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Money, Speech, and Chutzpah

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As a young boy growing up in a working-class family in a mostly Jewish neighborhood of Los Angeles, I learned that the word “chutzpah” had two different and opposite meanings. The positive one was a synonym for courage or moxie or fearlessness, as in the chutzpah to take on established authority. Think of Lenny Bruce, the great comic scourge of the establishment or of the cases recounted in Alan Dershowitz’s book called, simply, *Chutzpah*. The other meaning has a negative connotation, as in gall or nerve or effrontery, or perhaps even duplicity. Think of the example of the defendant who murders his parents and then seeks the mercy of the court on the ground that he is an orphan.

In the decades-old battle over whether campaign finance limitations violate free speech principles, I think there has been a good deal of chutzpah of both kinds. In the interests of full disclosure, I should note that I have been involved in challenging campaign finance restrictions—on the ground they are fundamental violations of free speech principles—for most of my professional career, both as an American Civil Liberties Union (ACLU) lawyer and as a Brooklyn Law School professor. So it will come as no surprise to hear that, in my view, those who champion limitations on campaign funding have a lot of nerve to insist that the way to improve democracy is by limiting free speech. Conversely, those hearty souls, fewer in number but no less passionate in purpose, who have challenged these restrictions have manifested the admirable form of chutzpah in the

decades-long battles, ranging from the 1976 landmark decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), to the more recent controversial ruling in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). That positive form of chutzpah says, “What part of ‘Congress shall make no law . . . abridging the freedom of speech’ do you not understand?” It asks why we should trust, let alone defer to, the judgment of elected incumbent politicians who are writing rules governing their reelections and limiting the free speech of their challengers and their critics. From the beginning, the battle over campaign finance restrictions has pitted the Davids of candidates, parties, and independent groups against the Goliaths of government who would pass laws making it a crime to spend money to criticize them, aided and abetted by major media allies and well-funded “reform” groups who support such laws. Talk about chutzpah. In my view, it took the bad kind of chutzpah for the people in power to pass those laws and the good kind for those who challenged them over the years.

The First Heroes

Take, for example, Randolph K. Phillips, Richard A. Falk, Robert J. Bobrick, Elizabeth A. Most, Alfred Hassler, Ron Young, and Ernest Gruening. They are the first heroes in the modern free speech war against campaign finance restrictions. They were a small band of left-wing activists convinced that then president

Richard Nixon had committed war crimes by his conduct of the war in southeast Asia. So they formed the National Committee for Impeachment. In the spring of 1972, they ponied up enough money to run a two-page ad in the *New York Times* detailing the allegations against the president and praising a handful of like-minded members of Congress who had sponsored an impeachment resolution against him. In a country with a First Amendment and a commitment to democracy, one would have thought that the people engaged in these activities would have received some kind of good citizenship award. Instead, they received a visit from agents of the U.S. government, which sued to shut the group down, claiming that the ad violated the brand-new Federal Election Campaign Act of 1972 (FECA), the ink on which was not even dry. Why? Because it was an election year, and the ad might somehow affect people's thinking about these issues and might thereby affect how they would vote in the 1972 elections and thereby "influence the outcome" of the elections. And because the group had run the ad without seeking the permission of the candidates the ad might help, as required by the brand-new law's limits on media expenditures supporting or opposing candidates for federal office, not to mention failing to form a political committee, file reports, and disclose their contributors and supporters—even though they proudly affixed their names to the newspaper advertisement—they would have to cease their free speech until they complied with the new law. At first glance, it seemed hard to believe that a proceeding like this could be brought, given the strong protection of political speech that the liberal Warren Court had established. And this seemed the clearest example of protected political speech that the government could not prohibit, limit, or license.

The antiwar group leaders reached out to the ACLU to represent them in defending this case. When we began to review it, we were stunned that the government would bring it and at the provisions of the new law that authorized the attempt to silence these critics of government. These laws were sold as "reforming" our elections. By silencing criticism of government? Some reform that turned out to be. Happily, we were successful in defending the group by persuading the federal appeals court in New York to rule that the new campaign finance law was not intended to and should not be applied to issue-oriented speech that commented on the critical questions of the day and appropriately criticized politicians in the course of doing so.

But as we learned more about the new FECA law in order to defend the impeachment group, the law's overbreadth and vagueness became immediately apparent, as did its prior restraint mechanism. It effectively sought to control any money spent "for the purpose of influencing the . . . election . . . of any person to federal office," which, in an election year, could extend to any money spent to criticize the incumbents running the government who were up for reelection. The ACLU, like countless

other cause organizations, could find *itself* running afoul of the law for its criticism of the civil liberties stance of elected officials, despite the ACLU's historic and absolute nonpartisan status.

