Chapter 1

Introduction

On May 31, 1972, a two-page ad appeared in the *New York Times* that featured the headline "A Resolution to Impeach Richard Nixon as President of the United States." The ad, which cost a total of $17,850, was paid for by a group consisting of several lawyers, at least one law professor, a former United States senator, and a number of other citizens of modest prominence, calling themselves the National Committee for Impeachment. In addition to criticizing President Richard Nixon, the ad recognized an "honor roll" of several congressmen who had introduced a resolution that called for the president's impeachment. The United States Department of Justice moved swiftly, getting a federal district court to enjoin the National Committee for Impeachment and its officers from engaging in further political activity. The committee, argued the govern-

ment, was violating the Federal Election Campaign Act of 1971 because its efforts had the potential to "affect" the 1972 presidential election, and the committee had not properly registered with the government to engage in such political activity.

United States v. National Committee for Impeachment was the first enforcement action ever brought under the Federal Election Campaign Act (FECA), which, as amended, remains our basic national campaign finance law. The case made plain the extent to which FECA was one of the most radical laws ever passed in the United States; for the first time in history, Congress had passed a law requiring citizens to register with the government in order to criticize its office holders.

The case also illustrates the inextricable link between political speech and political spending. For the government's hook in its effort to quiet the National Committee for Impeachment was not the committee's actual speech but its expenditure of money to advertise that speech. The government did not attempt to argue that the defendants had no right to speak out about impeachment or other subjects, or that the contents of the ad were libelous or defamatory. Rather, it argued that the Committee for Impeachment was barred by law from spending more than $1,000 to disseminate its views. But as the case shows, speech costs money. If the government can regulate or limit expenditures to fund speech, it can effectively regulate or limit the corresponding speech. Virtually any effort to communicate with a mass audience requires an expenditure of money, whether that expenditure goes to advertise in a newspaper or on television, rent a hall or pay for a permit for a public rally, publish a newsletter or handbills, or simply to purchase a soapbox and bullhorn. It was the expenditure of money—a quite modest amount, really—that made the speech of the National Committee for Impeachment potentially persuasive to voters, and that served as the foundation for the government's claimed authority to regulate that speech.

In the summer of 1976, Edward Cozzette and a handful of friends organized the Central Long Island Tax Reform Immediately Committee (CLITRIM). The group was unaffiliated with any political party or candidate. Cozzette and his friends contacted National Tax Reform Immediately, an unincorporated committee affiliated with the conservative John

Birch Society, and obtained information on the voting record of their local congressman, Representative Jerome Ambro. They then spent $135 to print copies of a bulletin that included a photo of Representative Ambro and a list of twenty-four of his votes in congress. Each vote was identified as being "for lower taxes and less government" or "for higher taxes and more government." Twenty-one of the twenty-four votes fell into the latter category. The bulletin urged readers, "if your representative consistently votes for measures that increase taxes, let him know how you feel. And thank him when he votes for lower taxes and less government." CLITRIM members distributed copies of the bulletin at a commuter rail station, shopping centers, and at a public meeting at which Representative Ambro appeared.

On August 1, 1978, the Federal Election Commission (FEC) sued CLITRIM in federal court for violating the terms of the Federal Election Campaign Act by distributing Representative Ambro's voting record in the summer of 1976.[1] Is this what Americans want in the polling data that seems to show overwhelming support for "campaign finance reform"? Is it right that a handful of Americans could be sued in court for spending $135 to publish and distribute truthful information about the voting record of a candidate for federal office? If not, what went wrong? Can it be avoided in the future?

In the end, the cases against both CLITRIM and the National Committee for Impeachment were dismissed by federal appellate courts, which ruled that the First Amendment to the Constitution prohibited enforcement of the Federal Elections Campaign Act against the defendants. Yet each case is, in essence, still alive, for in each of the last several congresses bills have been introduced, and even passed in the U.S. House or Senate, that would regulate, limit, and in some cases ban exactly the types of behavior engaged in by CLITRIM and the National Committee for Impeachment. And why not? In each case, the dismissal of the charges hinged on the fact that the literature in question did not specifically urge readers how to vote. Had either CLITRIM or the National Committee for Impeachment specifically urged readers to "vote against" a candidate for office, the Supreme Court's jurisprudence would have allowed the government actions against them to proceed. The speakers' First Amendment rights would have been pushed aside because of the allegedly "com-

pelling" government interest in preventing corruption, or the "appearance of corruption," in the ensuing election.

