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For the first time in twenty years, democratic reform is on the American political agenda. Indeed, there is reason to hope that the 1990s will be an important period of political renewal. The new administration and Congress are showing interest in regulations of campaign finance that would help reduce the influence of wealth on elections. Reformers are also exploring strategies for increasing public attention to political issues in campaigns and indeed in daily life. Proposals here range from diminishing the power of advertisers over programming content to encouraging greater network coverage of public issues and ensuring diversity in that coverage. Some even hold out the hope that—in the words of the Clinton/Gore campaign monograph, *Putting People First*—television might be turned from "a weapon of political assassination" into "an instrument of education."

Such proposals are extremely attractive. At a minimum, they could help to conform American practice to the best current approaches in Western Europe. More ambitiously, they could set new standards for promoting democratic goals and political deliberation.

These attractions notwithstanding, reform proposals face serious obstacles, and from an odd quarter. According to some analysts, there are high constitutional hurdles to regulating political contributions and expenditures or commercial broadcasting, even in the name of democratic reform. Some people argue that such efforts would inevitably violate the First Amendment prohibition on laws abridging freedom of speech and of the press. In short, they interpret the First Amendment as hostile to democratic renewal.

I think that this understanding of the First Amendment depends on a large mistake. It is precisely the mistake that fueled early constitutional objections to President Roosevelt's New Deal. In that earlier period, too, libertarianism was an important constitutional faith. And keepers of that faith—including a majority of the justices of the Supreme Court—argued that constitutional protections of liberty precluded democratic experimentation with the economy. In arriving at this conclusion, they identified the economic status quo with a system of constitutional freedom.

The 1930s New Deal for the economy ultimately triumphed over this economic libertarianism. The intellectual background of that triumph lay in the insistence by supporters of the New Deal on a simple point: that the economic status quo was a product of legal rules and political decisions and not simply free, individual market choices. Emphasizing the legal and political foundations of the economic status quo, the New Dealers rejected the identification of that status quo with genuine freedom and so dismissed the idea that new forms of regulation of the market would necessarily restrict liberty.

We now need a New Deal for speech, one that would extend some of the ideas of the economic New Deal to the political arena. A New Deal for speech would require a new understanding of freedom of expression. That understanding would draw a sharp distinction between a "marketplace of ideas" and a system of democratic deliberation.

It would be more self-consciously focused on our constitutional aspirations to democracy. In the name of those aspirations, it would reject our current system of regulation of expression and support a good deal of new government regulation of speech. But to proceed down this path we need first to embrace the key insight of the original New Deal about the legal-political foundations of "free markets." Applied to speech, that insight shows that our current "marketplace of ideas" is itself a system of regulation, not an untrammeled intellectual bazaar. So the choice we now face is not "leaving expression unregulated" or "regulating" it, but deciding among different systems of regulation, some of which serve the aims of democratic deliberation better than others.

Politics and Markets

To understand what I have in mind, I need to say a little more about the original New Deal. From about 1905 to 1935, the Constitution was regularly invoked to prohibit efforts by states or the nation to address economic ills. For example, minimum wage and maximum hour laws were seen

as unjustifiable exactions—"takings"—from employers for the benefit of employees and the public at large. Government must be neutral in general and between employers and employees in particular. It should respect their free choices. A violation of the neutrality requirement, thus understood, would count as a violation of the constitutional protection of liberty.

In practice, this meant that the Constitution prohibited government interference with the economic status quo—with existing distributions of economic rights and entitlements. In the pre-New Deal view, existing distributions marked the boundary not only between partisanship and neutrality, but between government action and inaction as well. When government protected existing distributions, it was not really acting at all, but only permitting free market choices to determine wages and hours. When the government altered the existing distributions—for example, imposing a minimum wage—it would be seen as "acting," thus raising constitutional doubts. The rallying cry "laissez-faire" captured such ideas. The fear of, and more importantly, the very conception of "government intervention" resulted from this basic approach.

The New Deal reformers insisted that this entire framework was built on fictions. President Roosevelt referred to "this man-made world of ours" and emphasized that "economic laws are not made by nature. They are made by human beings." The pre-New Deal framework treated the existing distribution of resources and opportunities as pre-political. It saw minimum wage and maximum hour laws as introducing government into an otherwise private or voluntary sphere. But the New Dealers claimed that legal rules of property, contract, and tort produced the set of entitlements that ultimately yielded market hours and wages. Those hours and wages were not part of a voluntary, law-free realm; they were an artifact of legal choices.