The ACLU felt compelled to bring its own lawsuit against the new campaign finance law on the ground that it unconstitutionally could suppress the group's nonpartisan criticism of government and the politicians who run it. It was now the fall of that 1972 election year, and the ACLU wanted to criticize President Nixon's opposition to busing to enforce school integration and support members of Congress who had opposed his position. But the threat of the law being applied to us stood in the way. We filed suit in the federal court in Washington, D.C., back in the day when you needed a three-judge federal court to consider the constitutionality of a federal statute. The three-judge court scheduled a hearing for late on a Friday afternoon in October, and I remember taking the Metroliner to Washington, D.C., accompanying one of the ACLU's senior counsel, Marvin Karparkin, who would be representing us in that hearing. As the train neared the nation's capital, we found ourselves marveling at a legal system that would provide a fair judicial forum for a group of citizens to sue the government for violation of their fundamental First Amendment rights and demand that the government explain the reasons for such censorship. It seemed it would take a lot of, shall we say, *chutzpah* for us to do that. But our marvelous judicial system, with its independent judiciary, provided the mechanism that enabled us to do so. (Karparkin certainly did not lack *chutzpah*. As a prominent litigator in military draft cases, he argued before the Supreme Court challenging the conviction of an anti-war protester who burned his draft card in dissent against the war in Vietnam. Unfortunately, the Court ruled against him in *United States v. O'Brien*, 391 U.S. 367 (1968).)

The three-judge court was very responsive to our arguments that afternoon, and it felt as though the meaning and purpose of the First Amendment had come alive in that Washington, D.C., courtroom. The court granted the ACLU a preliminary injunction to run its issue advertisement criticizing or praising incumbent politicians during an election season and went on thereafter to hold that the law requiring permission to speak out about politicians was an impermissible prior restraint and one that could not be imposed on nonpartisan issue organizations.

After Watergate

Those two rulings would certainly have cleared the way for the ACLU and the myriad other cause organizations in America to continue to criticize politicians free from fear of restraint under the campaign finance laws. But then came the Watergate scandals. Although only some matters involved campaign finance irregularities—misconduct that either was already illegal under existing law or occurred before effective disclosure of

contributions had been implemented—that served as the excuse for a massive expansion of the campaign finance controls. The new law, passed in the fall of 1974, was an across-the-board effort by the federal government to regulate political speech through limiting and controlling its funding. It set severe limits on political contributions and expenditures by candidates, parties, and independent groups; it imposed draconian new reporting and disclosure requirements designed to silence nonpartisan groups; and it set up a new agency to enforce this regime totally controlled by the incumbent politicians in the Congress and the White House. And this was all done in the name of reforming the political process. Talk about chutzpah.

Once again, a small group of outsiders had the courage to say, “No, this will not stand. This effort to control political speech as thoroughly as the condemned Alien and Sedition Laws of an earlier era will not go unchallenged.” Led by an odd couple of outsiders—James Buckley, the conservative U.S. Senator from New York, and the liberal, antiwar icon, Senator Eugene McCarthy of Minnesota—a strange bedfellows coalition of outsiders came together to challenge the law. They included the New York Civil Liberties Union, headed by Ira Glasser, and a number of other liberal and conservative cause organizations and third-party groups, including the Libertarian Party; the conservative magazine *Human Rights*; the Mississippi Republican Party; and Stewart Mott, a wealthy General Motors heir who had lavishly backed a number of left-wing causes. Taken as a whole, their complaint was that the new laws were systematic violations of the freedoms of speech, press, association, and petition safeguarded at the core of the First Amendment. At the same time, they were incumbent protection devices designed to preserve the power of the status quo and the entrenched political and media establishment, by denying outside voices the wherewithal to get their dissident messages out. (Oh, if we had only had Twitter back then.) Thus was the landmark case of *Buckley v. Valeo* born.

