Arguing with Money: Reasonableness and Change in *Citizens United v. Federal Election Commission*

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This paper explores the monetary features of political argument. Corporate speakers have been a concern of rhetorical and communication scholars for over thirty years (Cheney & McMillan, 1990; Deetz, 1992; Heath, 1980). The free speech protection of corporate money for producing and distributing political arguments has given rise to an object of regulation that I have labeled money/speech (Greene, 2007). *Buckley v. Valeo* (1976) enshrined a free speech right to the expenditure of money by striking down elements of the Federal Election Campaign Act of 1971 that limited the money spent by candidates and associated groups to influence an election. Under what conditions is it reasonable to think of money as a form of speech? And how does the judicial opinions of the U.S. Supreme Court use the ideal of reasonableness to promote and challenge regulations of money/speech in political elections? To explore these questions, this paper provides an analysis of the competing visions of reasonableness in the majority and minority opinions in *Citizens United v. Federal Election Commission* (2010). The paper argues that Justice Roberts’s majority opinion advances an epistemic approach to political reasonableness while Justice Stevens’s dissent advances a normative form of political reasonableness. In this case, an epistemic reasonableness trumps political reasonableness making social change against multinational capitalism more difficult.

The Reasonable as an Ideal of Public Argument

Perelman’s (1979) distinction between the reasonable and the rational suggests a rhetorical perspective for social change. In regard to the law, Perelman writes that:

[The] rational corresponds to adherence to the immutable divine standard or to the spirit of the system, to logic and coherence, to conformity with precedents, and to purposefulness; whereas reasonable, on the other hand, characterizes the decision itself, the fact that it is acceptable or not by public opinion, that its consequences are socially useful or harmful, that it is felt to be equitable or biased. (p. 121)

The reasonable finds its expression after an action: in an audience’s reception, in its effects, and in how decisions are held accountable to the norm of equality. For Hicks (2003), “Perelman’s claim that the rational and the reasonable are distinct, freestanding ideals – that they are not interchangeable terms, but in fact, in certain cases, the rational and the reasonable are in precise opposition – to be his most important political insight” (p. 471). Perelman and Olbrechts-Tyteca (1969)
warn of the necessity to "examine [the] interference or correspondence" between "reasoning relative to truth and those relative to adherence" (p. 4). Yet rhetorical approaches to argumentation, according to Hicks (2003), tend to displace the dialectical relationship between the rational and the reasonable and nominate "the reasonable . . . [as] the condition of possibility for the rational" (p. 471).

For Tindale (2010), the reasonable is potentially a situated universal invented through argumentative encounters with an audience. A speaker comes to know the reasonable by experiencing the common opinions of particular audiences while those same audiences adhere, more or less, to new understandings of the reasonable offered by the speaker. From such a rhetorical perspective, the universal is cashed out less in the "absolute . . . timeless . . . self evident character" of a universal audience as a figure of abstract rationality than the "particular audience, time, and place and to the argumentative situation for which it is relevant" (p. 350). The particular audience may be, as Tindale claims, "part of the given an arguer must deal" (pp. 501-551), but its invention as a universal suggests how the reasonable resides in the universal audience as a persona conjured by the discursive techniques of the arguer.

The interactional dimension of the reasonable suggests, for Hicks (2002), a political ideal for reasonableness separate from an epistemic approach to reasonableness. For Hicks,

Political reasonableness . . . is the willingness to harmonize our freedom with the freedom of others, to justify our actions and have those actions be critiqued on the basis that they afford equal respect to others . . . [t] should hold for all members of a political community independently of whether or not it is intrinsically derived from their moral tradition. (p. 107)

To explore the conceptual parameters of reasonableness, Hicks, Margesson and Warrenburg (2005) argue the New York Times editorial page references reasonableness in four ways: as prudence, rationality, fairness and appropriateness. The authors interpret prudence and rationality as epistemic forms of reasonableness and fairness and appropriateness as political forms of reasonableness. For Hicks (2002), political reasonableness is inclusive of epistemic elements, but the political dimensions are critically independent from the epistemic dimensions. In this view, the dialectical relationship between the reasonable and the rational, first set out by Perelman, is being re-specified as two competing forms of political reasonableness: one form that orients political reasonableness toward epistemic standards of reason (whether formal or practical) and another form of political reasonableness oriented to normative standards of interaction (for example, equality and fairness). For Hicks, the interactional character of an argumentative situation nominates a political idea of the reasonable as a critical ideal of argument evaluation. As such, the epistemic and political dimensions of reasonableness may be as often opposed to one another as complementary. The U.S. Supreme Courts' reasoning about regulations of money spent in campaigns provides an important exemplar for how
epistemic and normative standards of political reasonableness compete with one another.