In fact, to the New Deal reformers, the very terms "free market," "regulation," and "government intervention" were misleading. The laissez-faire system itself required government allocations of legal rights, and government protection of those rights. In allocating those rights and providing that protection, the government was acting. The government did not "act" only when it disturbed existing distributions. The initial problem with the system of "laissez-faire" was therefore conceptual. The term itself was a conspicuous fiction.

The New Dealers, of course, were not interested in simply registering this conceptual point. Their principal aim was to reject the libertarian's a priori identification of markets with liberty, and to insist that we evaluate different regulatory systems pragmatically and in terms of their consequences for social efficiency and social justice. The New Dealers understood that in general, a market system—for property or for speech— promotes both liberty and prosperity; its inevitable origins in law do not undermine that fact. But the New Dealers thought that courts should respect democratic judgments about the need to limit free markets, and reject an easy resort to the Constitution to pre-empt those judgments. A democratic conclusion that free markets sometimes constrained liberty—embodied in a law calling for maximum hours or minimum wages— was plausible and entitled to judicial respect. Such regulations might be wise or unwise, but the Constitution should not serve as an obstacle.

Constitutionalism, Democracy, and Speech

These ideas have played astonishingly little role in the law of free speech. For purposes of speech, our current understandings of partisanship and neutrality, or government action and inaction, are identical to those that predate the New Deal. The chief failing of American thought with respect to free speech is that it has not taken the New Deal reformation seriously enough.

To understand the point, we need to have a sense of what a successful system of free expression should look like. I suggest that such a system must promote democratic goals, which have of course been a prime impetus behind our enthusiasm for a free speech principle. To promote those goals, the system should have two minimal features.

First, it should allow for *broad and deep public attention* to public issues. An absence of information and attention is a decisive problem for the system. Serious issues must be covered, and they must be covered in a serious way. Indeed, the mere availability of such coverage may not

be enough if few citizens take advantage of it, and if most viewers and readers are content with programming that does not deal in depth with public issues.

Second, there must be public exposure to *an appropriate diversity of view.* The kind of diversity that counts as appropriate is, of course, controversial. I suggest only that a broad spectrum of opinion must be represented, that people must be allowed to hear divergent views, and that it is important to find not merely the conventional wisdom, but also challenges to the conventional wisdom from different perspectives. Without exposure to such perspectives, public deliberation will be far less successful, and the democratic system will be badly compromised.

A system of free markets in speech often fails on the relevant counts; regulatory reforms could make things better. I do not claim that speech rights should be freely subject to political determination, as are current issues of occupational safety and health, for instance. I do, however, insist that in some circumstances, policies that seem to involve government regulation of speech actually might promote the depth and diversity that are central to a system of free speech, and should not be treated as abridgments at all. I mean also to argue that what seems to be free speech in markets might, in some circumstances, amount to an abridgment of free speech.

It will be tempting to think that any such argument amounts to a *bizarre,* plea for more government control of speech. But this criticism misses the point. Suppose, for example, that someone tries to get access to the airwaves to make a political statement. Suppose, too, that the networks, refused to allow the statement to air. If so, then the government's own grant of legal protection—rights of exclusive use—to the networks might itself be responsible for compromising democratic values. The exclusion of the would-be speaker is not simply a product of the choices of the networks. It is made possible by the law of civil and criminal trespass. If government changed the rules—if networks were required to present competing perspectives—then the networks would not be able to make the choices they now make.

Here, then, is the lesson of the New Deal for speech: The state is deeply implicated in, indeed responsible for, what we now count as "private" action in the marketplace of ideas. We cannot have markets without law. This is not an argument against markets, but we should judge the status quo and efforts at reform by their consequences, not by question-begging characterizations of "threats from government." Efforts to promote greater quality and diversity in broadcasting, for example, seek a new and better regulatory regime, not to replace freedom with "government intervention."

Broadcasting, Citizenship, Democracy

If we wanted to increase the democratic character of our politics, we would explore many proposals for reform. I deal with broadcasting regulation in some detail; the area has obvious general importance, and it can serve as a case study having broad implications. I discuss some of these implications in the case of campaign finance regulation.

