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ESSAY

POLITICS AND TERRORISM: WHAT HAPPENS WHEN MONEY IS SPEECH?

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AS we enter the last phase of an election cycle marked by a huge and growing amount of money in politics, it is time to confront a central tension in the Supreme Court’s interpretation of the First Amendment. In the well-known 2010 case, *Citizens United v. Federal Election Commission*, the Court reaffirmed that giving and spending money in connection with elections constitute protected “speech” under the First Amendment and thus that any restrictions on these activities can only survive if they are narrowly tailored to serving a compelling governmental interest.¹ A bare five months later, another important case of the same term, *Holder v. Humanitarian Law Project*, considered whether the government may ban the provision of “material support” to terrorist groups and held that it may.² While some “material support” – expert advice and training -- raised First Amendment concerns, the Court did not consider whether giving money to terrorists was protected “speech” under the First Amendment but implied that it was not. Thus, a contradiction resides in the heart of the Court’s interpretation of the First Amendment. *Citizens United* tells us that giving money to Group X is “speech” under the First Amendment, while *Humanitarian Law Project* tells us that giving money to Group Y is not “speech” under the First Amendment. As we reflect on this election season in which lots of “material support” to parties and candidates is being passed around, this is an important contradiction to resolve.

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¹ 558 U.S. 310, 898–99 (2010).

² 130 S. Ct. 2705, 2722–30 (2010).

“Hard cases make bad law” instructs a familiar legal aphorism. Perhaps one of the hardest cases was the 1976 case of *Buckley v. Valeo*, in which the Supreme Court first addressed whether restrictions on both giving and spending money in connection with elections violated the First Amendment’s guarantee of free speech.³ The case was hard because restrictions on the giving and spending of money, while not direct restrictions on speech, have significant effects on speech because money facilitates speech and because giving and spending money are ways of expressing support for the person or entity to whom the money is given. As a result, the case required the Court to engage in one of the most difficult legal problems—defining or delineating what counts as “speech” under the First Amendment. In *Buckley*, the Court concluded that political contributions count as “speech” as the First Amendment understands that term for two reasons. First, giving money is a way of expressing support, of saying: “I like candidate X.”⁴ Second, the money that we give helps the candidate or party speak.⁵ It takes money to buy a TV advertisement, so the money we give to candidates leads to speech by candidates in the form of television, radio, Internet, and mail advertising.

As any first-year law student knows, a helpful way to test the rule a court might offer to govern a case is to see whether one is also comfortable extending that rule to a relevantly similar case. So, one might ask about the *Buckley* view that giving and spending money on politics is speech: if contributions to political candidates or to the Democratic or Republican party are treated as “speech” under the First Amendment, would we say the same thing about contributions to unpopular parties or candidates? Is a contribution to the Communist Party or the Nazi Party also “speech” under the First Amendment, such that it can only be curtailed in the service of a compelling governmental interest? Of course, one would reply. After all, it is a bedrock First Amendment principle that the government cannot favor some viewpoints or speakers over others, and so if a contribution to the Republican Party is speech under the First Amendment, then so too is a contribution to the Communist Party. But what about a contribution to Al Qaeda in the Arabian Peninsula? Hmm. On the one hand, if a contribution is speech, then it is speech no matter to whom the contribution is made. But on the other hand, this looks a lot like the support of terrorism. And that is exactly what the Supreme Court has held. In *Humanitarian Law Project*, the Court upheld

³ 424 U.S. 1, 39–51 (1976).

⁴ *Id.* at 21.

⁵ *Id.*

the Antiterrorism and Effective Death Penalty Act of 1996,⁶ which makes it a serious federal crime to provide “material support” to terrorist groups.⁷ The Supreme Court did not directly address whether giving money to terrorists is speech under the First Amendment, but it proceeded as if it was not, noting that “Congress has prohibited ‘material support,’ which most often does not take the form of speech at all.”⁸

We have thus arrived at an impasse. It is constitutionally permissible to criminalize giving “material support” to one sort of group and constitutionally impermissible to criminalize giving money to another. Yet the sine qua non of a plausible First Amendment theory rules out an approach that determines whether something is “speech” or not on the basis of the viewpoint or identity of the speaker.

How have we gotten here? We have arrived at this conundrum because it is far more difficult than one would imagine to delineate speech, which is protected by the First Amendment, from conduct, which is not. Some conduct is expressive in just the same way that talking or writing is expressive, and thus the Court has protected flag burning and other expressive actions.⁹ At the same time, some talking is more like action than expression—think of bribery. While the person who bribes another carries out his crime by talking, this activity is not protected by the First Amendment. If giving money to terrorist groups is not speech, why is giving money to political candidates speech?