Letting Money Speak

If we look more to the monetary features than the textual features of political argumentation activated and circulated by election campaign rhetoric, the reasonability of the corporate speaker arguing by spending money requires further investigation. The free speech protection for financing campaign speech was inaugurated by *Buckley v. Valeo* (1976). The Court reasoned that the expenditure of money to promote a candidate deserved free speech protection because:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate’s increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech. (p. 20)

The Court protects the monetary expenditures of candidates and organizations based on an argument that posits a unique “structure of reality” that affects all political communication. Money is advanced as a causal condition for making arguments public in a modern society. However, *Buckley* did not give money a free pass. *Buckley* performed an “argument by division,” splitting money into two elements: contributions and expenditures with contributions open to more regulation than the expenditures spent to support a candidate because of a governmental interest to decrease corruption or its appearance. Moreover, the Court supported the establishment of political committees (PACS) while maintaining the Federal Election Campaign Act’s intention to limit the use of general treasury funds from corporations and labor unions as direct contributions and as independent expenditures supporting political candidates.

The Bipartisan Campaign Reform Act of 2002 (BCRA) set in motion a new set of regulations on the “soft money” (money not directly covered by campaign finance law) underwriting elections. Title II of the BCRA took particular aim at a class of political advertisements known as election oriented issue ads that often ran during election cycles and discussed candidates in the context of important issues. However, unlike express advocacy ads that specifically appeal to an audience to vote for or against a specific candidate, issue ads refrain from making
a direct appeal to vote for a specific candidate. In an effort to regulate the “soft money” financing of election oriented issue ads, the BCRA invented electioneering communication as a specific genre of political advocacy and placed the financing and timing of this genre within the regulative scope of the Federal Election Commission. The BCRA also restricted corporations and labor organizations from using their treasuries to finance electioneering communication. When crafting the rules for implementing BCRA, the Federal Election Commission (2002) exempted “qualified non profit corporations” from the electioneering and independent expenditure restrictions (p. 65203). While the U.S. Supreme Court (McConnell v. Federal Election Commission, 2003) initially upheld the electioneering communication regulations preventing unions and corporations from financing electioneering communication, in Federal Election Commission v. Wisconsin Right to Life (2007) the majority found that electioneering communication regulations should not apply to issue ads, thus limiting the regulations on corporate treasury independent expenditures to “express advocacy.” Thus, the original intent of BCRA to restrict election oriented issue ads was dismissed as unconstitutional and McConnell’s constitutional support for the electioneering communication regulations was attenuated. In Citizens United v. Federal Election Commission (2010), the restriction on the direct use of corporate treasuries to fund electioneering communication (as express advocacy) was found unconstitutional. Writing for the majority Kennedy argues that:

The law before us is an outright ban, backed by criminal sanctions. Section 441b makes it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election . . . Section 441b’s prohibition on corporate independent expenditures is thus a ban on speech. As a “restriction on the amount of money a person or group can spend on political communication during a campaign,” that statute “necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. (pp. 20-27)

While the Court upheld the constitutionality of disclosure and disclaimer regulations on electioneering communication, Citizens United affirmed Buckley’s reasoning about money/speech by applying Buckley’s reasoning about money’s free speech status to electioneering communication. However, it did more than repeat the First Amendment protection of money/speech; it expanded the speaking rights of corporations by lifting the requirement that corporations segregate their direct expenditures through the establishment of political action committees, finding the distinctions between “qualified non profits” and profit oriented corporations unsustainable. Today, corporations are allowed to use their general treasuries to support independent expenditures in favor of a candidate whether such actions fall in the timeline of electioneering communication. They
may also participate in express advocacy and issue advocacy in support of a candidate or issue.

The Reasonability of Corporate Money/Speech

Kennedy’s expansion of corporate speech rights took aim at the reasonability of systematic distortion as rationale to restrict the use of corporate money. The government has no interest “in equalizing the relative ability of individuals and groups to influence the outcome of elections” (as cited in Buckley, 1976, p. 38). In contrast, Justice Stevens’ dissent supports restricting money financing elections based on the way money can distort the political process. Kennedy’s rejection of a systematic distortion rationale for a wide open free speech claim without concern for the communicative conditions for free and full expression relies on an epistemic standard of political reasonableness. Stevens’ normative approach to political reasonableness is a better approach for protecting the communicative norms of political advocacy.

The Court’s opinion explicitly addresses the idea of reasonableness two times. The first concerned the proper classification of the documentary Hillary as “express advocacy.” Wisconsin Right to Life developed a “functional equivalent test” for classifying political ads as express advocacy “if there is no reasonable interpretation other than as an appeal to vote for or against a candidate” (p. 7). For the Court, Hillary was just such a functional equivalent. The second direct appeal to reasonableness concerned the Court’s decision to uphold disclosure requirements concerning the names of contributors. In this case, disclosure was upheld because there was “no reasonable probability” that such disclosure would threaten the contributors. In both cases, this appeal to reasonableness appeals epistemically as a situated standard for making judgments about cases. More provocative was the Court’s implied standard of reasonableness. The Court performed the reasonability of its judgment narratively to reject the governmental interest underwriting the restrictions on corporate speakers to use their general treasury. Put differently, the courts used a narrative rationality to support the political reasonableness of lifting restrictions on electioneering communication. A narrative form of reasoning, therefore, reveals itself as a way to advance an epistemic notion of reasonableness.

