Accountability After Citizens United – Panel Three Transcript

Panel 3: The First Amendment Rights of Associations and Individuals

Mark Ladov: So I would like to thank everybody for sticking around for our last panel of the day. We are going to be changing gears a little bit and speaking a little bit more about jurisprudence, about constitutional law, and about litigation questions. And in many ways this panel is really building on the symposium that the Brennan Center hosted last year, which resulted in the book that we've put out this week edited by Monica Youn and published with the Century Foundation in which we're really trying to figure out well, what's the new jurisprudential questions that we need to be asking after *Citizens United*. And even though this is a little bit more of a jurisprudential kind of legal theory panel we do want to think of it as pragmatically as the two panels we've heard so far today. Our goal here is to try to figure out what are the ideas that we need to raising in litigation, in the courts, as we move forward to try to shift the debate, to try to steer us out of a lot of the problems that I think we all recognize with the *Citizens United* paradigm that we're in right now.

So I'd like to start my introduction of this panel on the First Amendment rights of associations in individuals with an incredibly banal observation, which is that everybody here is a member of an association. We belong to political parties. We contribute to advocacy non profits, such as the Sierra Club, or Common Cause, or the NRA. We belong to neighborhood associations and unions and all of these organizations play an absolutely critical role in democratic politics and in the self governance of our communities and of our nation.

And yet our understanding of the role of these associations in our constitutional democracy has historically been largely unexamined and under theorized. Our rich First Amendment tradition has struggled mightily with the question of freedom of speech, but very little comparatively with the First Amendment's guarantee of the right of the people peaceably to assemble. And only recently largely in reaction to *Citizens United* and *Boy Scouts of America v. Dale*, have legal thinkers really begun to think about what the constitutional rights of association really means?

And I think one consequence of the absence of this long kind of rich debate about associational rights is that in the *Citizens United* opinion we sort of see this gap taking hold. In the absence of a rich understanding and a nuance understanding of what associational rights are all about we're left with the courts conclusion that all corporations should be viewed uniformly as "associations

of citizens" and that all such associations are entitled to the same First Amendment rights, or the First Amendment speech protections as any other speaker.

So today's panel aims to enrich that debate, and to help us develop the kinds of ideas that we need to steer our courts towards a more reasonable approach to political participation and the role of money in politics. And we've asked these panelists to help us think about the issues moving forward and think about how do we promote and protect the critical role of associations in our politics without unduly protecting associations from legitimate public scrutiny, or really burdening the associational and First Amendment rights of the members themselves, which as Professor Hill is going to discuss, has sometimes gotten lost in the shuffle.

So I would like to briefly introduce our panelists and, of course, everybody's full bios and accomplishments can be found in the programs themselves, but first there's going to be Professor Daniel Ortiz, who is currently the John Allan Love Professor of Law in the Edward F. Howrey Professor of Law at the University of Virginia.

Second will be Dale Ho who is Assistant Council of the NAACP Legal Defense and Educational Fund where he works in the political participation group.

Third is going to be Professor Fran Hill from the University of Miami School of Law. I will just note that her excellent essay on non participatory association and compelled political speech from last year's symposium is found in the volume that we just published this week and in many ways really inspired the program, this panel that we're about to have.

Fourth will be Glenn Magpantay, the Director of the Democracy Program at the Asian American Legal Defense and Education Fund.

And finally we're going to hear from Professor Tobias Wolff from my Alma Mater, the University of Pennsylvania Law School.

And so thank you very much and I'll let Professor Ortiz take it.

Professor Daniel Ortiz: Thank you very much. Recognizing that we're a panel of five and the only thing standing between you and cocktails, I'll try to be quick. I'm the kind of guy who lies awake at night trying to figure out things like whether our First Amendment is bipolar or merely passive aggressive. It's an amendment that's very important to us, but it has been theorized to be often at war with itself. Or euphemistically it has complimentary parts, however you want to view it.

One view, which is often thought to be older, but I'm not sure actually is, is that the First Amendment expression clauses exist to protect the individual—the right to express what you think, who you are, what you believe, that sort of thing. It's ancillary, if you will, to the freedom of conscience, what the other parts of the First Amendment, the religion clause, are there for. And it's a right that belongs to the speaker; it protects the individual.

