

CORPORATE FIRST AMENDMENT RIGHTS AND THE SEC. By Nicholas Wolfson.¹ Westport, Conn.: Quorum Books. 1990. Pp. vi, 178. Cloth, \$42.95.

FREEDOM OF EXPRESSION IN THE AMERICAN MILITARY: A COMMUNICATION MODELING ANALYSIS. By Cathy Packer.² New York, N.Y.: Praeger Publishers. 1989. Pp. xii, 268. Cloth, \$47.95.

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The Greek philosopher Zeno of Elea set out to prove that you can't move from point A to point B. First you have to get to the half-way point between A and B. Let's call that point A1. Then you have to get to the half-way point between A1 and B, which we can call A2. Then you have to get to the half-way point between A2 and B, or A3. And so on. An infinite number of movements are necessary before you ever arrive at B, and so you can never get to B. The problem is that people get to B all the time. Some scholarly discussions of free speech issues, including the books under review, suffer from the equivalent of this weakness in Zeno's reasoning.

I

Nicholas Wolfson has set out to demonstrate that the federal securities laws regulate speech that cannot be distinguished from speech fully protected by the first amendment. The problem is that most of us would agree that *some* speech is not entitled to "full" first amendment protection. How do we get *there* without either using distinctions that Wolfson says won't work, or identifying some other distinction that he has neglected? Thus, Wolfson's argument has a Zeno-like flavor. In this sense his argument is unsatisfying, although otherwise challenging, perceptive, and carefully analytical.

Under the federal securities statutes, the SEC regulates what corporations may say when they solicit proxies, what hostile bidders must disclose during takeovers, and what securities issuers must put in prospectuses. The SEC also licenses the giving of investment advice. There is no defensible way to distinguish these regulations of

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speech, according to Wolfson, from regulation of the content of newspapers or political speeches.

In his first chapter, Wolfson examines the case law dealing with commercial speech in general. Many of the Supreme Court cases deal with advertising, which in recent decades has been given a modicum of first amendment protection as "commercial speech," though less than that accorded "noncommercial speech." Chapter two involves "SEC speech" in particular. Three Supreme Court justices relied upon the first amendment to support a decision that the SEC could not stop unregistered investment advisers from publication of advice in securities newsletters. Two circuits have examined whether the SEC can regulate corporate press releases or newspaper advertisements intended to influence proxy contests or stock purchases.

In the next two chapters, Wolfson evaluates the positions of various scholars regarding the lesser first amendment protection given to commercial speech. These include Martin Redish, C. Edwin Baker, Thomas Jackson and John Jeffries, Frederick Schauer, Vincent Blasi, Steven Shiffrin, Laurence Tribe, Aaron Director, Ronald Coase, Richard Posner, Fred S. McChesney, and George J. Benton. The final chapter, previously published in part as a law review article, sets forth affirmatively Wolfson's position that "[t]he federal securities laws regulate speech that is impossible to meaningfully distinguish from speech that all of us would concede should receive the full protection of the First Amendment."

Wolfson first identifies the most generally accepted underlying purposes of the first amendment. One is to aid the political process. Certainly our political system assumes that ideas can be freely exchanged. Another purpose is to facilitate the search for truth. The idea is that truth may best be arrived at by the free competition of ideas. Finally, the first amendment may also be supported by the intrinsic value to individual human beings to express themselves and to hear others. Each of these purposes, according to Wolfson, supports freedom to advertise a product for sale as much as it supports freedom to express oneself in other ways.

The first amendment freedom of expression furthers the democratic process, but unless we accept Robert Bork's now-discredited article in the *Indiana Law Journal*, the first amendment cannot be limited to campaign speech. In any event, a lot of campaign speech is economically self-interested and therefore indistinguishable from advertising.

The search for truth may also be furthered as much by business advertising as by political or artistic expression, according to Wolf-

son. He rejects the often-cited rationale that business advertising is hardier and more resistant to suppression than political or artistic speech. Among his arguments are that political speech often reflects economic interests and is therefore robust. Moreover, “[i]t is commonplace to contrast the courage of the ideologue to the timidity of the businessman.” Wolfson also rather easily disposes of the argument that the content of advertisements is more easily verifiable than the content of political speech. Some advertisements are obviously difficult to verify (e.g., “our shampoo will beautify your hair”), while some political speech can be verified or disproved easily (e.g., “The Holocaust did not occur.”).