But would there really have been a threat of corruption if CLITRIM had urged voters specifically to "vote against Jerome Ambro," as opposed to merely criticizing Ambro's voting record? And why should it be unlawful, as it is today, for a group of individuals to contribute more than $5,000 to a challenger's campaign that urges voters to "vote against the president this fall," but not to impress upon voters, as the National Committee for Impeachment tried to do, that the president's actions are so deleterious as to merit not merely defeat at the polls but impeachment once in office? Was the government not correct in believing that a two-page ad in the *New York Times* that urged voters to support impeachment of the president had as much potential to affect the outcome of the upcoming election as a $5,000 donation to the campaign of George McGovern, Nixon's opponent? Would McGovern, had he been elected, not have felt a debt of gratitude to the National Committee for Impeachment? Could not this debt of gratitude have had the potential to influence McGovern's actions as president? Wouldn't this be "undue" influence obtained through the expenditure of money?

Curiously, soon after the decision in *United States v. National Committee for Impeachment*, the Supreme Court held in the case of *Buckley v. Valeo* that, because of the compelling government interest in preventing "corruption" and the "appearance of corruption," the Constitution does not prohibit legislation that limits individual citizens to giving no more than $1,000 directly to a presidential candidate. But doesn't a $17,850 newspaper ad urging not the defeat but the impeachment of his opponent pose the same "threat of corruption?"

On April 27, 1988, Margaret McIntyre and two others stood outside of Blendon Middle School in the town of Westerville, Ohio, passing out handbills. Inside, employees of the Westerville public schools were holding a meeting to rally public support for an upcoming vote for higher school taxes. McIntyre, whose son attended Westerville schools, was passing out a handbill that criticized certain wasteful practices of the school board and listed various promises that the board had made, and allegedly

later broken, since a previous tax-hike campaign. McIntyre had created the fliers on her home computer and paid to make several hundred copies at a local printing shop. She signed some of the fliers in her own name and others as "Concerned Parents and Taxpayers." After observing McIntyre, J. Michael Hayfield, an assistant superintendent in the Westerville school district, approached her and told her that her distribution of handbills violated state law. McIntyre, however, carried on. The tax increase was eventually defeated. Several months later, Hayfield filed charges against Margaret McIntyre for violating the Ohio Elections Code by distributing "anonymous" campaign literature, and McIntyre was fined by the Ohio Elections Commission.

The state law under which Margaret McIntyre was charged, found guilty, and fined is, unlike the FECA, relatively old; it dates back to the first wave of campaign laws passed in the United States in the early part of this century. The law was rarely enforced until the 1970s, however, when Watergate helped to foster an explosion of both new laws and media attention related to campaign finance. McIntyre's actions would seem to be the very core of First Amendment activity—true grassroots activism by a single, middle-class, suburban housewife. Yet the State of Ohio forced McIntyre to litigate against her punishment for six years before she was finally granted relief by the United States Supreme Court, which held that McIntyre's activities were constitutionally protected.[2] The Supreme Court pointed out that anonymous political activity has a long and honored place in American history, with past practitioners including, among others, Abraham Lincoln and the authors of the Federalist Papers. Unfortunately, McIntyre herself never saw her final triumph—she died during the course of the protracted legal proceedings.

During the litigation, one argument put forth by the state in defense of the statute was that enforcement was necessary in order to insure the integrity of state's campaign finance laws. After all, if campaigning can be done anonymously, how can the state keep track of who is contributing how much and to which campaigns? If it cannot do that, what is to prevent some people from spending or contributing large sums of money to support a candidate's bid for election? If a few Margaret McIntyres get caught in the way, is that not a small price to pay to assure "clean" elec-

tions? And, indeed, the Supreme Court's opinion included language to indicate that such anonymous speech might not be permitted in a candidate election—a position explicitly adopted by Justice Ruth Bader Ginsberg in a concurring opinion.

In the fall of 1998, Suffield, Connecticut resident Leo Smith was mad. The Republican majority in the U.S. House of Representatives appeared poised to impeach President Bill Clinton, and Smith didn't like it. On his computer, he designed a web page that urged viewers to "support President Clinton" and to defeat Connecticut Congresswoman Nancy Johnson, a Republican who was supporting the impeachment bid. He included links to other political sites critical of Republicans. He felt that he had done his part to participate in one of the great political debates of the day. And then Smith received a call from the campaign of Johnson's opponent, Charlotte Koskoff. Smith discerned that the Koskoff campaign was concerned that his website put both him and the campaign in violation of the Federal Election Campaign Act. Smith sought an advisory opinion from the Federal Election Commission.

