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The Left's War on Free Speech

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The following is adapted from a speech delivered on April 26, 2017, at Hillsdale College's Allan P. Kirby, Jr. Center for Constitutional Studies and Citizenship in Washington, D.C., as part of the AWC Family Foundation Lecture Series.

I like to introduce the topic of free speech with an anecdote about my children. I have three kids, ages twelve, nine, and five. They are your average, normal kids—which means they live to annoy the heck out of each other.

Last fall, sitting around the dinner table, the twelve-year-old was doing a particularly good job at this with his youngest sister. She finally grew so frustrated

that she said, “Oliver, you need to stop talking—*forever*.” This inspired a volley of protests about free speech rights, and ended with them yelling “shut up” at each other. Desperate to stop the fighting and restore order, I asked each of them in turn to tell me what they thought “free speech” meant.

The twelve-year-old went first. A serious and academic child, he gave a textbook definition that included “Congress shall make no law,” an evocation of James Madison, a tutorial on the Bill of Rights, and warnings about “certain exceptions for public safety and libel.” I was happy to know the private-school fees were yielding something.

The nine-year-old went next. A rebel convinced that everyone ignores her, she said that she had no idea what “public safety” or “libel” were, but that “it doesn’t matter, because free speech means there should never be any restrictions on *anything* that *anybody* says, *anytime* or *anywhere*.” She added that we could all start by listening more to what she says.

Then it was the five-year-old’s turn. You could tell she’d been thinking hard about her answer. She fixed both her brother and sister with a ferocious stare and said: “Free speech is that you can say what you want—as long as I like it.”

It was at this moment that I had one of those sudden insights as a parent. I realized that my oldest was a constitutional conservative, my middle child a libertarian, and my youngest a socialist with totalitarian tendencies.

With that

introduction, my main point today is that we’ve experienced over the past eight years a profound shift in our political culture, a shift that has resulted in a significant portion of our body politic holding a five-year-old’s view of free speech. What makes this shift notable is that unlike most changes in politics, you can trace it back to one day: January 21, 2010, the day the Supreme Court issued its *Citizens United* ruling and restored free speech rights to millions of Americans.

For nearly 100 years up to that point, both sides of the political aisle had used campaign finance laws—I call them speech laws—to muzzle their political opponents. The Right used them to push unions out of elections. The Left used them to push corporations out of elections. These speech laws kept building and building until we got the mack daddy of them all—McCain-Feingold. It was at this point the Supreme Court said, “Enough.” A five-judge majority ruled that Congress had gone way too far in violating the

Constitution’s free speech protections.

The *Citizens United* ruling was viewed as a blow for freedom by most on the Right, which had in recent years gotten some free speech religion, but as an unmitigated disaster by the Left. Over the decades, the Left had found it harder and harder to win policy arguments, and had come to rely more and more on these laws to muzzle political opponents. And here was the Supreme Court knocking back those laws, reopening the floodgates for non-profits and corporations to speak freely

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[Latin]: in the first place

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again in the public arena.

In the Left's view, the ruling couldn't have come at a worse time. Remember the political environment in 2010. Democrats were experiencing an enormous backlash against the policies and agenda of the Obama administration. There were revolts over auto bailouts, stimulus spending, and Obamacare. The Tea Party movement was in full swing and vowing to use the midterm elections to effect dramatic change. Democrats feared an electoral tidal wave would sweep them out of Congress.

In the weeks following the *Citizens United* ruling, the Left settled on a new strategy. If it could no longer use speech laws against its opponents, it would do the next best thing—it would threaten, harass, and intimidate its opponents out of participation. It would send a message: conservatives choosing to exercise their constitutional rights will pay a political and personal price.

We've seen this strategy unfold, in a coordinated fashion and using a variety of tactics, since 2010.