There's another view too that's become very current and that has put this first view under a little bit of pressure. And that's the view that the expression clauses are not really a speaker's right, but a listener's right. We protect someone's right to speak, not because we actually care about that person's individual expression at all, but because we care about the listener's right to hear. It's a speakerless view of the First Amendment, if you will. We protect X's right to speak only because it's an effective way to protect Y's right to hear. Now, in this view, the First Amendment expression clauses are basically structural, not individual at all. They aim to protect the marketplace of ideas, not individual expression and individual participation.

As I said, often you can see these two different views as complimentary, but at times, especially in the realm of campaign finance, they conflict—often head on.

Now let's quickly look at some of the various rights of expression to see why this is actually about the right to association. I'm won't be talking about all of them, the right to press, and that sort of thing. But take speech—that's the one where we spend most of our time. I think it's largely gone over to the dark, sorry I mean, structural side of things. And these days it's basically market-protecting, rather than individual-protecting. I don't know those of you who caught or heard about the argument in the Supreme Court a month ago in [*Borough of Duryea v.*] *Guarnieri*, the first petition clause case to actually be argued before the Supreme Court in quite some time. It represented the fight between exactly these two different views of the petition clause. Does it protect the individual? Or is it meant more to protect the marketplace of ideas, political speech, that sort of thing.

Now the right of association is very interesting among First Amendment freedoms. It's, I think now, the most individual of all the expression rights. It has two forms. One protects the right of intimate associations. It protects families, that sort of thing. It's obvious that this form runs to the individual.

And the right of association also protects expressive associations. I'm thinking here of cases like *Hurley* (the St. Patrick's Day Parade case) and *Dale* (the Boy Scout case), where it protects the rights of individuals to express who they are and what they believe. Associations, in other words, are protected because they amplify the individual voice. The right protects the individual by allowing the individual to combine with others to pursue a common aim.

Now, in short, the right of association nowadays seems to be the First Amendment refuge of this individual view of things, a view which seems to be fading away from most of the other expression clauses. Now you can see this conflict between the structural and the individual views in the history of campaign finance doctrine. Take yourselves way back before *Citizens United* and think about both the early constitutional architecture in this area and even some of the enduring subconstitutional architecture.

I'll just point to one or two examples. Thinking about the early constitutional architecture, one of the primary, most famous, and contested features of *Buckley v. Valeo* was the distinction between contributions, on the one hand, and independent expenditures, on the other.

Contributions were viewed as second class speech; speech by proxy, if you will. On the other hand, independent expenditures were viewed as the real deal—first class speech. Whenever I take a dollar and hand it over to someone else to run the political advertisements they think best with it, the resulting speech, the Court says, is only indirectly mine, even if those I give it to presumably can carry out my ideas better than I could. They know how to run a political campaign; I don't. And so from the individual-participation point of view, regulating contributions poses little concern.

On the other hand, when we're talking about expenditures, and I'm out there deciding how my money will actually be spent—which signs to buy, what messages to put on them—I'm not turning over all those decisions to someone else. That expression really is my own view and my participation is suddenly at stake. So, you can see some of the lines that people were beginning to draw in *Buckley v. Valeo* as reflecting the individual participation view of the expression clauses.

Now, you can also see this view reflected in the subconstitutional architecture, particularly in the distinction the statute draws between contributions of money and contributions of personal services. You often hear Warren Buffett, for example, complain that he can't sing as well as Barbara Streisand and it's a real shame that she should be allowed to give her personal services to a political campaign, whereas he shouldn't be able to give as much money as he wants, because that's the only way he has to help out. Okay. I'm being facetious, of course. He may sing well. In any event, he doesn't make that complaint.

But in a sense, that complaint, if he made it, would be true. Why should Barbara Streisand, just because she can sing well, be allowed to make that kind of contribution and Warren Buffett, who has all his money, not be? Well, if there is a reason, it's not actually grounded in the market-protecting view of things, but more on the fact that when Barbara Streisand sings she's actually doing something herself. We recognize that kind of participation as superior to just handing over some money.

