

Remarks of Adam C. Bonin, Esq. Cozen O'Connor
"Campaign Finance Law, Issue Advocacy, and the Supreme Court"
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When Praveen called me to talk about this event, he told me he'd love to have me come down to DC if I thought there was an interesting Internet angle to all this. And while I vaguely remembered that Wisconsin Right to Life had a website, you didn't really need me here to tell you that, though I do want to talk about it.

Instead, what I want to suggest is that this whole debate feels a bit like a constitutional dinosaur, that it's the equivalent of being in the year 1460 and still talking about the regulation of illuminated books while Gutenberg's printing press is already up and running.

But first, let's talk about that website. Wisconsin Right to Life's ads told viewers to go and visit their website. www.BeFair.org, to learn more about these issues. Now, there's a debate – and it's an interesting one – as to whether the group's statements on its website can be incorporated into the constitutional analysis of the ads themselves, but let there be no mistake that on its website, under current federal election and campaign finance law, Wisconsin Right to Life has an immense amount of freedom on that site. Under the regulatory scheme enacted by the FEC a little over a year ago – which is more of a de-regulatory scheme -- there are multiple routes available for WRtL to do full-blown electioneering on its site, not the least of which being setting up a blog on the site via the FEC's "media exception" to cover news regarding pro-life issues, and editorializing and urging action as to candidates, pending legislation and other issues. I have no doubt that it could even fundraise on behalf of preferred candidates through a link on the blog, and exhort its readers to contribute to Sen. Feingold's opponent.

Now, should this be problematic, even if corporate funds are going towards the website? I'd argue no, and it's because of a distinction that I think the Internet helps clarify:

Television advertisements are "push" communications. You watch them because you have to. You're sitting there, watching a show, and then it's temporally interrupted by this paid message. Also, the content of the ad is fixed. As WRtL notes, it takes time to create and produce a television ad. Once it's done and edited, it's done.

The internet doesn't work that way – at least, assuming net neutrality is in place. Yes, there's advertising online, but the bulk of what's going on is pull, or opt-in communications -- people choose to visit the websites they want to visit. And advertising doesn't have much of an impact of moving eyeballs -- most online

advertising is still seen as a nuisance, to be ignored, clicked away, or hidden on another screen while it delays the loading of desired content.

Moreover, online content and advertising -- and money online generally -- doesn't crowd out other speech.

I would also question -- though this is more of a factual question than a constitutional issue, whether televised grassroots calls-to-action are as effective as online appeals to a targeted, often preselected community. When you look at what communities like MoveOn.org have been able to accomplish by relying on appeals to membership -- which, beyond a willing audience, can have a quick production time in framing an email, unlike WRtL's tv ads -- well, it makes you wonder why an organization would bother with a method that's so much more expensive if the true purpose was stimulating grassroots activity.

There's a second point about effectiveness and technology that needs making. Thanks to TiVo/DVR technology, iTunes, plummeting newspaper circulations and the like, traditional advertising is dying anyway. It's just easier to avoid the places where unwanted messages can be pressed. Many consumer goods will work around that, tv-wise, via product placement and program sponsorship, but I doubt we'll ever see presidential candidates or issue advocacy groups paying to have their posters placed in the backgrounds of tv shows, or for Darryl to say in an episode of "The Office" that "Michael, if Congress just passed S. 284, I wouldn't need a raise. Would you please call our Congressman and let him know?" And for local or even statewide races, that's not an option anytime soon, until networks can start personalizing their shows for each viewing area.

So it strikes me that these groups have to move to "opt-in" or pull technology sooner rather than later anyway. Or they're going to have to target people very carefully, with personalized direct mail pitches and the like, or use low-tech means to invade the physical spaces where a group's messages are unavoidable, like billboards, or programming that is more likely to be watched live, like sporting events and awards shows. One other trend we're starting to see is lifestyle-based targeting, or "psychographics" -- based on where you live, what car you drive, what magazines you subscribe to, you'll start receiving carefully targeted appeals from campaigns.

The other thing they'll have to do? Make their messages more interesting. The Hillary/1984 ad has now been viewed 3.1M times in its original location -- create a message that people want to see, and they will find you.

In all, then : I think we're really looking at a constitutional dinosaur here, in terms of the power of amassed wealth to corrupt our politics by using their disproportionate resources to push messages onto people. I do think that over the next decade or so, the technological ability to pay to broadcast messages to an unwilling audience (and the need for accumulated wealth to broadcast such messages) is only going to decrease -- and yet, I think such enhanced user control over their "message environment" has some costs. When he wrote his book Republic.com back in 2001, Cass Sunstein fretted over a future Internet in which liberals only listened to liberals, and conservatives to their own, and the damage such ideological cocooning would do to deliberative democracy. I'm actually not that concerned about this, given the heavy amount of cross-linkage between the left-and-right blogospheres, but I do wonder how we're going to reach the apathetic-but-persuadables in the future -- folks who might become active on a certain issue or for a certain candidate, but need to be woken up about it first. It's going require real grassroots organizing again -- from the precinct up, rather than from tv down, and it will involve both online and real-world action.

I haven't said a word yet about what I thought the Court will or should do in this case. I guess that's because I just don't know how much it matters. Thank you.