One tactic is the unleashing of federal and state bureaucracies on political opponents. The best example of this is the IRS targeting of conservative non-profits. To this day, Obama acolytes and Senate Democrats characterize that targeting as a mistake by a few minor IRS employees in Cincinnati who didn't understand the law. That is a lie.

Congress held several investigations of this targeting, and the truth is clear. In the months following the *Citizens United* ruling, President Obama delivered speech after speech on behalf of Democratic midterm candidates, repeating the same grave warning at each stop—thanks to *Citizens United*, he would say, shadowy and scary organizations are flooding into our elections. He suggested these organizations might

be operating illegally and might be funded by foreign players. He noted that somebody should do something about it.

These speeches acted as a dog whistle to an IRS bureaucracy that was already primed to act. Former IRS official Lois Lerner was well aware of Democratic demands that the agency go after conservative Tea Party and non-profit groups. Senate Democrats and left-wing interest groups had been sending letters to the agency for months, demanding it go after the very groups it ultimately went after. And Ms. Lerner had her own biases—we know this from her recoverable emails—that put her politically and substantively in the anti-free speech camp. The result is that the IRS deliberately put some 400 conservative organizations, representing tens of thousands of Americans, on political ice for the 2010 and 2012 elections.

It is hard not to believe that this was designed to help Democrats in those elections. We know that senior members of the Treasury Department were aware of the targeting abuse in early 2012, and took steps to try to slow it. Yet those officials did not inform Congress this was happening, and chose not to divulge the abuse until well after that year's election.

Another intimidation tactic is for prosecutors to abuse their awesome powers in order to hound and frighten political opponents. The most terrifying example of this was the John Doe probe in Wisconsin. Democratic prosecutors in Milwaukee launched a bogus *criminal* campaign finance investigation into some 30 conservative groups that supported the public-sector union reforms championed by Governor Scott Walker. Wisconsin's John Doe law gave these prosecutors the right to conduct this investigation in secret and to subject their individual targets to gag orders. Prosecutors secretly looked through these individuals' financial records, bank accounts, and emails.

Prosecutors also conducted pre-dawn raids on some of their targets' homes. In one horrifying instance, the target of such a raid was on an out-of-town trip with his wife, and their teenage son was home alone. Law enforcement came into the house and sequestered the boy, refusing to allow him to call a lawyer or even his grandparents, who lived down the road. They hauled items out of the house, and as they left they told the boy that he too was subject to the gag order—that if he told anyone what had happened to him, he could go to jail.

We only learned of this because one brave target of the probe, Eric O'Keefe, told *The Wall Street Journal* what was going on. We broke that story, and it became national headline news. But it ultimately took a lawsuit and the Wisconsin Supreme Court to shut down the probe. In its ruling, the Court made clear its view that the probe's purpose had been intimidation. The prosecutors had been sending the message: if you dare to speak, we will turn your lives into a living hell and potentially put you in prison.

More recently we have seen this tactic in the joint action of 17 state attorneys general, who launched a probe into Exxon and some 100 different groups that have worked with Exxon over the years. The implicit prosecutorial threat: get on board with our climate change agenda or we might bring racketeering charges against you.

A third intimidation tactic is for activist groups to use blackmail against corporations and non-profits in order to silence them. One subject of such attacks was the American Legislative Exchange Council (ALEC), a group that works to promote free-market policies at the state level. As a non-profit, it is largely funded by corporate donations. Because it is so successful, it has long been despised by left-wing activist groups.

These groups focused their efforts on ALEC in 2012, in the wake of the

tragic shooting of 17-year-old Trayvon Martin in Florida. ALEC had played a tangential role in crafting the popular stand-your-ground laws that the Left attacked after the shooting. On that basis, left-wing activists branded ALEC a racist organization and threatened to run ad campaigns against its corporate donors, branding them as racists too—unless they stopped funding ALEC. In a coordinated action, Democratic U.S. Senator Dick Durbin sent letters to a thousand organizations across the country, demanding to know if they supported ALEC and suggesting they'd get hauled in front of Congress if they did. ALEC lost nearly half of its donors in the space of a few months.