Regulation of Broadcasting

For much of its history, the Federal Communications Commission (F.C.C.) imposed the "fairness doctrine" on broadcast licensees. Among other things, the fairness doctrine required licensees to devote time to issues of public importance and to broadcast speech by people of diverse views.

The last decade witnessed a mounting constitutional assault on the fairness doctrine. One reason for the doctrine was the scarcity of licenses, but licenses are no longer scarce. The F.C.C. concluded in the 1980s that the fairness doctrine violates the First Amendment because it is an effort by government to prevent broadcasters from choosing what they say.

The Constitution does forbid any "law abridging the freedom of speech." But is the fairness doctrine such a law? An alternative view is that the fairness doctrine promotes "the freedom of speech" by broadening access to the airwaves and ensuring more diversity than the market provides. Perhaps this is true; perhaps not. Even to address this issue, however, we need first to

reject the F.C.C.'s contention that the fairness doctrine represents impermissible government interference with an otherwise law-free and voluntary private sphere. Extending the insights of the New Dealers, we should assess the fairness doctrine by exploring the relationships between the goals of a system of free expression and various alternative regulatory systems.

Three assessments of these alternatives naturally suggest themselves. First, courts might decide that the current broadcast market— without requirements of fairness—is unconstitutional because the existing property rights produce little political discussion or exclude certain views. (Recall that exclusion is a product of law.) Pursuing this path, they might conclude that the fairness doctrine is not simply permissible, but actually mandated by the Constitution. I think that courts should be cautious about reaching this conclusion, in part because the issue turns on complex factual issues not easily within judicial competence. A second possibility is that fairness-style regulation of the market might be upheld if the legislature has made a considered judgment, based on a factual record, that the particular regulation will promote First Amendment goals. The third possibility is to invalidate government regulation of the market because it discriminates on the basis of the viewpoint of speakers, or actually diminishes either attention to public affairs or diversity of view.

The first lesson of the New Deal for speech is that judgments about the consistency of proposed regulations with the First Amendment must depend in large part on the facts. So let's consider some of them.

Some Facts

We now have a good deal of information on the content of broadcasting. For example, local television news devotes very little time to genuine news. Instead, coverage is principally devoted to movies, television programs, and sensationalized disasters. During a half-hour of news programming, no more than eight to twelve minutes involve news. Moreover, the stories themselves— which tend to focus on fires, accidents, and crimes—typically last for twenty to thirty seconds. Coverage of government tends not to describe the content of relevant policies, but instead focuses on brief "soundbites" or sensational and often misleading "human impact" anecdotes. In addition, there has been greater emphasis on "features" dealing with popular actors, or entertainment shows, or even the movie immediately preceding the news. Economic pressures seem to be pushing local news in this direction even if reporters might prefer to deal with public issues more seriously.

With respect to network news, the pattern is similar. Consider the coverage of presidential elections. In 1988, the average "soundbite" from the candidates was about ten seconds long, a dramatic contrast to the much longer and more substantive excerpts in the 1960s. In the same year, almost 60 percent of the national campaign coverage involved "horse race" issues—who was winning, who had momentum—while about 30 percent involved issues and qualifications. In 1992, there was a preliminary effort to counteract the "sound-bite" phenomenon, but by the end of the campaign, the average length of candidate statements was even smaller than in 1988—about eight seconds.

There is evidence as well of advertiser influence over programming content. No conspiracy theory appears plausible; but some recent events are disturbing. Advertisers have a large impact on local news programs, especially consumer reports. Advertisers appear especially reluctant to sponsor material that deals with controversial subjects or that endorses a controversial point of view. It is for this reason unlikely that a program taking (for example) a pro-life or pro-choice position could attract sponsors during primetime. Indeed, there are many examples of advertisers refusing to fund or withdrawing support from shows that do not create "a favorable buying atmosphere"—including shows that are politically controversial, that put businesses generally in an unfavorable light, or that are "depressing."

Educational programming for children, meanwhile, simply cannot acquire sponsors. In 1974, the F.C.C. concluded that "broadcasters have a special obligation to serve children," and thus pressured the industry to adopt codes calling for educational programs. But in 1981, the new

F.C.C. Chair, Mark Fowler, rejected this approach. For Fowler, "television is just another appliance. It's a toaster with pictures." Shortly thereafter, network programming for children dramatically decreased, and programs based on products increased.