Finally, business advertising involves personal fulfillment, and often contains artistic and cultural expression, while some speech that is fully protected by the first amendment, such as a book praising one’s product, may be just as economically self-interested as any advertisement.

All of this presents a cogent argument for protecting advertising expression as fully as political or artistic expression.⁴ Still, full first amendment protection for business advertising is not the same thing as full first amendment protection for all of the expression that the SEC regulates. A proxy solicitation is not an advertisement. In this regard, Wolfson reasons as follows: The primary justification for not applying the full protection of the first amendment to SEC speech is that it is commercial speech. The distinction doesn’t even work for business advertising. Since business advertising presumably deserves full protection, SEC speech certainly does so—it is *closer* to political and artistic speech than is advertising, and therefore *more* deserving of protection.

The problem with this analysis is that we know that some kinds of conduct having expressive content may be regulated. Driving fast on the highway may, for instance, be expressive. If we start with an activity that is clearly not subject to full first amendment scrutiny, and extend this to find an expanding number of other types of conduct to be indistinguishable, we may ultimately reach SEC speech, and from SEC speech onwards to unprotected activi-

4. One response might be that the harms resulting from failure to regulate advertising are different in nature from the harms resulting from nonregulation of political or artistic expression. Such an argument does not necessarily undermine the persuasiveness of Wolfson’s argument, however. The dangers of political and social upheaval resulting from limits on the ability of government to control political and artistic expression are perhaps no less than the dangers of consumer fraud. In addition, the danger of social upheaval may indeed be lessened in the long run by a wide freedom of expression. But the danger of consumer fraud might similarly be actually lessened by limiting government control of advertising. Consumers would have the advantage of vigorous counteradvertising, and they might also generally rely less on the accuracy of fully unregulated advertising.

ties. If such a progression is tenable, then the Constitution, in order to avoid a contradiction, can only be interpreted to require that a rough line be drawn. It is therefore not enough to say merely that SEC speech is indistinguishable from some speech that is fully protected. Wolfson must also distinguish SEC speech from conduct that is clearly not. Such a distinction may not be easy.

Surely, for instance, the government can regulate how a corporation is formed or governed. When people organize themselves into corporations, they do so to take advantage of benefits (such as limited liability) that are granted by the law. It is hard to imagine that the Constitution prohibits conditions from being imposed upon the structure of organizations that obtain such benefits. But much of the activity of putting together or governing any organization is communicative. The idea that corporate structure can be regulated thus suggests that expression can be regulated. Clear examples would be notice requirements for shareholder meetings, and voting requirements for shareholders. It is only a small step to say that the state can regulate what must be in a prospectus, or what must be in proxy solicitations. If the state can do this, moreover, without violating the first amendment, surely the federal government can do so as well.

Wolfson rejects the argument that modern corporate structure is by its nature particularly coercive or dangerous, but rejecting such an argument is a far cry from saying corporate structure cannot be regulated. Wolfson suggests a couple of times that he is really talking about freedom of association rather than freedom of expression. The implication is that the first amendment limits the regulation of corporate structure. He even says that the only difference between a corporation and a political party is the indefensible one that the corporation is commercial. But a political party needs no statutory authority to form; a corporation does.⁵

Most recently, the Supreme Court has cut back even on the first amendment rights of corporations with respect to political campaign contributions. The rationale for upholding a Michigan statute limiting campaign contributions by a nonprofit corporation was that:

State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability

5. Certainly the Supreme Court has not indicated that our Constitution guarantees the benefits of corporate status to people who organize themselves any which way, though the first amendment has recently and logically been held to protect the ability of political parties to decide how to organize.

to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments.

...