Now this conflict between the structural and the individual views of the expression clauses is full front and center in the corporate-spending-on-candidate-elections debates.

Think of *MCFL*, *Massachusetts Citizens For Life*, the Court's first real intervention in this area. I just went back and re-read it. It's actually remarkable. Justice Brennan says you have to defend ideological corporations, treat them differently from business corporations, because regulation is going to affect garage sales, bake sales, raffles, things like that. The first time I read that I thought he was off his rocker, just romanticizing politics. But then I realized that he's talking about peoples' right to participate. He's thinking much more on a grassroots level—and perhaps that is over-romanticized—but that kind of participation was actually very important to him. And as long as promoting that kind of activity was what corporation spending was about, he believed the First Amendment wasn't going to let you go there. It's a case that talks about free speech, that other part of the First Amendment, but the real talk in the case is mostly association talk, not really speech talk at all.

Now think of *Austin*, the court's next intervention in the area. If you want to go back and look at it, it stands to *MCFL* as *Roberts v. Jaycees* stands to *Dale* and *Hurley*—that is, as the Jaycees stand to the Boy Scouts and the people behind the Boston St. Patrick's Day Parade. That is, we don't protect business corporations, like the Jaycees, because they don't really have an identity to express, but we do protect those organizations that help individuals carry out their own personal expression.

Now, CU, *Citizens United*, repudiated completely this old fashioned "individual" way of thinking about things in two different ways. First, with respect to the Free Speech Clause, it went all structural on us. You look at *Citizens United* and there's very little that actually talks about the importance of individuals expressing themselves. The identity of the speaker doesn't matter. Corporations, individuals, who cares? All you care about is that something is said, not that an individual says it. You care than an idea gets into the marketplace to be considered, not who can participate in that marketplace. That's Kennedy's view and the view of all the others who joined him.

And there's a second way *CU* repudiates the individual way of looking at things, which I think is probably more dangerous in the long run. It's about what Michael Waldman and Jennifer Taub mentioned this morning. The majority in *CU* is trying to re-theorize freedom of association, not just free speech, as a structural right, a purely structural right, not one that protects individual participation. In other words, in the view of *CU*'s majority, freedom of association protects the idea of getting speech out there—the marketplace of ideas. It's really just part of the free speech clause, rather than a different provision that recognizes something special about the individuals who make up or compose the organization and their relationship to it.

And I would actually disagree with Michael on one small point. I think the danger here is more Scalia than Kennedy.

Now there are some problems here. Under the structural market-protecting view that seems to have been adopted by the majority of the court, campaign finance regulations are inherently more difficult to defend. Defenders get involved in more controversial theories of corruption—access corruption and influence corruption—rather than traditional quid pro quo corruption, and some of the assumptions about why people vote they way they do are unflattering to democratic citizens.

What I hope we can do is recuperate the more traditional, individual view of the expression side of the First Amendment, the individual participation value, through reviving or at least holding on to the associational lens. If we can do that, I think this sort of exercise will be more than just an exercise in legal history, although that's where I fear it's going. And maybe, in this way, we can thoughtfully preserve for the future another perspective which some at the court may be able to revivify in order to protect individual participation. Thank you.

Professor Daniel Ortiz: Do I have more time?

Professor Daniel Ortiz: No, no, no, no. (Laughter)

Mark Ladov: I think Dale would be next.

Dale Ho: Sure. I guess I'm next. Well, thank you, Mark, and thank you to everyone at the Brennan Center for inviting me to participate on today's panel.

I work at the NAACP Legal Defense Fund, and I should make clear before I start that the views I express today are my own and shouldn't be imputed to my colleagues.

I'm going to talk today about a case, *NAACP v. Alabama* which was the case in which the Supreme Court, for the first time, articulated the importance of anonymity in the context of the First Amendment, freedom, to associate. And I want to situate that case in the context of what I see as one of the more problematic recent legal developments, which is a matter in which landmark precedence of the civil rights era have been deployed, erroneously at times, and dishonestly, in my view, at other times, to work across purposes against the values that originally animated those cases. Now the most notorious example of this example of this trend that I'm describing is the manner in which *Brown v. Board of Education*, a case that in my reading, is concerned with racial subordination and the state's maintenance of a caste system, has been distorted to stand for a purportedly neutral principle of anti-classification.

