speech of a school teacher adversely affected the operation of a school board, and yet the Court explicitly refused to accept this as a sufficient criterion for subordinating the school teacher's speech to the managerial authority of the school board. For a fuller discussion of the boundaries of managerial domains, see Post, *supra* note 18, at 1784-1809.

decide which speech gets incorporated into the "mechanism" of elections, and which speech remains within public discourse, must therefore depend upon a full assessment of the impact of the distinction on public discourse and on elections.

This suggests that the placement of a line between election speech and public discourse must be sensitive to the nature of the proposed regulation of election speech. Relatively more benign forms of regulation, like disclosure requirements, may constitutionally reach more deeply into the recesses of public discourse than more draconian requirements, like expenditure limitations.

In his article, however, Briffault proposes a boundary between election speech and political speech that, if I understand it correctly, is designed to be clear, distinct, and indifferent to the kind of regulation of election speech that is at issue. This approach may be justified by reasons of policy, but I am confident that any constitutional assignment of the boundary between election speech and public discourse will ultimately prove far more context-dependent. The line proposed by Briffault may therefore in particular circumstances prove over- or underinclusive when measured against constitutional norms.

That having been said, it is difficult to quarrel with Briffault's basic point that if we are to regulate election speech, we ought to do so in ways that are effective rather than futile. Briffault's proposed line sounds plausible to me, but I have neither the experience nor the expertise to evaluate whether it will achieve its commendable policy goals. What I need no expertise to observe, however, is that Briffault's line has the potential for seriously and adversely affecting public discourse, depending upon the severity of the statutory regulations of election speech it is meant to implement.

Of course, this fact would not by itself necessarily render the line unconstitutional. My observation is meant instead merely to motivate the preference I noted at the outset of this Comment for election reforms that seek to establish floors rather than ceilings. It strikes me as plain good sense to attempt to avoid harm to public discourse if we can. We have a chance to avoid such harm if we can attain our ends by providing campaign subsidies rather than by imposing spending restrictions. If subsidies prove insufficient, there will be time enough to proceed to more stringent and problematic measures.

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