The omnibus complaint against the new campaign finance law was first heard by the entire D.C. Circuit, in an exceptional en banc proceeding that was provided for in the new law in order to allow its immediate challenge. The suit was filed the first day the law went into effect. Our team was led by then Yale Law School professor Ralph K. Winter Jr., who would go on to an extremely distinguished career on the Second Circuit, and by Brice Claggett, a major litigating partner at the Washington powerhouse firm of Covington and Burling, ably assisted by John R. Bolton, then a young associate who would also go on to an extremely distinguished career in politics and public service. Except for the fact that we were working out of Covington’s fancy law firm offices, we felt like decided outsiders up against a legal, political, and media establishment that had vouched for the constitutionality and necessity of the law. David and Goliath once again. It did seem that we had a lot of nerve challenging

what was heralded as such a solid gold law. And, indeed, the proceedings in the D.C. Circuit seemed to vindicate the law and its defenders, with a ruling that upheld every provision of the law except one—a section that would have required groups like the ACLU to disclose their members and contributors as the price of criticizing elected officials during an election year. It has always been a source of pride for me that I was responsible for arguing that part of the case, which provided the one bright spot of victory in the en banc court decision.

It was always clear that the case would go to the Supreme Court on an exceptionally fast track, and it did. Once again, we felt like long-shot underdogs, with so much of the Establishment on the other side of our challenge. During the argument at the Court—another exceptional moment, the whole day set aside for argument on the one case—luminaries like Senator Ted Kennedy and others who had championed the law were prominently seated in the first row of the distinguished guests section of the courtroom. But once the arguments began, and as we started hearing the kinds of skeptical questions many of the justices were directing at the lawyers defending the law—questions we had been raising from the beginning of the case and to little avail—we felt for the first time in the litigation that our arguments were getting the fair hearing they deserved. Once again, it seemed the nerve of those enacting such a questionable law was being met by the courage of those with the chutzpah to challenge it. At the end of the day of oral argument, we had the feeling that, win or lose, for the first time the severe First Amendment concerns raised by the law were being taken seriously.

The Landmark *Buckley* Decision

As is well known, the Court’s landmark 1976 *Buckley* decision ruled decisively, for the first time, that limitations on the funding of political speech were limitations on that speech itself and subject to the most careful First Amendment scrutiny. Limits on spending failed that test, as did limits on issue advocacy by groups and individuals. Limits on giving to candidates and parties were upheld on the theory—mistaken in my view—that they were necessary to avoid corruption or the appearance of corruption, concerns that we challengers had argued could be addressed adequately and less drastically by disclosure of large contributions and enforcement of conflict-of-interest and bribery laws. But to those of us who a few years earlier, in the impeachment advertisement case, had strenuously insisted, when few others concurred, that limits on political funding were limits on political speech, the Court’s confirmation of that view was gratifying, as was the Court’s reaffirmation of core First Amendment principles. For the next 25 years, the *Buckley* framework would govern campaign finance laws and result in Court decisions tending to strike down provisions that

limited spending, while upholding those that limited giving to candidates and parties.

As we had predicted in our arguments to the Court in *Buckley*, any Solomon-like splitting of the decision would lead individuals and groups to use their resources to get out their message in ways not involving direct contributions to candidates or to benefit candidates. The result was a lot of donations of “soft money” to political parties for their generic activities as well as spending of funds independently by corporations and labor unions for issue advocacy that skirted direct endorsement of candidates but could have an impact on elections. To “close these loopholes,” Congress passed the McCain-Feingold bill, which outlawed any raising or spending of soft money by any political parties even to be used for things like get-out-the-vote campaigns. All corrupting, said Congress. Even worse, the law made it a crime for any corporation—including all of the nonprofit cause organizations in America—or any labor union to spend any funds speaking out, on broadcast or similar media, for or against politicians during an election season, or even mentioning their names. To make the First Amendment insult even greater, the corporate news media were specifically exempted from this statutory gag order. To paraphrase George Orwell, all groups are equal, but some groups are more equal than others. As the powerful dissent of the late Justice Antonin Scalia would point out, it took an unusual amount of chutzpah for the Congress to pass this law, which was the ultimate incumbent protection measure. It censored the political parties—who most often support challengers to incumbents—and it censored those powerful independent groups—corporations, nonprofit organizations, and unions—who most frequently criticized incumbents. Not to mention that the First Amendment seems to say that Congress cannot do that: “Congress shall make no law,” and all that.

The law was challenged by another strange bedfellows coalition, which had the American Federation of Labor–Congress of Industrial Organizations (AFL-CIO) marching side by side with the U.S. Chamber of Commerce and the ACLU joining forces with the National Rifle Association (NRA), all in opposition to this law that silenced all of them and the tens of millions of Americans they represent. They disagreed on so many policy matters, but they all agreed that the new law was a direct affront to the First Amendment. It was a coalition assembled under the leadership of Republican Senator Mitch McConnell, and it included, as one of the plaintiffs, the current vice president of the United States, Mike Pence, then a member of the House of Representatives. This was certainly not a small band of outsiders like the *Buckley* plaintiffs. Rather, it was key participants in the political process insisting that the law was designed to silence them and empower their political adversaries, who had been the ones who pushed the law through in the first place. During the argument, for which the Court once again set aside an entire day,

the tenor of the questioning—especially some questions asked by Chief Justice William Rehnquist—led us at the challengers counsel table to feel that we might have a chance to eke out a narrow 5–4 victory striking down the law. Unfortunately, our celebrations were quite premature.