... Michigan's regulation aims at . . . the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.⁶

While this rationale is subject to criticism (three justices dissented vigorously) where political campaigns are concerned, the argument certainly has great force where corporate governance is involved. *Austin* thus fundamentally undermines Wolfson's argument. He seems to realize this, but doesn't really have an answer, beyond the points made in dissent in that case.

Justice Scalia's dissent, for instance, argued that noncorporate groups and individuals are given state advantages ranging from tax breaks to cash subsidies, but that a state cannot condition such favors on loss of the first amendment protection. At some point, though, such an argument breaks down. The government, for instance, can certainly pay a publicity company to advertise in favor of Armed Forces recruitment, and condition such payment on speaking in favor of, rather than against, enlisting in the Army. The reason must be that there is a close relationship between the government benefit and the limitation on expression.⁷ There is room for argument about the directness of the relationship between the benefits of corporate status and limits on campaign contributions, but much less room to question the relationship between the benefits of corporate status and the rules of corporate governance.⁸

6. *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1397 (1990).

7. Stated differently, the government can sometimes "buy" the waiver of a constitutional right. While this sounds harsh in the abstract, it happens all the time when the waiver and the "purchase" are very closely connected. See, most recently, *Rust v. Sullivan*, 111 S. Ct. 1759, 1771-76 (1991). If an American has the right to go where he or she pleases, and not be confined for a long period of time without due process of law, the government can certainly hire the same American to sit, for instance, in a guardhouse or at a desk for eight hours a day, fifty weeks per year. As long as the paycheck keeps getting cashed, the government can demand such "confinement," if that "confinement" is an integral part of what is being paid for. We can argue about whether this is the wisest use of the employee, but it doesn't help the argument too much to talk about not depriving the person of liberty without due process of law. Of course if the employee is not deskbound as part of the job, but rather as a punishment for dishonesty, due process considerations come back into play. But the first question is whether the very terms of employment involve the "confinement."

8. Take a statutory requirement that shareholders receive notice of shareholder meetings, for example. Corporate status facilitates coherent pooling of resources, and the resulting social good arguably outweighs society's interest in insuring that individuals have more direct control over how their resources are used. The requirement of notice for shareholder meetings puts a minor limit on the ability of economic interests to act coherently. The limit is

Once the constitutionality of government regulation of corporate governance is established, it must still be asked whether the kinds of regulation that the SEC engages in are similarly justified as a condition for governmental benefits. The SEC regulates not only corporations, but also other types of entities that issue securities, though most are statutory creations of one sort or another. Perhaps SEC regulation is not sufficiently related to the benefits that the government gives to the largely-corporate participants in the investment market. The issue is of course distinct from the issue of whether such rules are wise.

The key inquiry is whether the control of speech inherent in SEC regulation can be seen as part of the bargain in permitting individuals to organize themselves to attract investment in certain profitable ways. The answer may be yes or no, but it does not dispose of the question just to demonstrate that the speech is indistinguishable from fully protected speech in terms of its nature, purpose, or effect. In short, if any part of corporation law is free of first amendment inquiry, then Wolfson has not distinguished it from the "SEC speech" that he says should be protected by the first amendment.

II

Cathy Packer's argument on free speech and the military is similar to Wolfson's in many ways. She attacks the present Court's standards for reviewing restrictions on military speech, taking aim at the grounds most often asserted for distinguishing military speech from civilian speech for first amendment purposes. Her ultimate claim, however, is considerably less radical than Wolfson's. It is not that there should be no distinction, but that under the first amendment there should be "greater tolerance of servicemembers' expressive activities" than there is now. She doesn't take a position on how much greater that tolerance should be.

Packer starts with a summary history of the development of theories of communication. Various models of how communication works have been developed since World War I, reflecting the increased recognition of such factors as listener selectivity, feedback, psychological framework of the sender and receiver, "noise," agenda-setting, and so on. After reviewing two dozen models, each accompanied by a computer-graphic illustration, Packer sets forth her own summary model, emphasizing that communication is "a continuous process that works differently in different contexts and

directly related to the benefit that those interests enjoy because the limit serves to protect the very interest compromised by the statute—the social good that results from individuals' having more direct control over the use of their resources.

when communicators have different communications skills," and also that "communication has an unpredictable variety of purposes and effects, or it may have no effect at all."

