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The First Amendment Future of Modern Media and Political Campaign Speech Regulation

by

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This past June, the U.S. Supreme Court handed down one of the last opinions of its term in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011).[1] In a 5-4 decision, the Court ruled that a provision in Arizona's public campaign finance law providing "equalizing" or matching funds violates the First Amendment. With elections in several states on November 8, and next year's presidential and congressional elections on the horizon, the *Arizona Free Enterprise Club* ruling should be of interest to those who follow communications law and policy as it demonstrates the linkage between political campaign finance regulations and modern media regulations.

In particular, *Arizona Free Enterprise Club* reveals the potential for the Supreme Court's jurisprudence in political campaign finance speech cases to influence the Court's future jurisprudence in modern mass media speech cases. The Court's recent political campaign finance decisions borrow from First Amendment precedents in the mass media context. At the same time, however, those recent decisions appear to take more seriously First Amendment protections of speakers' editorial judgments than do many other judicial rulings involving regulatory speech restrictions on modern media speakers. *Citizens United v. FEC* (2010),[2] for instance, also appears especially

emphatic in its rejection of speech restrictions that are claimed to promote the speech of others or undermine the concentration of power held by the regulated speakers.

To the extent that the old scarcity and bottleneck rationales that justified special speech restrictions on modern mass media such as broadcasting and cable are recognized as outdated in light of today's market competition and proliferation of new media outlets, the less justifiable those special speech restrictions will become. In that event, the Court's recent political campaign finance decisions will likely supply a potent source of constitutional authority for treating modern media speech like other forms of protected speech. That will also render less tenable modern media speech restrictions that are said to be justified by their balancing of speech in the market or promotion of the voices of other selected speakers.

Thus, the First Amendment principles advanced in cases like *Arizona Free Enterprise Club* will likely bolster the First Amendment claims made in future cases by modern media speakers. This would not only bring greater unity to the Court's First Amendment doctrine but also afford greater free speech protections for media speakers of all kinds.

Common Elements of Political Campaign Finance and Modern Media Regulation

The close connection between political campaign finance and modern mass media regulation can be seen on a number of fronts. That connection is evident, first and foremost, in the fact that modern media outlets provide the medium through which political messages are disseminated. Political campaign finance restrictions have historically been premised in part on the powerful impact of media advertising on popular opinion, as well as contentions that everyday individuals or less-funded political candidates have reduced access to media channels for disseminating contrary messages.

There is also a close affinity between jurisdictional and other legal issues raised by political campaign finance speech regulation and media speech regulation that hinges on the structural similarities between the federal agencies typically charged with implementing those regulations. Political campaign finance regulation and media regulation are both the province of independent federal agencies – the Federal Elections Commission and the Federal Communications Commission, respectively. Both agencies are constructed according to a progressive model premised on separating such agencies' administrative functions from everyday political influences by vesting control in commissioners nominated by the President and confirmed by the Senate, on staggered multi-year terms, and removable only for cause. And both agencies also exercise a combination of executive, legislative, and quasi-judicial powers.

Accordingly, Supreme Court rulings regarding the constitutional powers and limits of one of those independent agencies, in all likelihood, apply with equal force to each other. Just as *Free Enterprise Fund v. PCAOB* (2010) – a case involving a board appointed by the Securities and Exchange Commission – has separation of powers

implications for similarly modeled independent agencies like the FEC and FCC,[3] so the First Amendment protections against federal regulatory restrictions on speech outlined by the Court in *Citizens United* apply with equal force to the FCC. The same goes with *Arizona Free Enterprise Club*.

In addition, both campaign finance regulations and mass media regulations are often characterized by government restrictions or bans on certain kinds of private speech. Thus, directly or indirectly, both types of regulations pose problems under the First Amendment. Restrictions on private speech through campaign finance regulation includes caps on campaign contributions by various individuals or groups, or burdens on privately funded campaigns through public financing of opposition candidates. And restrictions on private speech through mass media regulation ranges from the old right-of-reply and Fairness Doctrine mandates to media ownership limits to video must-carry and program carriage rules.