Three cases make up the key plot points of the Court’s narrative: Buckley v. Valeo (1976), First National Bank of Boston v. Bellotti (1978), and Austin v. Michigan Chamber of Commerce (1990). For Kennedy, two conflicting lines of precedent had been established by these three cases, but the bad precedent was Austin. Unlike Buckley and Bellotti, Austin advocated a restriction on independent expenditures based on the identity of the speaker as a corporation (Citizens United v. Federal Election Commission, 2010, p. 32). The problem with Austin’s restriction on corporate expenditures was partly due to its finding of a governmental interest in decreasing distorting effects of an “immense aggregation
of wealth" (p. 1397) on the political arena. For the Court, the line of precedents established by *Buckley* and *Bellotti* protecting corporate money/speech were more or less consistent rejecting corporate-identity restrictions on money/speech, but *Austin* disrupted this line of precedent. To overturn *Austin's* distortion rationale was a return to a better line of precedent. The narrative form of the Court’s reasoning is a restoration narrative committed to returning the proper precedent to its rightful place governing future judicial decisions. This restoration narrative in support of corporate speakers to more directly argue with their money was advanced in terms of equal rights to participation of all corporations and to protect some types of corporations from the power of other corporations (*Citizens United v. Federal Election Commission*, 2010, p. 100). For Kennedy, since “all speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech” (p. 35), the express advocacy and expenditure restrictions unjustly apply to both profit and non profit corporations, they give media conglomerates an unfair advantage, (pp. 35-37), and may harm smaller corporations more than bigger corporations (pp. 38-40). Narrative consistency to *Buckley/Bellotti* required the robust defense of corporate money/speech.

Justice Stevens writes the dissent and asserts the permission to uphold the constitutionality of “reasonable restrictions on corporate electioneering” (p. 41). To do so, he defends the anti-distortion rationale. First, corporations are different than human beings; they are “not themselves members of “We the People” by whom and for whom our Constitution was established” (p. 76). Stevens asserts the primacy of the individual to self-expression and posits that restrictions on electioneering communication do “not prevent anyone from speaking in his or her own voice” (p. 77). The restrictions under review do not harm any one’s “autonomy, dignity, or political equality” (p. 77). Thus, Stevens attempts a dissociation strategy protecting the real rights of real persons over the false rights of artificial persons like corporations. Second, setting aside the anti-distortion rationale fails to protect the interests of audiences. This is so because corporate speech is more attuned to the profitability of the corporation and is not oriented toward adapting itself to competing societal priorities, non resident corporations may be at odds with the interests of local citizens, corporations can crowd out alternative view points by buying up media time, corporate control of election rhetoric can harm citizens faith in democracy, corporate electioneering can make it more difficult for citizens to hold elected officials accountable, and corporate war chests can generate “special advantages” promoting legislation increasing corporate rent seeking that may be more destructive than non-corporate influence (pp. 78-82). Not only do these reasons support the distinction between corporate and non-corporate speakers, they uphold the distortion rationale displaced by the majority decision. The majority is unreasonable because they “may well promote corporate power at the cost of individual and collective self-expression the [First] Amendment was meant to serve” (p. 85). In this case,
Justice Stevens advances a political model of reasonableness oriented to the normative conditions of political communication. As Thomas Goodnight (1993) argues, public argument should “preserve the communicative relationships that make political deliberation possible” (p. 334). Stevens’ advances a view of political communication with an eye toward accounting for asymmetrical relationships between participants. As such, he advances a normative approach to political reasonableness oriented to protecting the integrity of argumentative interaction.

Conclusion

Stevens provides insight into political reasonableness by suggesting the need for a concern with the systemic distortions of corporate money/speech. Kennedy disagrees, and alternatively submits the need to harmonize the right of corporations with other corporations and individuals via an equal respect for the money they spend on promoting and challenging candidates. While Kennedy’s approach would seem to be concerned with equalizing the relationship between non-profit and for profit corporations and corporations and individuals, the vision of political reasonableness advanced is more epistemic than normative because of its use of a narrative rationality. On the other hand, the political idea of reasonableness advanced by Stevens is normative because it recognizes the distortions made possible by corporate power. However, I would go further. In a footnote, Justice Stevens notes that “the majority never uses a multinational business corporation in its hypotheticals” (p. 100) as if to suggest that any position on campaign finance is, as Jameson (1991) once said about postmodernism, a stance on multinational capitalism. Money/speech expresses how multinational capitalism asserts itself as an “immutable divine standard” regulating political argumentation. The next question is whether political reasonableness can generate for a rhetorical perspective on argumentation an exodus from the spirit of capitalism’s sovereign rule? It is possible that Buckley was right and political argument is so “thoroughly permeated by money – and not by accident but by [its] very nature” that an adherence to its universal audience “ought to make us shudder” (Deleuze, 1990, para. 11).

References


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July 2011