Correctives and the First Amendment

Regulatory strategies cannot solve all of these problems, but they could help with some of them,

For example, there appears to be a strong case for public provision of high quality programming for children, or for obligations, imposed by government on broadcasters, to provide such programming. The provision of free media time to candidates would be especially helpful, simultaneously providing attention to public affairs and diversity of view, while overcoming some of the distorting effects of "soundbites" and financial pressures.

More dramatically, government might require purely commercial stations to provide financial subsidies to public television or to commercial stations that agree to provide less profitable high quality programming. Or government might award subsidies or "points" to license applicants who promise to deal with serious questions or provide public affairs broadcasting even if unsupported by market demand.

Many steps might be taken to reduce the effects of advertising on program content. We might impose a tax on advertising proceeds from the newspaper or broadcasting industry as a whole and use the proceeds to subsidize circulation or programming. (Sweden does something of this sort.) The consequence should be to decrease the incentive to respond to advertising desires and to increase responsiveness to readers and viewers—while at the same time increasing attention to controversial issues.

It is worthwhile to consider more dramatic approaches as well. These might include rights of reply for both candidates and commentators, reductions in advertising on children's television, content review of children's television by nonpartisan experts, or guidelines in the form of recommendations designed to encourage attention to public issues and diversity of view.

Objections

Of course there may be problems with some of these proposals. One general objection is that in an era of cable television, the problems I have described disappear. People can always change the channel. Some stations even provide public affairs broadcasting around the clock. Both quality and diversity can be found as a result of the dazzling array of options made available by modern technology. Why should a foreclosure of expressive options not be viewed as an infringement on the freedom of speech?

The most basic response is that we should be extremely cautious about the use, for constitutional and political purposes, of the notion of "consumer sovereignty." Consumer sovereignty is the conventional economic term for the virtues of a free market, in which commodities are allocated through consumer choices, as measured through the criterion of private willingness to pay. Those who invoke free choice in markets are really insisting on consumer sovereignty as the governing free speech principle. But the constitutional conception of "sovereignty" is the relevant one for First Amendment purposes, and that conception has an altogether different character.

According to the constitutional conception of sovereignty, we should respect not private consumption choices, but the considered judgments of free and equal citizens. In a well-functioning polity, laws frequently reflect those judgments—what might be described as the convictions of the public as a whole. Those convictions can and often do call for markets themselves. But they might also diverge from consumption choices—a familiar phenomenon in such areas as environmental law, protection of endangered species, social security, and antidiscrimination law. Democratic aspirations should not be disparaged. And in the context at hand, the people, acting through their

elected representatives, might well decide that democratic liberty, calling for quality and diversity of view in the mass media, is more valuable than consumer sovereignty.

A thought experiment may make the point more vivid. Imagine a regime in which there was extraordinary competition with respect to broadcasting—such astonishingly robust competition as to ensure 10,000, or 100,000, or 250 million separate stations. In the most extreme of these cases, each person would even be allowed to see or hear a station all her own. If technology progressed this far, and if the marketplace worked perfectly to satisfy consumer tastes, would our problems be solved? On the contrary, a system of this kind would not be anything to celebrate. .It could well entail the elimination of a shared civic culture, which contemplates at least a degree of commonality among the citizenry. More importantly, it could fail to promote attention to public affairs and diversity of view. For those concerned with democratic goals, everything depends on the relationship between the robust marketplace and those goals; this issue cannot be resolved on an a priori basis, or through a belief in axiomatic connections between markets and liberty.

There are other, more familiar, objections as well. Most obviously, some new regulations might leave room for discretion and abuse in making decisions about quality and public affairs. The market, surrounded by existing property rights, may restrict speech; but at least it does not entail the sort of official approval or disapproval, or overview of speech content, that would be involved in the suggested New Deal.

But there are several responses to such objections. The current system itself creates serious obstacles to a well-functioning system of free expression, and government is responsible for that system. The absence of continuous government supervision should not obscure the point. Moreover, the right institutions could ensure that such decisions can be made in a nonpartisan way. Regulatory policies have helped greatly in the past. They are responsible for the very creation of local news in the first instance. They have helped increase the quality of children's television. Public television, which offers a wide range of high quality fare, owes its existence to governmental involvement. Nor is there any reason grounded in evidence—as opposed to market theology—to think that regulatory solutions of these sorts would inevitably be inferior to the current system.