To the layperson, perhaps the answer is obvious. Giving money to Joe Blow to run for office is different from giving money to Joe Blow to blow up the bagel store. The latter is not speech because blowing up a bagel store is not speaking and, in addition, is a crime. True enough. This observation points to two possible ways to distinguish giving money to candidates and giving money to terrorists. First, perhaps the difference lies in what the money is used for—words or bombs. Second, perhaps the difference lies in why the government forbids giving the money—is the government trying to curtail speech or prevent criminal activity? Let us try out each of these theories. On the first account, the state cannot forbid giving money to political parties because that money is used for expression, but it may forbid giving money to terrorists because that money is not used for expression, and is instead used for criminal activity. Let us see where this leads. On this rationale, we

⁶ *Humanitarian Law Project*, 130 S. Ct. at 2713.

⁷ Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250 (1996).

⁸ *Humanitarian Law Project*, 130 S. Ct. at 2723.

⁹ See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989).

would need to protect giving money to terrorists so long as that money was segregated for expressive purposes. If Al Qaeda set up an affiliated organization—say an Al Qaeda PAC—then contributions to this group would be protected speech. Whether this is a good idea as a matter of policy is up for debate, but it hardly matters as it is quite far from what the Supreme Court has held. In *Humanitarian Law Project* itself, the Court said that providing legal advice to terrorist groups about how to bring human rights claims before international tribunals could be considered “material support” under the law.¹⁰ In other words, when we are talking about terrorists, not only is giving money not speech but legal advice is in fact money.

This latter conclusion—that legal advocacy is both speech and money—is, to my mind, deeply troubling both as an interpretation of the First Amendment and as a matter of policy. But the point I want to stress here is that one can hardly reconcile the propositions that giving money to political groups is speech but giving money to terrorist groups is not-speech on the grounds that the first is used for speech but the second is used for criminal activity unless one would be willing to accept that giving money to the Al Qaeda PAC is also speech. Given the Court’s view that providing legal services to a terrorist group to bring their claims to international tribunals counts as “material support,” this hardly seems an approach the current Court is likely to adopt.

What about the second theory? On this view, whether a law restricts speech depends on why the state enacts it. Does the state forbid donating money in order to suppress speech or in order to prevent criminal activity? This too will not resolve the dilemma at the heart of our First Amendment case law. Even if we accept that the way to understand the First Amendment’s command is by focusing on the reasons for which the government enacts a law, it is not at all clear that the state restricts giving and spending money in connection with elections in order to suppress speech. Rather I would think that there are several good reasons to restrict the amount of money that individuals or corporations can give or spend on politics. Here are a few: (1) To insure that people with a lot of money do not have significantly more influence on the outcomes of elections than ordinary voters. Money is power, on this view, not speech. (2) To insure that people continue to believe that our system is a democracy—a confidence threatened by the influence of super PACs and the rich people who form them. (3) To avoid the “prisoner’s dilem-

¹⁰ *Humanitarian Law Project*, 130 S. Ct. at 2729–30.

ma,” in which people who have money they can donate each think they had better give it to political parties or candidates because folks on the other side are doing the same, money that they might otherwise give to homeless shelters, church groups, etc. In short, there are many reasons to restrict money in politics that have nothing to do with suppressing speech. So long as the government restricts giving and spending money for reasons unrelated to suppressing speech, these restrictions should not raise First Amendments concerns.

Humanitarian Law Project allows us to see the mistake of a jurisprudence begun in 1976 which too quickly moved from the claim that money both expresses support and facilitates speech to the conclusion that giving and spending of money deserve First Amendment protection. That claim is clearly wrong. If it were correct, giving money to terrorist organizations would also be “speech” under the First Amendment. That conclusion—a sort of argument ad absurdum—shows us that the premise is flawed. Congress may prohibit giving money to political organizations because providing material support for speech is not same as speaking.

The Antiterrorism and Effective Death Penalty Act of 1996 prohibits the provision of *material* support to terrorists, and for good reason.¹¹ There is a real and important difference between support and material support. While the First Amendment would prevent Congress from outlawing the expression of support for terrorist groups or actions, it should not be read to prohibit Congress from outlawing giving money to these groups.

But what is good for the goose is good for the gander, and we must recognize the same distinction between support and material support in the context of politics. At the risk of abandoning the central commitment of the First Amendment to government neutrality between competing views and speakers, we must also say that expressing support for political candidates or parties is protected by the First Amendment but providing material support for candidates or parties is not.

¹¹ § 303, 110 Stat. at 1250.