Packer then surveys the literature on communication in the military, including S.L.A. Marshall's comments on the lack of clear commanding voices on the battlefield during World War II, varying views on how well enlisted persons' thinking is heard in the officer ranks, arguments that the development of sophisticated new weapons requires greater discussion and individual responsibility among servicemembers, and published discussions of the effect of dissent in the ranks during the Vietnam War.

She next surveys law journal articles and other scholarly opinion on such issues as whether the Bill of Rights should be applied to the military, how the first amendment should apply to soldiers, and whether particular articles of the Uniform Code of Military Justice are unconstitutional. Her fourth survey covers the military justice system in general, including a section on civilian court jurisdiction over military cases. She relies for the most part upon sometimes dated secondary authority; this is the apparent cause of her omitting to mention the 1983 statutory provision for Supreme Court review of Court of Military Appeals decisions.⁹

Next is a survey of cases: military court cases from 1951 to 1964 affirming convictions for expressive activity, later Supreme Court cases involving protest against the Vietnam War, and various federal cases involving limits on servicemember speech. The two key Supreme Court cases were *Parker v. Levy*,¹⁰ upholding the court martial conviction of an Army doctor for counselling black soldiers not to go to Vietnam, and *Secretary of the Navy v. Avrech*,¹¹ upholding the court martial of a private in Vietnam who gave a typed statement critical of the war to a military mimeograph operator to have copies made.

Packer's final survey is of varying views about four post-Vietnam first amendment problems involving the military: are unions compatible with the military? may soldiers participate in extremist group activity? can the political speech of generals be silenced? to what extent can commanders keep their soldiers from circulating petitions?

With all the "literature" laid out, Packer applies it in her final chapter to ascertain the "model" accepted by courts as descriptive

9. Military Justice Act of 1983, Pub. L. 98-209, 97 Stat. 1393, 1405 (1983) codified at 28 U.S.C. § 1259 (1988).

10. 417 U.S. 733 (1974).

11. 418 U.S. 676 (1974).

of military communication. The model's flaws of course demonstrate that the courts' conclusions are defective. She contrasts the model with the overall communication model described in her first survey. A more accurate military communication model would lead presumably to wiser court judgments, though Packer barely suggests what those judgments should be. She merely sets forth a more descriptive model. This is the employment of social science jargon to engage in legal criticism.

She first lists the characteristics of the "separate military society" (the phrase is from *Parker v. Levy*) assumed in the case law:

- (1) the military has the unique mission of waging war successfully,
- (2) because of the threat of war, the military does not have time to allow the marketplace of ideas to work,
- (3) instant and unquestioning obedience is both possible and necessary to the military mission,
- (4) soldiers are motivated to risk their lives because they are trained to obey orders and are instilled with loyalty to their country and commanders, and
- (5) there is effective two-way communication through official military channels.

Packer criticizes each of these "characteristics" seriatim, though not always persuasively.¹²

Packer next lists four legal rationales for abridging the first amendment rights of military personnel:

- (1) the military must remain politically neutral,

12. Sometimes the characterization of the military is relatively accurate, but the criticism is weak. For instance, it is true that courts refer to the military's unique mission of waging war successfully; Packer's only vaguely critical comment is that large percentages of our forces perform service and support functions where the attitude of the enlisted person toward war is "of marginal importance."

Other times the characteristic is in the nature of a straw man. For instance, the third characteristic suggests that the discipline furthered by limits on expression involves "absolute obedience" and "shouting orders to be instantly obeyed." Packer cites various authorities for the propositions that new weapons systems make individual initiative more important, that reliance by modern armies upon small units requires training that emphasizes tactical flexibility and initiative, and that absolute obedience on the part of all members of the armed forces is impossible. The implication is that "[s]trict discipline during training may fail to instill in soldiers the initiative and decision-making skills needed in small combat units." This is simply playing with the meaning of the word "discipline." It is a caricature of the concept to describe discipline only as unthinking compliance with detailed orders. If the ordered mission requires initiative and independent decision-making, then ready compliance with orders to undertake such a mission—reflecting the highest discipline—demands such initiative and independence. It is therefore nonsense to juxtapose discipline and initiative as opposites. It is probably even more important to have discipline, properly understood, when small units are required to react to new situations without detailed instructions from higher up.