Finally, any regulations would be subject to a degree of judicial scrutiny under the First Amendment. Government would be banned from favoring particular points of view. The free speech principle would be satisfied by a broad requirement that public affairs programming, or free time for candidates, be provided. It would be violated by a requirement that feminists, pro-lifers, or the Democrats in particular must be heard. And the legislature must generate a factual record to support any regulatory alternative to the existing regime.

Campaign Finance

Many people have argued for restrictions on campaign finance. In their view, such restrictions are an effort to promote political deliberation and political equality by reducing the distorting effects of disparities in wealth.

But some people have said that campaign finance laws violate the First Amendment and so lie beyond the legitimate reach of the democratic process. Indeed, some people claim that these laws unjustly take from rich speakers for the benefit of poor ones. It was on this rationale that the Supreme Court invalidated expenditure limits in the crucial 1976 case of *Buckley v. Valeo.* In the key passage, the Court said 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...."

The *Buckley* Court issued several holdings. According to the Court, the government could constitutionally limit campaign *contributions.* Such contributions could create the appearance and even the reality of corruption, in the form of cash in return for political favors. But legal restrictions on campaign *expenditures* (by candidates themselves or by people acting in the interest of but independently of the candidate) would be unacceptable. Restrictions on expenditures fall in the category of unacceptable efforts to "restrict the speech of some elements ... in order to enhance the relative voice of others." With its uneasy distinction between contributions and expenditures,

Buckley has produced an exceptionally complex body of law. It has produced the current legal morass with respect to the status of political action committees (PAC.s). In the aftermath of *Buckley,* it is clear that serious constitutional issues are raised by any efforts to limit expenditures by or contributions to PACs.

The *Buckley* framework strikingly reflects pre-New Deal understandings. According to the Court, reliance on markets *is* governmental neutrality; letting the existing distributions determine political expenditures is the mark of government inaction; it does not constitute government action.

But it should now be clear that this is all a mistake. Elections based on existing distributions are actually subject to a regulatory system, made possible and constituted through law. That law consists not only of legal rules protecting the present distribution of wealth, but more fundamentally, of legal rules allowing candidates to buy speech through markets.

Efforts to redress economic inequalities, or to ensure that they do not translate into political inequalities, should not be seen as impermissible redistribution, or as the introduction of government regulation where it did not exist before. Instead we should evaluate campaign finance laws pragmatically in terms of their consequences for the system of free expression. Much will depend on the particular regulation under discussion. My point is that here, as in the broadcasting context, market theology is operating to bar a serious look at the democratic effects of different regulatory systems. We should be entitled to examine such alternatives as full, or increased, public financing; flat caps on donations; and curbs on contributions to or expenditures by political action committees. These proposals raise serious issues about the nature of our commitment to political equality, indeed about our self-definition as a democratic system. They should not be foreclosed by reflexive resort to the Constitution.

These are simply a few examples of the sorts of questions that would arise if we were to focus our thinking about the First Amendment on issues of democratic self-government. We would see that there is a sharp difference between a marketplace of ideas and a system of democratic deliberation. I do not deny that a system of markets in speech has major advantages over other forms of regulation. But our current system of free expression does not sufficiently serve the democratic aspirations that underlie the First Amendment itself. It would therefore be a supreme irony if the First Amendment turns out to be an obstacle to such democratic experiments as campaign finance reform and improvements of the broadcasting market in the interest of political deliberation.

The most dangerous aspect of current free speech debates is that this very difference has become decreasingly visible; it sometimes seems as if deregulated markets *are* the system of free expression. Those who value a democratic conception of the First Amendment should insist that this is wrong—that free markets in speech have only a contingent and partial connection with free speech goals. We should not allow the First Amendment, the overarching symbol of our commitment to democratic self-governance, to be transformed into an obstacle to efforts to improve democratic deliberation. We should instead attempt to create a system of free expression that is both old and new—old in its emphatic reaffirmation of democratic aspirations; new in its willingness to adapt our practices to sustain those aspirations under changing social conditions.