In the ensuing advisory opinion, the FEC concluded that Smith's establishment of a web site counted as an independent expenditure in favor of Johnson's Democratic opponent, and so was subject to the reporting requirements of FECA.[3] There would be no more unregulated grassroots activity for Smith, lest his efforts corrupt, or create the appearance of corrupting, Representative Johnson or her opponent.

Unlike Margaret McIntyre, Leo Smith did not pursue his case to the Supreme Court, and if he had, he would probably have lost. Yet why should McIntyre's speech have greater constitutional protection than the speech of someone such as Leo Smith, simply because it related to an issue separate from any candidate campaign, whereas Leo Smith's speech criticized the actions of a person running for office and urged voters to defeat that candidate at the polls? Would it matter if Smith had spent thousands of dollars to design and promote his web site? If so, why? And if Smith's speech is subject to regulation, as the FEC claims, then we find ourselves in the curious position of providing greater constitutional protection to internet pornography, which is protected from regulation by

the First Amendment, than to internet political speech.[4] Can this be how the nation's founders intended the First Amendment to be applied?

For nearly twenty years prior to 1996, Steve Forbes had written an opinion column in each issue of the business magazine that bears his family name. Before that, the column had been written by Forbes's father, and before that, by Forbes's grandfather, all the way back to the founding of the magazine in the early part of the century. In 1996, Forbes declared himself a candidate for the presidency of the United States. As a candidate, he continued to write his monthly column in *Forbes* magazine. He never discussed his candidacy, but he did discuss subjects such as abortion, taxes, term limits, the gold standard, and that most passionate of political issues, interleague baseball play. In September 1998, the Federal Election Commission instituted an action against Forbes, Inc., the publisher of *Forbes*. The FEC calculated the value of the columns to Forbes's presidential campaign at $94,900, and argued that by publishing the columns, Forbes, Inc. had violated the legal prohibition on corporate contributions to candidates. Oddly, Steve Forbes had already spent some $28 million of his personal fortune, largely made through Forbes, Inc., on his campaign.

As a candidate, the FEC argued, Forbes lost the right to speak to the public through his magazine columns, unless his campaign paid *Forbes* to publish the columns. In other words, as a candidate, Steve Forbes had fewer rights under the First Amendment than he did before declaring his candidacy. Such a theory seems preposterous, for it is hard to imagine a time when one would more want or need to exercise First Amendment rights than when one is running for office. Thus it was not altogether surprising when, just two months after filing suit, a rather embarrassed FEC, with three new commissioners on board, dropped its enforcement action against Forbes, Inc. Yet dropping the enforcement action raised questions as well. For it is clear that Forbes, Inc., or any other publisher of a newspaper or magazine, could give editorial space to writers other than the candidate to support or oppose various candidates for president or other federal office. Why should publishers have this power, but not candidates themselves? Why should a publishing corporation be able to devote substantial resources to supporting or opposing a candidate when

a nonpublishing corporation cannot? This publishing dilemma raises other questions, such as whether to regard Internet web pages as publications. If a web page is considered a publication, should Leo Smith's Internet activities be exempt from reporting requirements? Or is the difference that Leo Smith has less First Amendment protection because he doesn't operate his web site for profit?

These five cases—the National Committee for Impeachment, Edward Cozzette and CLITRIM, Margaret McIntyre, Leo Smith, and Steve Forbes—are each problematic in their own way, yet they are not atypical of the world we have created in an effort to regulate campaign finance. Indeed, in many respects they barely scratch the surface of the intractable dilemmas that mark efforts to regulate campaign finance. None of the actions of any of these people posed any serious danger of political corruption, by any stretch of the imagination. It is true that the first three were all vindicated in the courts, that the FEC chose not to pursue Smith (although Smith closed his web site) and that the FEC dropped the Forbes case. Yet in each of the last several congresses laws have been drawn up, and in many cases nearly passed, that are far more restrictive of political speech than anything under which any of the above individuals were charged. If the polling data is accepted at face value, Americans approve of such restrictions on political speech and, in fact, would like to see more of it.