We've also seen this tactic employed against private individuals. One such person was Idaho businessman Frank VanderSloot, who Barack Obama's reelection campaign singled out in 2012, following a VanderSloot donation to Mitt Romney. The campaign publicly branded him a disreputable person, painting a target on his back. Not long after that, VanderSloot was audited by the IRS and visited by other federal agencies.

Out in California, left-wing activists targeted donors to the state's Prop 8 ballot initiative, which supported traditional marriage. They combed through campaign finance records, and put the names and addresses of Prop 8's donors on a searchable map. Citizens on this list had their cars keyed, their windows broken, their small businesses flash-mobbed, and their voicemails and emails flooded with threats and insults. Some of them even lost their jobs—most notably Brendan Eich, the founder and CEO of Mozilla. In later depositions, many of these targets told lawyers that they wouldn't donate to future ballot initiatives. So the attacks were successful in silencing them.

Note the use of disclosure in these attacks. We have come to associate transparency and disclosure with good government. But unfortunately, our

system of disclosure has been turned on its head. Disclosure was supposed to enable citizens to keep track of politicians; but if you followed Hillary Clinton's server scandal, you know that politicians have now become expert at hiding their business. Instead, disclosure is increasingly becoming a tool by which government and political thugs identify people and organizations who oppose them.

Sadly, our federal judiciary has refused to honor important precedents that protect anonymity in politics—most notably the famous 1958 case, *NAACP v. Alabama*. In that case, a unanimous Supreme Court ruled against the Alabama attorney general, who had demanded a list of the state's NAACP members. The civil rights group knew this was tantamount to making targets of its members in a state that was riven at the time with race-related violence. The Court held that some level of anonymity is sometimes required to protect the rights of free speech and free assembly. The Court expanded on this precedent until the Watergate scandal, when it too got caught up in the disclosure fad. Political privacy rights have been eroding ever since.

What is to be done? For starters, we need to be aware that this is happening, and that it is not random. The intimidation game is very real. It is the work of left-wing groups and politicians, it is coordinated, and it is well-honed. Many of the targets of intimidation who I interviewed for my recent book weren't aware of what was happening to them, and that allowed the intimidation to go on for too long. Awareness is key.

We need to think hard about ways to limit the powers of the administrative state, to stop rogue agents at the IRS and other agencies from trampling on free speech rights. We can make great progress simply by cutting the size of federal and state bureaucracies. But beyond

that, we need to conduct systematic reviews of agency powers and strip from unaccountable bureaucracies any discretion over the political activities of Americans. The IRS should be doing what it was created to do—making sure taxpayers fill out their forms correctly. Period.

We need to push corporations to grow backbones and to defend more aggressively their free speech interests—rather than leaving that defense to others.

We need to overhaul our disclosure laws, and once again put the onus of disclosure on government rather than citizens. At the moment, every American who donates \$200 or more to a federal politician goes into a database. Without meaning to sound cynical, no politician in Washington is capable of being bought off for a mere \$200. We need to raise that donation threshold. And we need to think hard about whether there is good reason to force disclosure of any donations to ballot initiatives or to the production and broadcast of issue ads—ads designed to educate the public rather than to promote or oppose candidates.

Most important, we need to call out intimidation in any form and manner we see it—and do so instantly. Bullies don't like to be exposed. They'd rather practice their ugliness in the dark. And one lesson that emerged from all my interviews on this topic is that speaking out works. Those who rolled over merely set themselves up for future attacks. Those who called out the intimidators maintained their rights and won the day.

Finally, conservatives need to tamp down any impulse to practice such intimidation themselves. Our country is best when it is engaging in vigorous debate. The Framers of the Constitution envisioned a multiplicity of interests that would argue their way to a common good. We succeed with more voices, not fewer, and we should have enough confidence in our arguments to hear out our opponents. ■