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The Burger Court and the Political Process: Whose First Amendment?

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In the past decade, the Supreme Court has engaged in a highly selective form of judicial activism in its evaluation of the constitutionality of restrictions on political expression. Limitations on political expenditures, whether by private individuals, corporations, candidates, or political action committees, have been tested by extraordinarily demanding standards and have almost invariably been held unconstitutional. In *Buckley v. Valeo*,[1] the Court invalidated provisions of the Federal Election Campaign Act[2] imposing limitations on the amount of money individuals and political candidates could spend in the course of political campaigns. In *First National Bank of Boston v. Bellotti*,[3] the Court invalidated a Massachusetts law restricting how corporations could spend money to promote political causes. In *Federal Election Commission v. National Conservative Political Action Committee*,[4] the Court invalidated a provision of the Presidential Election Campaign Fund Act[5] limiting the amount of money PAC's could spend promoting presidential candidates. In these and similar decisions, the Court has applied strict scrutiny to restrictions on political expression and given no deference whatever to legislative judgment.

In contrast, the Court has applied an extraordinarily deferential standard of review in a series of decisions involving restrictions on other forms of political expression. Indeed, once one moves beyond the specific context of cases like *Buckley*, *Bellotti*, and *NCPAC*, the Court in recent years has consistently and almost without exception upheld restrictions on political speech. In *Lehman v. City of Shaker Heights*,[6] the Court upheld a city policy permitting commercial, but not political, advertising to be

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1. 424 U.S. 1 (1976).

2. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-41 & 451-54 (1982) and scattered sections of 18 U.S.C. and 47 U.S.C.).

3. 435 U.S. 765 (1978).

4. 105 S. Ct. 1459 (1985).

5. Pub. L. No. 92-178, 85 Stat. 563 (1971) (codified as amended at I.R.C. §§ 9001-13 (1982)). The provision relating to political action committees is I.R.C. § 9012(f).

6. 418 U.S. 298 (1974).

displayed in city buses. In *Greer v. Spock*,[7] the Court upheld a rule prohibiting individuals wishing to communicate with soldiers from entering the otherwise wholly public areas of a military base to make speeches on political issues. In *Heffron v. International Society for Krishna Consciousness*,[8] the Court upheld a Minnesota State Fair rule prohibiting all peripatetic leafleting on the grounds of the State Fair. In *United States Postal Service v. Council of Greenburgh Civic Associations*,[9] the Court upheld a Postal Service rule prohibiting groups from placing unstamped material in letter boxes. In *City Council of Los Angeles v. Taxpayers for Vincent*,[10] the Court upheld a Los Angeles ordinance prohibiting the posting of signs on public property, in this case, public utility poles. Finally, in *Cornelius v. NAACP Legal Defense and Education Fund*,[11] the Court upheld an Executive Order excluding any otherwise eligible organization that engages in political advocacy from the federal employees' charitable fund raising program.

My concern, I should note, is not that the Court was necessarily wrong in its decisions in *Buckley*, *Bellotti*, and *NCPAC*. Rather, the Court has seriously underestimated the cumulative significance of the restrictions upheld in *Lehman*, *Vincent*, *Greer*, *Heffron*, *Greenburgh*, *Cornelius*, and similar decisions.[12] The Court seems oblivious to the reality that many participants in the political process, particularly at the local level, do not have large amounts of cash to spend and therefore cannot afford access to television, radio, newspapers, and other mainstream means of communication. A healthy system of free expression, a vital political process, demands that groups and individuals have access to a wide range of alternative means of expression in their efforts to communicate their views effectively to others. By adopting a highly elitist perspective, the Court has permitted the continuing constriction of such alternate means of communication.

To achieve its results in these cases, the Court has relied on three distinct doctrines. First, the Court has maintained repeatedly in these cases that the challenged restriction is permissi-

7. 424 U.S. 828 (1976).
8. 452 U.S. 640 (1981).
9. 453 U.S. 114 (1981).
10. 104 S. Ct. 2118 (1984).
11. 105 S. Ct. 3439 (1985).
12. Metromedia v. San Diego, 453 U.S. 490 (1981).

ble because "adequate alternative means of communication remain available." As the Court recognized in the *Schneider* case almost fifty years ago, however, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[13] There are grave dangers in the assumption that courts and legislatures can fairly and reliably determine whether alternative means of expression are "adequate" for particular groups or individuals who disagree with such a judgment. Although the existence of alternative means of communication is not irrelevent to the determination of when First Amendment rights have been abridged, it is a matter that must be approached with sensitivity and caution.