So de-contextualized from history and from social meaning, *Brown* becomes nothing more than admonition that the mere invocation of race itself is suspect such that in the Supreme Court's decision and *Parents Involved* [*in Community Schools*] *v. Seattle School District #1*, a voluntary school integration program in Seattle which was designed to expose school children to other children of different racial and ethnic backgrounds is somehow equated to the segregated schools of a Jim Crow South.

Now, my argument today is the same sort of a historicism at work in that case is on display in recent efforts to deploy *NAACP v. Alabama* against contribution and campaign disclosure requirements. In my view, however, that case was motivated by concerns that are not present in many of the context in which the cases invoked today and rather the values animating it line up in favor of, rather than against disclosure in many instances.

So let me start with a brief description of *NAACP v. Alabama*. The case was initiated 55 years ago in 1956 when Alabama brought suit against the NAACP and demanded that it turn over its membership lists. Now some historical context I think is useful here; 1956 was the same year as the Montgomery bus boycott. It was the same year that the first African American student, Autherine Lucy, was admitted to the University of Alabama. And as we all know these achievements were not easy victories, or inevitable triumphs. They were contested and that southern whites responded to these and other watershed moments of the civil rights movement with coordinated campaigns of economic reprisals, physical attacks and bombings.

Now although the NAACP had been operating in Alabama since at least 1918 it wasn't until this critical juncture in 1956 that the state, and particularly the Attorney General of Alabama and later Governor, John Patterson, bought a suit against the NAACP alleging that it failed to comply with a state statute requiring out of state corporations to register before doing business there. Now non compliance of that statute was punishable by a variety of means including fines,

criminal prosecution of the corporation's officers, and injunctive relief demanding that the corporation cease all business in the state.

So the goal, in other words, was to put the NAACP out of business and to expose its members to violent retaliation.

Now, what the Supreme Court held unanimously was that compelled disclosure of the NAACP's membership list would violate the member's right to freedom of association. And from a purely doctrinal standpoint the decision was a very important development in First Amendment law in part by introducing the notion that private activity can chill speech as directly as direct state action such that laws do not themselves directly restrain speech, but which enable or create conditions by which private actors can deter expressive conduct. They may also fall within the ambit of First Amendment prohibition so that disclosure requirements may sometimes be subject to First Amendment analysis.

Now I think there are at least two ways to read *NAACP v. Alabama* borrowing the frame that Professor Ortiz just used. We can first look at the case from an individual rights or balancing perspective and acknowledge that while the state obviously has an interest in making sure that its rules governing corporate behavior are adhered to, that individuals also have the right of expression. In this case there were at least two factors which tipped the scales I think in favor of the NAACP and its members which were one, the severity of the harms which they were subjected to, and two, the likelihood of those harms. There was no uncertainty that those harms would happen because the state simply didn't contest the NAACP evidence that they would be subjected to violent reprisal.

So the court, in its decision, noted that the NAACP members would be subject not just to public scorn if their identities would be disclosed, but that they had in fact made an uncontroverted showing that their members had been exposed to economical reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.

So that's one way of looking at the case. Now there's another prism through which you could evaluate the case which is the structuralist prism, and through that prism we, I think, would acknowledge that the protection of political rights, such as freedom of speech and association has value not just for the speakers and the members of the NAACP, but advances structural values for the quality as a whole which has an interest in robust political discourse to ensure that the democratic processes function effectively. So the paradigmatic articulation of that view from the Supreme Court is in is proclamation in the *New York Times v. Sullivan* that First Amendment freedoms are essential to ensure that public debate on issues of civic importance is "uninhibited, robust, wide open".

So *NAACP v. Alabama* predates *Sullivan* by two years but I think there's some strains of that view in the court's reasoning where the court stated in *NAACP v. Alabama* that society has an interest in ensuring that political views of disfavored groups can be expressed and that "effective advocacy of private points of view" particularly controversial ones, is undeniably enhanced by group association, and particularly were a group espouses dissident beliefs.