- (2) loyalty and morale must be maintained at a high level in order for soldiers to fight effectively,
- (3) strict order, discipline, and obedience must be maintained if a military force is to act promptly and efficiently, and
- (4) the appearance to foreign countries of dissension in the ranks of the U.S. armed forces should be avoided.

Now for the big jump. "Implicit in those rationales" are four assumptions:

- (1) communication is a discrete, linear process that can be stopped,
- (2) the purpose of communication usually is persuasive,
- (3) communication has powerful, direct, and predictable effects, and
- (4) the communication process works the same way regardless of who is communicating and regardless of the context in which the communication process occurs.

To read these assumptions into the arguments listed requires a lot of stretching. For instance, a conviction of a former POW in North Korea for expressing support for the North Koreans in speeches, groups, and classes while a POW was upheld with a judicial comment that the speech could be used to help the enemy. This and other cases show that the courts find such speech to be "powerfully persuasive." Certainly speech can persuade, or at least potentially persuade, without our assuming that the *purpose* of the speech was persuasive, or that all of the effects are direct and predictable. Yet when Packer subsequently criticizes the list of assumptions, the context for arriving at them is lacking, and they can be criticized as being simplistic. "[T]he purpose of communication is frequently not persuasion and . . . receivers as well as senders have multiple motives." Communication has "a wide range of effects" that may be "direct or indirect, short- or long-term, cumulative or noncumulative." It is hard to see how these insights undermine court decisions upholding punishment for speech in aid of the enemy, or for speech encouraging disaffection or disobedience.

Even more than in the case of corporate regulation, it is clear that the military can control the speech of servicemembers. "Tell your subordinates to prepare to attack at dawn," or "establish liaison with foreign unit X" are obvious examples of control of the expression of soldiers. It should be obvious that such control is necessary, and that failure to comply should be punishable by court martial. It would be absurd to interpret the first amendment to the contrary. As in the case of government control of corporate structure, the very government undertaking assumes some control over

expression, control that would not be permitted if the expression were that of a private citizen. Such control is a condition of service.¹³

Again, this is not to suggest that the government can control military speech completely. At some point the connection between the military endeavor on the one hand and a soldier's expression on the other becomes too attenuated. Where that point lies seems a question best answered initially by the military, subject ultimately to court review. Military leaders like to get the job done, and the value of communication is forced upon those who don't already appreciate it. Military leaders also know a lot about the nature of discipline; martinet shouting orders went out of style long ago. Doubtless the interest in free expression by soldiers is not weighed as accurately by the military as it is by the courts, but it is just as likely that a court will not weigh the military's interest in discipline as accurately as the military will. It therefore makes sense for the courts generally to defer to the military in evaluating that interest. Certainly an across-the-board increase in the amount of court intrusion into the military communication structure requires far more justification than Packer has presented.

TEMPERED ZEAL: A COLUMBIA LAW PROFESSOR'S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE. By H. Richard Uviller.¹ Chicago: Contemporary Books. 1988. Pp. xix, 234. Cloth, \$19.95.

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Appellate judges and legal academics too often lack firsthand acquaintance with the front-line realities of the criminal justice system. Fearing that his own exposure to those realities as a young prosecutor had grown stale during fourteen years teaching law, Professor H. Richard Uviller spent eight months of a recent sabbatical "hanging out with" and observing police in the crime-ridden Ninth Precinct of New York City. The book that resulted should interest

13. While service is not always voluntary, everyone recognizes that military service involves at least the kinds of loss of freedom that are incident to voluntary employment. If a drafted soldier has the freedom to flout orders, then it doesn't make much sense to have a draft at all. Maybe the draft is unwise or unconstitutional, but surely such a conclusion is not required simply by the freedom of expression principles of the first amendment.

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