In its decision in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), a decision with a rare joint co-authorship by both Justice John Paul Stevens and Justice Sandra Day O’Connor, the majority of the Court—its “liberal” justices—severely watered down the First Amendment’s protections of political speech and association in order to uphold the law as a way to deter not only corruption but also undue access and influence by those

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who financially support political parties or make independent expenditures speaking about politicians. The majority opinion was the absolute nadir of First Amendment jurisprudence in this area, giving the government extremely broad powers to regulate the funding of political speech and association—the most potent weapon the people have to challenge the government. Talk about chutzpah. The ruling was cheered by most of the major media, and why not? Now they would be the only major institutions with a free hand to use their resources to speak about politicians. Lucky for those who own a newspaper or a broadcast network.

Citizens United

Of course, the final chapter in our story is yet to come. That is the case of *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), certainly the most widely known, though perhaps least understood, Supreme Court decision of modern times. For a landmark ruling, it didn’t start out that way. According to the head of the group, David N. Bossie, Citizens United, a conservative political and cause organization, was not spoiling for a constitutional fight. Its chutzpah was not that it wanted to set a

landmark precedent or overturn a prior ruling. What it did want to do was emulate a liberal iconic storyteller, Michael Moore, whose 2004 film *Fahrenheit 9/11* was a broadside attack against President George W. Bush, who was up for reelection that year. Citizens United wanted to do the same thing against Hillary Clinton, the front-runner for the Democratic Party presidential nomination in 2008.

The problem was that the law upheld in the *McConnell* case seemed to make it a crime and otherwise prevent the group from doing so because it was a corporation, albeit a nonprofit like hundreds of thousands of other cause organizations, but the law made no exception for that. Citizens United might be able to make the movie, but it could not advertise it on television or

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show it on demand. It was not even clear Citizens United could show the film in a movie theater because it politically attacked then senator Clinton. The group tried to see if there was any way the Federal Election Commission might approve or make an exception for the film, but there was not. So Citizens United really had not set out to bring a landmark case, but in order to get its movie and its message out, it had to challenge the campaign finance law's restrictions. When one steps back a moment, this whole situation should have been, as lawyers say, *res ipsa loquitur*. The idea that a group of citizens wanting to make and distribute a movie critical of a leading presidential candidate could not do so because the law would not allow that, or could not do so without seeking the permission or approval of a government agency, seems utterly unreal in a country with a First Amendment and, supposedly, a culture of free speech. How could such a classic example of free speech be made a crime?

Citizens United filed suit seeking a judicial declaration that it

could produce and distribute the film *Hillary: The Movie* without fear of enforcement of the federal campaign finance laws against it. There were a number of issues raised about whether nonprofit groups like Citizens United—and the countless counterpart groups like the ACLU and others—could be restricted in this fashion. The issues would certainly be important for free speech and criticism of government generally. A lower court ruled against the group on the ground that the law covered the film and prevented its distribution.

The case was argued in the Supreme Court in March 2009 and raised the expected issues. But at one pivotal point, Justice Samuel Alito asked the government's lawyer whether, under the government's theory of the First Amendment and the Court's precedents, the law could be used to ban a publishing company from distributing a *book* critical of Senator Clinton? When the government's lawyer answered "yes," there was an audible gasp from members of the audience. Here was the government telling the Supreme Court that a book could be banned if it criticized a presidential candidate during an election year and was published by a corporation. It took nerve to give that answer, but it was consistent with the government's theory about the need to enforce the campaign finance laws. Many have speculated that, because of that answer to that question and the position it espoused, the Court decided to schedule the case for re-argument. In the re-argument, Citizens United's position would be supported by a Who's Who of labor, business, civic, and political organizations across the political spectrum in America, including the ACLU, the AFL-CIO, the Chamber of Commerce, the NRA, and the Reporters Committee for Freedom of the Press.

