Speech and Markets

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Deborah Hellman, *Money Talks but it Isn't Speech*, 95 **Minn. L. Rev.** -- (forthcoming 2011), available at SSRN.

Is there anything new to say about the constitutionality of campaign finance regulation? Well, actually, there is, and Deborah Hellman says it in her fine new article "Money Talks but It Isn't Speech." The significance of Hellman's article extends beyond the vexed yet tired issue of campaign finance, however. Her work is an important intervention in a central – perhaps the central – problem in modern constitutional law.

To understand what that problem is, we need a brief and necessarily crude overview of twentieth century constitutional history. During the first third of the century, civil liberty rights, to the extent that they existed at all, were closely linked to property and market rights. The reigning ideology treated both as within a private sphere. Liberty was defined as the absence of government intervention, and, at least in principle, there was no distinction between free markets in goods and free markets in speech, both of which were judicially protected by limits on the political branches.

On the conventional account, Franklin Roosevelt's struggle with, and ultimate victory over, the Old Court ended constitutional protection for property and markets. Property distributions were moved from the constitutionally mandatory sphere to the politically discretionary sphere. On this view, it was at least open to the political branches to treat true economic liberty as necessitating, rather than precluding, government intervention.

The question, though, was what to do about civil liberties. In the famous *Carolene Products* case, the Roosevelt court provided an answer: Although markets and property entitlements were subject to political regulation, civil liberties were not. In other words, the old ideology equating freedom with the absence of government was preserved in the civil liberties sphere, even as it was abandoned in the economic sphere. In the wake of the *Carolene* reformulation came a burgeoning of civil liberties protections (always equated with the absence of government) — in particular greatly expanded criminal procedure rights, speech and religious rights, and rights to reproductive autonomy. At the same time, the Roosevelt Court abruptly terminated constitutional protection for private economic arrangements.

By the early twenty-first twentieth century, the *Carolene* reformulation has begun to fray around the edges. In some areas, the Court has retreated from the protection of civil liberties, and there are hints of renewed interest in economic protection. Yet, by and large, the reformulation has endured. What has endured as well, though, are the tensions at the heart of the reformulation – tensions that should have been apparent from the beginning. Briefly stated, the problem is this: No civil liberty can be exercised in the absence of some sort of property entitlement. For example, it does no good to be secure in one's home from unreasonable searches and seizures if the government can simply declare that it is no longer one's home, but instead government property. Similarly, all speech must occur somewhere and use something. If the government is entirely free to shift property entitlements to the somewhere and something, then it is free to control speech as well.

This deep contradiction is right at the surface of the debate over campaign finance regulation. Everyone concedes that political campaigning is free speech in its purest sense. But campaigning costs money. If the *Carolene* compromise means that the government can control the money, doesn't it follow that it can control the speech as well?

It is at this point that Hellman's proposal takes hold. Hellman starts by noticing what seems to be a contradiction in our civil liberties jurisprudence: Some constitutional rights are assumed to entail the right to use money to exercise them, while others are not. For example, the right to own a gun includes the right to purchase the gun. The right to have an abortion includes the right to pay a doctor to perform it. But the right to vote does not include the right to buy and sell votes, and the right to child rearing does not include the right to buy children.

Hellman resolves the contradiction by respecting both halves of the *Carolene* reformulation. Because markets are not constitutionally protected, the government has discretion to create nonmarket methods for distributing certain goods, even if the goods themselves are constitutionally protected. When it does so, it also has the ancillary power to prohibit the use of money to buy the goods. But when the government chooses to use market methods of distribution, then the other half of the *Carolene* reformulation takes hold, and it must allow the goods to be purchased.

At first, it may seem that this solution is entirely circular: The government can prohibit the purchase of constitutional goods when there is not a market method of distribution, and there is not a market distribution when the government prohibits the purchase of the goods. Hellman breaks out of the circle by insisting that if there is not a market distribution, then the Constitution demands some other method of distribution. Thus, the government could ban the sale of guns, but if it did so, it would have to have some other (presumably constitutionally adequate) method of getting guns into at least some people's hands.

It follows from this that campaign finance regulation is permissible if, but only if, the government has decided to distribute the means to speak in political campaigns by a nonmarket mechanism. Hellman is uncertain whether the McCain-Feingold regime satisfies this requirement, but at least it is clear that, under her approach, a system that relied entirely on public financing could also prohibit private contributions.

Does this approach solve the *Carolene* conundrum? Not entirely. For example, at least in theory, her approach seems to mean that the government could nationalize all newspapers and then distribute them for free. Perhaps she has an argument that avoids this conclusion, but the paper does not present it.

Surely, though, we cannot expect a single doctrinal intervention to solve a fundamental contradiction in constitutional law. At base, the contradiction rests on the impossibility of providing meaningful civil liberties protections in an economic system that produces huge differences in wealth. That contradiction is not going away any time soon.

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