Moreover, speech restrictions contained in both campaign finance and mass media regulations implicitly treat government as the arbiter of private speech. Under both types of regulation, government decides whose speech is too powerful and should be curtailed by government and whose speech should be propped up by government. Political campaign finance regulation at issue in *Arizona Free Enterprise Club,* for example, was defended on the grounds that its "promotion of First Amendment ideals offsets any burden the law might impose on some speakers."[4] Modern media regulations such as media ownership restrictions are premised on promotion of diverse viewpoints,[5] while the FCC's recent net neutrality regulation was premised on its supposed promotion of free expression and civic engagement.[6] Accordingly, both kinds of speech restrictions are often propped up using similar arguments about the supposed need for government to eliminate concentrations of power or other distortions in the marketplace of ideas and to give a boost to certain speakers or groups of speakers.

***Arizona Free Enterprise Club*: Mass Media Precedents Inform Political Campaign Speech Jurisprudence**

Arizona Free Enterprise Club is particularly instructive because both the type of speech burden at issue in the case and the reasoning employed by Chief Justice Roberts reveal the jurisprudential connection between First Amendment limits on political campaign finance speech restrictions and First Amendment limits on mass media speech restrictions.

Under the Arizona scheme, when a privately financed political candidate's expenditures, combined with independent groups' expenditures, crossed certain thresholds, it triggered a matching funds mandate. Each extra dollar the privately financed candidate or independent group expends would result in a dollar of additional state funding to the publicly financed opponent.

Chief Justice John Roberts' opinion for the Court in *Arizona Free Enterprise Club* struck down Arizona's matching funds scheme because of the unique burdens it placed on

privately financed candidates and independent expenditure groups. Those burdens violated the First Amendment free speech rights of the burdened candidates and groups.

As the Chief Justice wrote, the Arizona matching scheme "plainly forces the privately financed candidate to 'shoulder a special and potentially significant burden' when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy."[7] For independent expenditure groups, "spending one dollar can result in the flow of dollars to multiple candidates the group disapproves of, dollars directly controlled by the publicly funded candidate or candidates."[8] Such a group could only avoid the triggering of matching funds by either changing its message to focus on an issue instead of a candidate or by silencing itself.

In explaining the majority's ruling, the Chief Justice rejected the idea that the matching funds scheme promotes speech, thereby offsetting any burden the law might impose on privately financed candidates and independent expenditure groups. The Chief Justice pointed out that "[a]ny increase in speech resulting from the Arizona law is of one kind only – that of publicly financed candidates."[9] As the Chief Justice emphatically maintained, "[t]his sort of 'beggar thy neighbor approach' to free speech – 'restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others' – is 'wholly foreign to the First Amendment.'"[10]

Particularly significant to the decision in *Arizona Free Enterprise Club* is its reliance on insights from two case precedents familiar to anyone familiar with mass media law. "We have rejected government efforts to increase the speech of some at the expense of others outside the campaign finance context,"[11] wrote the Chief Justice, comparing Arizona's matching funds scheme to the enforcement of the Florida right-of-reply statute against a newspaper in *Miami Herald Publishing Co. v. Tornillo* (1974).[12] In *Tornillo*, the Court held unconstitutional a state-mandated printed right-of-reply because while that statute was claimed to advance free discussion, newspapers were deterred from speaking in the first place. Chief Justice Roberts also expressly relied on *Pacific Gas & Electric Co. v. Public Utilities Commission of California* (1986),[13] where the Court held unconstitutional a mandated dissemination of a message a utility company disagreed with in its billing envelopes. The Chief Justice noted that *PG&E* is "distinguishable from the instant case on its facts, but the central concern – than an individual should not be compelled to 'help disseminate hostile views' – is implicated here as well."[14]

Neither *Tornillo* nor *PG&E* involved political campaign finance issues. But because *Tornillo* and *PG&E* rejected restrictions on the speech of certain persons in order to promote the speech of others, the Court was able to incorporate the reasoning of those decisions into its own ruling in *Arizona Free Enterprise Club*. And to the extent that future challenged political campaign finance restrictions on speech are advanced using the "beggar thy neighbor" rationale that the Supreme Court has rejected in recent cases such as *Arizona Free Enterprise Club* and *Citizens United*, precedents like *Tornillo* and *PG&E* will continue to lend themselves to the Supreme Court's campaign finance jurisprudence.