So while the polity has an interest in seeing that its statutes are adhered it also has a countervailing democratic interest in ensuring that dissident voices are heard in the political process, one that's heightened, where strict majoritarian rule has prevented a minority group from entering into the democratic process in the first place. I mean indeed I think the very legitimacy of those democratic processes is called into question when minorities are locked out of the political process entirely as certainly was the case of Alabama in the 1950s.

So with that framework in mind I want to take a look at how *NAACP v. Alabama* has been deployed in more recent cases. So one example is the case *ProtectMarriage.com v. Bowen* which arises in California brought by a challenge, which is a challenge that was brought by supporters of Proposition 8 to disclosure campaign, disclosure requirements in California.

Now, the plaintiffs in that case invoked *NAACP v. Alabama* to support their claim to anonymity and argued that like the NAACP of half a century ago supporters of Proposition 8, the anti-gay marriage ballot initiative, had endured – and this is from one of their briefs – "nothing short of domestic terrorism". So here are some examples in their own words of the harms which they endured.

Home egged and floured multiple times. Bumper sticker ripped off of car. Openly gay members of DeClarance Country Club gave him looks of disdain and do not greet him as he passes unlike formerly warm greetings.

Now, to be fair, there were more egregious examples that were listed in their brief, but I think overall *ProtectMarriage.com* is setting the bar very low for what counts as domestic terrorism these days.

But you know we see precisely the same arguments on display in a recent OpEd this week by David Marston and John Yoo who admonished that we need to revisit *NAACP v. Alabama* because disclosure rules on corporation contributions raise "the specter of retaliation and harassment" against corporate donors. But are Marston and Yoo really likening the fact that some people might exercise their lawful right to stop patronizing certain businesses to express their opposition to those businesses' political activities to the bombing of Fred Shuttlesworth's church in Birmingham in 1958?

Now what's interesting to me, as a civil rights lawyer, I think the parallels between you know this sort of argument and what we have seen in the *Brown* context that I was alluding to earlier. So for Marston and Yoo, *NAACP v. Alabama* stands for the mere proposition that where any person could be deterred from speaking by the private condemnation of others, but that's a harm that merits judicial intervention. The nature of the harm, the level of the threats, the social context in which those threats occur is meaningless, irrelevant, to the analysis in fact.

But I think that can't possibly be the case. Just like all race based classifications are not equal, so in my view not all so called reprisals are equal. Now the state definitely has a strong interest in robust political discourse which might weigh against disclosure in some circumstances, but robust is not equivalent to uninhibited or limitless. And indeed, as many have argued, disclosure rules can be justified in some circumstances when they actually serve to enhance rather than

inhibit public debate. So if there's a lesson from *NAACP v. Alabama* I think it's that the relatively powerless sometimes need special protection, such as anonymity, and that such protections benefit not only the speakers themselves, but society as a whole from a structural perspective. But those protections are not necessarily inheriting goods for their own sake.

And symmetrical application of them to members of the majority or the relatively powerful or even to the merely average means some circumstances actually undermine rather than promote the values under animating *NAACP v. Alabama.* Thanks.

Professor Frances Hill: Thank you for inviting me to participate today. I am going to repay this kindness by not doing quite what Mark said I was going to do. But it is, I think, closely related, and it addresses the issue of how we achieve consent.

If constitutional government's legitimacy and vibrancy are based on consent, then we have to think about participation and representation. The first sentence of the constitution talks about the peoples' duty to ordain and establish the constitution and the First Amendment links this to governance by peaceably assembling and petitioning the government for redress of grievance.

This is, of course, why we have associations--to preserve the structure of democratic governance. Isolation and atomization are the tools of oppressive and tyrannical governments. The option of association is a hallmark of democratic government. As Charles Black pointed out in his seminal 1969 book, *On Structure and Relationship in Constitutional Law*, much can be understood if we think about the role of the people in governance as a constitutional structural principal, which includes the right of individuals to participate in associations. Individuals may, of course, confront the government as individuals if they wish to, but they may also participate in and through associations.

But, so many of our associations are now so deeply dependent financially on government grants, contracts and exempt status that questions must be raised about their ability to play this structural constitutional role. Pardon me for being a business lawyer, but we cannot have a jurisprudence of association without facts that are integral to understanding how organizations operate. This situation cannot be cured by saying that members ought to support their organizations. The question is why don't people give?