The dangers in this inquiry, and the Court's own failure to approach the inquiry in a sensitive and forthright manner, are evident throughout the decisions. In *Vincent*, for example, the Court, in upholding the prohibition on posting political signs on public utility poles, maintained that "ample alternative modes of communication" existed.[14] In particular, the Court pointed to the ability of individuals to post political signs on private property and to distribute leaflets by hand. These means of expression, however, are clearly less efficient and less effective than the means of expression prohibited in *Vincent*. The Court has, in truth, paid only lip-service to the "alternative means" inquiry.

The second doctrine that the Court has invoked repeatedly in these decisions is embodied in the idea that "content-neutral laws are not serious threats to free expression." Content-neutral restrictions, as a class, are generally less threatening to free speech than restrictions based on content,[15] but the Court has taken the point too far. The Court appears to have concluded that, so long as a law does not discriminate on the basis of content, does not involve a public forum, and does not place a limit on the expenditure of cash, it should be upheld. Even content-neutral restrictions, however, can pose a serious threat to First Amendment values. Like content-based laws, content-neutral laws can have significant content-differential effects, for

13. Schneider v. State, 308 U.S. 147, 163 (1939).

14. 104 S. Ct. at 2133.

15. *See* Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

although neutral on their face, they can skew the marketplace of ideas. As Justice Black observed more than forty years ago, "[l]aws which hamper the free use of some instruments of communication thereby favor competing channels. . . . [and] can give an overpowering influence to views of owners of legally favored instruments of communication."[16] Moreover, apart from the content-differential effect of content-neutral restrictions, such restrictions cannot help but constrict the available means of communication, thereby impairing the vitality and liveliness of public debate.[17]

The third doctrine that the Court often has relied upon is premised on the idea that "exclusions from non-public forum public property are permissible so long as they are viewpoint-neutral and rational." In its 1972 decision in the *Grayned* case, the Court abandoned the previously rigid division of public property into public and non-public fora, proclaiming that the "crucial question" in every case "is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[18] In its more recent decisions, the Court has abandoned *Grayned* and created an even more rigid and artificial distinction between public fora, limited public fora, and non-public fora, in practical effect concluding that, except in so-called public fora, content-neutral restrictions on public property are per se constitutional. Like the discredited doctrine that pre-dated *Grayned*, the Court's new set of categories elevates the property interests of the state to an unreasonable degree. By narrowly defining public fora, the Court has effectively made all public property other than streets and parks off-limits to free expression so long as the state acts in a content-neutral manner.

Having said all this, I hasten to add that I do not mean to suggest that a person should have the right to speak whenever and wherever he likes. On the contrary, some governmental regulation of speech is appropriate, but what is needed is reasonable accommodation, not complete abandonment of the individual's right to speak in public. In cases like *Vincent* and *Metromedia*, the government should be permitted some discre-

16. Kovacs v. Cooper, 336 U.S. 77, 102 (1949) (Black, J., dissenting).

17. For a more comprehensive analysis of this issue, see Stone, *Content Neutral Restrictions*, 54 U. Chi. L. Rev. __ (1987).

18. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

tion to regulate the size, number, location, and appearance of signs and billboards to protect legitimate aesthetic and traffic safety concerns, but the government should not be allowed to ban *all* signs and billboards, thereby eliminating these means of expression. In cases like *Heffron*, the government should be permitted to restrict the number, location, and behavior of leafleters to protect legitimate regulatory concerns, but it should not be permitted to ban all leafleters. Similarly, in cases like *Lehman* and *Cornelius*, once the government voluntarily decides to open its property or other facilities to speech, it should not have the discretion to exclude political expression, which lies at the very core of the First Amendment, merely because the Court can conceive of some rational explanation for the exclusion. As Justice Roberts recognized in his landmark opinion in the *Hague* case almost fifty years ago, the right to freedom of expression "must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."[19]

The Court's selective activism in protecting the expenditure of cash but of almost no other means of expression is disturbing both because it fails to protect the interests of those who do not have access to mainstream means of expression and, perhaps more importantly, because it reflects a non-neutral judgment about *whose* speech must be preserved.

19. Hague v. CIO, 307 U.S. 496, 516 (1939) (Roberts, J., concurring).