That re-argument in September 2009 had great drama to it, with some of the top lawyers in the country, like Floyd Abrams, Ted Olson, then solicitor general Elena Kagan, and former solicitor general Seth Waxman, crossing swords. The same question about banning books was asked and answered, with a little more nuance. But the answer was basically the same: yes, the government could ban a book published by a corporation in order to enforce the law. As the Court's 5-4 ruling four months later in January 2010 would indicate, that seemed to be the straw that broke the back of the government's theory. It resulted in the landmark ruling, written by Justice Anthony M. Kennedy, that independent speech about government and politics could not be banned or restricted because the speaker was an organization—be it corporate, nonprofit, or labor—just as it could not be banned if it came from an individual. The free speech rights and benefits of the First Amendment had to be available equally to all. There could be no second-class speakers under our First Amendment; were the rule otherwise, the Court insisted, then the organized and established news media, almost all of which are corporate in form, could be restrained as well, which would be an intolerable consequence. Despite the fact that the Court explained that it

was protecting Citizens United in order to protect the *New York Times*, most of the major media greeted the decision with furious anger and contempt, not with open arms. But for those of us who had any role to play—however modest—in bringing about the Court’s decision and the free speech reasoning behind that ruling, it was a great day for the First Amendment.

Nonetheless, the ruling was met with an avalanche of protest and condemnation. It would lead to a corporate takeover of our government. It would be the death of democracy. And leading the charge was the president of the United States, who, in his State of the Union message a few days later, publicly attacked the decision, with the members of the Court sitting before him silently. I have never seen a president show such disrespect to the Supreme Court before. Talk about chutzpah. Of course, that would set the tone for the relentless media and partisan attacks on the decision that have not abated even now. During the recent presidential campaign, Secretary Clinton repeatedly promised—to great applause each time—not to name anyone to the Supreme Court who was not prepared to overrule the decision. I thought litmus tests were improper for Supreme Court appointments and an undermining of the independence of the judiciary. Let alone the irony of a leading presidential candidate attacking a decision that permitted a group of citizens to question her fitness for the office. More chutzpah, for sure. One of our two major parties’ platforms contained a pledge to seek a constitutional amendment, if necessary, to overrule the decision. The last time there was a serious effort to overrule a decision protecting free speech was against the Court’s ruling upholding the First Amendment right to burn the American flag as an expression of protest. That proposed amendment was defeated, and this one will be as well, and with good cause. We do not need a new First Amendment that repeals the current one. We just need to safeguard and apply the one we have, which has served America so well for 225 years.

One more recent example of the courage of one’s convictions in this area involves Shaun McCutcheon, a businessman from Alabama and dedicated Republican Party supporter. He wanted to give a number of contributions—each within the legal limit—to Republican candidates and committees whose principles and policies he shared and supported. The federal campaign finance law contained a provision limiting the aggregate amount of such contributions that any one person could give during an election season, even though each individual one would be perfectly legal. The Supreme Court in *Buckley* had upheld such an aggregate limit as a way to prevent corruption. But the campaign finance statutes and regulations had changed since then, and there were a number of new protections and restrictions to address such concerns. Building on *Citizens United’s* questioning of campaign finance limits, McCutcheon filed suit to challenge the aggregate contribution limits. In another 5–4 ruling, the Supreme Court agreed with him, declaring that his aggregate financial

support—fully disclosed and each specific contribution within the law’s limits—was an example of core First Amendment activity no different than marching in a parade or handing out leaflets, and no less admirable under our constitutional protections of freedom of speech and association. His chutzpah in bringing and winning that case paid off as well.

Conclusion

So there it is: From a handful of left-wing antiwar protestors to an organization of right-wing conservatives to a Republican businessman, groups and individuals have had the nerve to stand up and challenge the right of the government to seek to silence their criticism of those who run the government. It took the bad kind of chutzpah for the government full of incumbents to pass those incumbent-protecting, speech-suppressing laws in the first place, given the meaning and purpose of the First Amendment, and it took the good kind of chutzpah for all of the people and groups who took the government to task for violating those principles.

In doing so, they were vindicating the brave words of three Supreme Court justices of an earlier era who certainly did not lack chutzpah. In a case in which the government tried to make it a crime for labor unions to speak out on candidates for office, Justice William O. Douglas, for himself and Justice Hugo Black and Chief Justice Earl Warren, put it this way:

Under our Constitution, it is We The People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important—vitaly important—that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community.

...

Some may think that one group or another should not express its views in an election because it is too powerful, because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justifications for withholding First Amendment rights from any group—labor or corporate. . . . First Amendment rights are part of the heritage of all persons and groups in this country. They are not to be dispensed or withheld merely because we or the Congress thinks the person or group is worthy or unworthy.

United States v. Auto Workers, 352 U.S. 567, 593, 594 (1957) (Douglas, J., dissenting). ■