

# Speech is free only to those who can afford it

Maybe it will go down in the Supreme Court annals as the chutzpah case.

I take the suggestion from the dissenting opinion of Justice Elena Kagan in the court's Monday decision striking down the Arizona public financing law as a violation of the free speech provisions of the U.S. Constitution.

The Arizona statute, which was adopted at a public referendum, would have provided a base grant of public funds to state legislative candidates who agreed not to accept or spend any other funds. These candidates then were given additional grants of no more than three times the base amount if they were opposed by a candidate who opted out of the public funding system and chose self-financing or private fundraising.

As Kagan explained, Arizonans had chosen this flexible program to encourage candidate participation without having to make the initial public grants so large as to financially burden the state treasury. It was what Kagan called "the Goldilocks solution — not too large, not too small, but just right."

In other words, if all the candidates for a particular office were satisfied to accept \$21,000 to run their campaigns, why offer them \$63,000? So only the candidates who were facing privately funded opponents were eligible to receive additional funding up to the point the opponent spent more than \$63,000.

The problem with this system, according to the 5-4 majority of the court, was that the additional subsidy to publicly financed candidates penalized their opponents for exercising their First Amendment right of freedom of speech. Duh!

Or as Kagan put it: "Arizona, remember, offers to support any person running for state office. Petitioners have refused that assistance. So they are making a novel argument that Arizona violated their First Amendment rights by disbursing funds to other speakers, even though they could have received (but chose to spurn) the same financial assistance. Some people might call that chutzpah."

So let's get this straight. Providing the wherewithal for additional speech (a right of reply?) by a candidate, who is being drowned out by an opponent who refused public money, violates the free speech of the free-spending candidate. Or as Kagan again poetically put it: "Except in a world gone topsy-turvy, additional campaign speech and electoral competition is not a First Amendment injury."

And by the way, the majority in this case consisted of the same five justices who, just a year ago in Citizens United, wrote that “the governing rule” of the First Amendment is “more speech, not less.”

The only explanation must be that the principle of “more speech” only applies for the conservative majority when they are talking about the unlimited speech of the corporate community and the independently wealthy, which the court there said had an unlimited right to deploy their wealth to help elect candidates of their choice.

It is obviously inapplicable when the voters want to give poorly funded candidates a chance to be heard. Or maybe speech is only free when you have the money to pay for it.

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