Scarcity and Bottleneck Rationales Mean Modern Media Speech Receives Less Protection than Political Campaign-Related Speech

As FSF President Randolph May pointed out earlier this year in written testimony submitted to the House Subcommittee on Intellectual Property, Competition, and Internet, in the time since *Tornillo*, courts have recognized that First Amendment protections for editorial judgments about content also apply to those engaged in editorial and other speech activities using modern mass media technologies such as cable TV companies and broadband ISPs.[15] But *Arizona Free Enterprise Club* and *Citizens United* seem to indicate that the Supreme Court is inclined to more thoroughly apply the logic behind *Tornillo* and *PG&E* in the political campaign finance context than in other cases involving modern communications technologies such as video or the Internet.

The Supreme Court's decisions such as *Red Lion Broadcasting Co. v. FCC* (1969) as well as its *Turner Broadcasting System, Inc. v. FCC I* and *II* decisions from the 1990s – not to mention more recent lower court rulings like *Prometheus Radio Project v. FCC* (2011) – suggest that speech restrictions premised on promoting the speech of others may be more acceptable in the modern media speech context.[16] More recently, the FCC justified its adoption of sweeping net neutrality regulation on the grounds that its rules would promote speech.[17] In *Prometheus*, the Third Circuit recently upheld several of the FCC's cross-ownership rules from constitutional challenges on the grounds that the FCC's regulation increased the diversity of speech.[18] And the "beggar thy neighbor" approach to the First Amendment is still regularly employed by pro-regulation scholars and activists when it comes to modern mass media. Pro-regulation advocates often claim that restrictions on media speech are counterbalanced by the speech-enabling effects of the regulation.

The difference in the Court's treatment of restrictions on political campaign speech and restrictions on other modern media speech may be attributable to regulation of the latter being premised on supposed scarcities – as in *Red Lion* and *Prometheus* – or so-called "bottlenecks" as in *Turner I* and *II*. Those premises underlie the Court's "varying standards approach" to speech regulation of modern communications platforms. The difference might also be explained by the Court's subjection of commercial speech restrictions to intermediate-level scrutiny, whereas political speech restrictions are more often subjected to strict scrutiny.

After *Arizona Free Enterprise Club*: Political Campaign Speech Jurisprudence Informing Modern Media Jurisprudence?

As the rise of competition in the media market and the accompanying proliferation of media outlets are increasingly recognized – because they cannot be easily ignored – the old rationales for imposing special restrictions on certain types of media speakers for purposes of promoting the speech of others will likely erode. That recognition might slowly be growing in the D.C. Circuit, in particular. Two recent rulings by the D.C. Circuit – *Cablevision v. FCC* (2010) and *Cablevision v. FCC* (2011) – conclude that the video

marketplace that was characterized by bottlenecks when the Cable Act of 1992 was passed is now "mixed," with competition varying according to geographic region.[19] A third recent ruling by the D.C. Circuit, *Comcast v. FCC* (2009), seemed even more conclusive in citing "evidence of ever increasing competition among video providers" and concluding"[c]able operators…no longer have the bottleneck power over programming that concerned the Congress in 1992."[20]

And even without directly attacking the scarcity or bottleneck rationales themselves, the Supreme Court has recently expressed, at least in principle, some disfavor toward the "varying standards approach" to communications platforms that is premised on those rationales. In last year's *Citizens United* ruling, for instance, Justice Anthony Kennedy wrote that "[w]e must decline to draw, and then redraw, constitutional lines based on particular media or technology used to disseminate political speech from a particular speaker."[21] The Court expressed disapproval of disparate treatment of different forms of media communications technologies. It is unlikely that the pro-regulatory dispensations resulting from the scarcity and bottleneck rationales would retain any validity or force should the Court adopt a technologically neutral standard for analyzing First Amendment challenges to speech restrictions.