Meanwhile, pressure is growing for a "final solution" to the problem of First Amendment limits on government power, limits that forced the charges against the National Committee for Impeachment, CLITRIM, and Margaret McIntyre to be dismissed. In 1997, thirty-eight U.S. senators voted for a constitutional amendment that would have essentially repealed the First Amendment when it comes to political speech: the amendment would have allowed Congress to impose "reasonable" restrictions on political speech.[5] The amendment also had considerable support in the House. Richard Gephardt, the minority leader in the House and a supporter of the amendment, went so far as to tell *Time* magazine, "What we have is two important values in direct conflict: freedom of speech and our desire for healthy campaigns in a healthy democracy."[6] Similarly, New Jersey Representative Bill Pascrell, responding to a witness's comment that "the First Amendment promises us free elections,"

is reported to have replied, "I find that to be ludicrous."[7] Could it possibly be true? Are free speech and healthy campaigns incompatible? Is the idea that the government should not interfere with what and how much is said in political campaigns really "ludicrous"?

Or consider these comments from former Common Cause president Ann McBride. Appearing on national television in 1996, McBride stated, "at the same time there are efforts to regulate them, [you] have oil and gas companies, [you] have trial lawyers, [you] have all the major interests that have an outcome in the election and an outcome in policy being able to pour this money in . . . they want access to influence in the political process. It's corrupting."[8]

Are efforts to persuade fellow citizens how to vote "corrupting," or are they the essence of democracy? Consider the implications of McBride's statement. She is arguing, in essence, that those persons and interests that are affected by government policies and possibly subject to government regulation must give up their right to try to influence government policy. This is a far cry from "no taxation without representation." In fact, McBride seems to suggest that the very possibility of taxation ought to deprive one of the right to representation: "It's corrupting."

If the five cases discussed above indicate that something is wrong with the laws we have passed in an effort to regulate campaign finance, the words of Minority Leader Gephardt, Representative Pascrell, and Ann McBride indicate that perhaps our entire approach to the issue has gone dreadfully astray. It is hard to believe that one of the highest-ranking members of the United States House of Representatives would state that free speech and healthy campaigns are in irreconcilable conflict, without the slightest public outcry in response. It is hard to imagine how more than one-third of the U.S. Senate could vote to repeal the protections given by the First Amendment to political speech, with no more public debate or press coverage than is given to a routine highway funding bill. But it is true, and it is more believable once we recognize that this is the end result of a long and determined campaign to cheapen some types of political speech.

As long ago as 1989, Columbia Law School professor Martin Shapiro bemoaned the fact that "almost the entire first amendment literature produced by liberal academics in the past twenty years has been a literature of

regulation, not freedom—a literature that balances away speech rights."[9] During the intervening years, the nature of that scholarship has grown still more radical. Today, in the pages of some of the nation's most prestigious law journals some of our most talented young legal scholars are arguing that the Constitution permits, or perhaps even requires, a ban on all partisan political speech, except to the extent authorized by a grant of government speech vouchers. If this seems like idle speculation from the ivory tower, it should be noted that what today are mainstream prescriptions for campaign finance "reform" were, just a few decades ago, considered equally radical, and that one such advocate, Edward Foley, formerly of the Ohio State University School of Law, was appointed Ohio state solicitor in 1999 by a conservative state attorney general.

When statements such as those of Richard Gephardt and Ann McBride can be made by prominent persons in national news media and create no stir at all, something has gone wrong with the way in which we think about political campaigns. This book is an effort to explain what has gone wrong, both at a political level and in constitutional doctrine. This is a book about campaign finance, but unlike most such books, it is not full of breathless innuendo about alleged "corruption" in politics, nor is it replete with cocktail party factoids aimed at making it seem as though political spending is beyond all control. Rather, this book asks the reader to reconsider the entire intellectual framework around which most of the nation's campaign finance regulation has been built. It asks the reader to begin by considering the possibility that virtually everything that the typical American knows, or thinks he knows, about campaign finance reform is wrong. And unlike most such books, it concludes not with any grand new scheme for "closing loopholes" or regulating the system, but for the readoption of a radical *old* approach to the question of campaign finance regulation.

Part I of this book explores how we arrived at our present state of campaign finance regulation, and how our existing efforts at regulation have not always worked as planned; Part II discusses the constitutional issues surrounding reform; Part III discusses the future of campaign finance regulation. In discussing this future, Part III suggests that we are rapidly approaching the day of reckoning, when we must either jettison our traditional First Amendment liberties, as Gephardt and others ask us

to do, or we must pull back, and return to the system of campaign finance "regulation" envisioned by the framers of the Constitution and enshrined in the First Amendment. I remain confident that when the American people understand the options available to them, they will choose the system chosen by the founders. This book is intended to present those options—plainly, if not always simply, for the issues are complex—to the people.