To the extent that the Supreme Court's political campaign speech jurisprudence now takes more seriously First Amendment principles contained in cases like *Tornillo* and *PG&E* than much of its modern media jurisprudence, one should expect those political campaign finance precedents increasingly will be cited in future judicial rulings involving the free speech rights of media speakers in general. In other words, in the time ahead we might likely witness increasing cross-fertilization of the Court's political campaign finance and modern mass media rulings. As the Court's jurisprudence for modern media speech catches up with its political campaign finance jurisprudence, the result will be a more complete embracing of the First Amendment principles recognized in *Tornillo* and *PG&E*. This would mean that modern media speech restrictions that the FCC contends will promote free expression or enhance the speaking opportunities for different viewpoints – such as media cross-ownership regulation, video must-carry and program access regulation, or even net neutrality regulation – would be less likely to prevail in the face of First Amendment challenges to the extent they rely on such rationales.

Conclusion

Arizona Free Enterprise Club demonstrates the affinity between political campaign finance regulations and modern media regulations. One the one hand, it borrows from First Amendment precedents in the mass media context. But on the other hand, its application of those principles is even more vigorous than that witnessed in modern media cases involving technologies such as broadcasting and cable video.

The commitment to free speech principles contained *Arizona Free Enterprise Club* and *Citizens United* thereby have the potential to help reinvigorate First Amendment protections for modern media speakers of all kinds in future cases outside the political campaign speech context. A positive feedback loop between the Court's recent political

campaign finance decisions and its mass media decisions will help to bring about more thorough-going protections on free speech and corresponding limits on government speech restrictions.

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[1] -- U.S. --, 131 S.Ct. 2806 (2011).
[2] -- U.S. --, 130 S.Ct. 876 (2010).
[3] -- U.S. --, 130 S.Ct. 3138 (2010).
[4] 131 S. Ct. at 2820.
[5] *See, e.g., Prometheus Radio Project v. FCC,* 652 F.3d 431, 2011 U.S. App. LEXIS 13855, at *89 (3d Cir. 2011) (citing *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 799-800, 98 S. Ct. 2096 (1978)(upholding substantial government interests in promoting diversified mass communications and viewpoint diversity).
[6] Report & Order, *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52 (December 23, 2010), at 80, para. 146.
[7] *Arizona Free Enterprise Club*, 131 S. Ct. at 2818 (quoting *Davis v. FEC*, 554 U.S. 724, 739, 128 S. Ct. 2759 (2008)).
[8] *Id*. at 2819.
[9] *Id*. at 2820.
[10] *Id*. at 2821 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49, 96 S. Ct. 612 (1976)).
[11] *Id*. at 2821.
[12] 418 U.S. 241, 94 S. Ct. 2831 (1974).
[13] 475 U.S. 1, 106 S. Ct. 903 (1986).
[14] *Arizona Free Enterprise Club*, 131 S. Ct. at 2821, fn. 8.
[15] Written Statement of Randolph J. May, Hearing on "Ensuring Competition on the Internet: Network Neutrality and Antitrust," Subcommittee on Intellectual Property, Competition, and Internet (February 23, 2011), available at: http://www.freestatefoundation.org/images/Written_Statement_on_House_Net_Neutrality_Hearing_022311.pdf.
[16] 395 U.S. 367, 89 S. Ct. 1794 (1969); 512 U.S. 622, 114 S. Ct. 2445 (1994); 520 U.S. 180, 117 S. Ct. 1174 (1997); 652 F.3d 431, 2011 U.S. App. LEXIS 13855.
[17] *See* note 6, *infra*.
[18] 2011 U.S. App. LEXIS, at *89.
[19] 597 F.3d 1306, 1314 (D.C.Cir. 2010); 649 F.3d 695, 712 (D.C.Cir. 2011).
[20] 579 F.3d 1, 8 (D.C.Cir. 2009).
[21] *Citizens United*, 130 S.Ct. at 891.