We don't give. We Americans do not give to many of the associations on which we depend. Partly it is due to the ever growing inequalities of material wealth. Partly it is the idea that we can free ride. The idea that we can be autonomous from government and our associations can be autonomous from government is not realistic. What we have now is a situation of financial dependence. One result is that we are living in a rather chaotically designed social science experiment. I refer to the budget process at the federal level, the state level and the municipal level where many of the grants on which organizations depend for their very existence can no longer be paid. From this unwelcome experience we are going to learn a lot (including much that we may not want to know) in the next year or so about association, representation, participation and the meaning of democracy.

How does jurisprudence relate to all of this? I am going to suggest that we need to wash off the books a jurisprudential dead end from our racist past and that we ought to think deeply about the section of the Constitution that defines the terms of associations' financial dependence on government. The jurisprudential dead end from our racist past is of course the state action doctrine. If only Justice Scalia were trying to link state action to the jurisprudence of association we could perhaps contain it. But some of our leading scholars have embraced the idea that we need to rely on the state action doctrine to support the assertion that private associations cannot be regulated. We would do well to reread Professor Charles Black's devastating critiques of reliance on the state action doctrine. We also ought to think about whether financial dependence makes associations state actors. That is certainly what the courts held with respect to racially exclusive private schools in denying their claims that they should be exempt from taxation. The courts have not done the same based on subsidies in other contexts, but we could be heading there.

We are in an era where the activities of exempt entities are going to be subject to ever closer scrutiny. The recent AARP Hearings may have been only a beginning.

But there's more. Even if we move beyond the state action doctrine, we have to think about the Spending Clause. After all, a government grant or contract is not a right or an entitlement. An association does not have a property interest in them, even in the sense of the new property of Professor Charles Reich.

The Spending Clause and the jurisprudence under it are a true challenge for developing a jurisprudence of association because the government can condition spending. We, of course, have been conditioned to think that we could waive the First Amendment at any problem like a clove of garlic in the face of hostile forces and all those problems will go away. But they will not.

The leading case, *South Dakota v. Dole*, tried to rely on the 21st Amendment, the right of states to determine drinking ages, in the face of a limit on what the states could do if they took federal highway funds. The Supreme Court found a way to avoid the force of the 21st Amendment.

In *Rust v. Sullivan* the Court upheld a statute prohibiting counseling with respect to abortion if a clinic is funded with federal money. The Court held that such a prohibition is not a violation of the First Amendment but simply a condition on government funding for a "project" because the "entity" funded with private money can still provide abortion services. A mere firewall in the checking account is insufficient. Abortion activities must be completely separate.

During this session of Congress we have seen efforts to extend this reasoning. We have the Hyde Amendment (no federal money for abortion), *Rust v. Sullivan*, and now Congressman Pence has been holding up Planned Parenthood funding claiming that it should not have any government money at all as long as it spends its own money for abortion services.

The same expansion of Spending Clause reasoning could also apply to lobbying. We have the Byrd Amendment (terribly drafted, unclear, something of an enigma, but it's there) providing that an organization cannot use federal grant or contract money for lobbying. How far are we,

one wonders, from the claim that no grants can be received if there is any lobbying? It would be the same move that is being attempted in the Planned Parenthood case.

Where does this leave us? In an important new article entitled Associational Speech now out in the *Yale Law Journal*, Professor Bhagwat said, "Government sponsored community groups are not the sort of association at the heart of the First Amendment's protection and goals. Such groups, which are necessarily under heavy state influence, cannot play the kind of independent role in self governance, including values free of state interference and in overseeing and petitioning public officials that the First Amendment envisages."

Professor Bhagwat may be correct.

I am not ready to give up that thoroughly yet.

How are organizations coping? Their first response is to embrace pay to play politics with the added boost from *Citizens United* clearing the way for the use of general treasury funds for independent expenditures. If an association operates in a political patronage system it needs a political patron. In effect, the association has to pay to play to be paid. If it does that, then possibly it will pay to play and then possibly representation and participation can be facilitated by associations.

I am asking here that we think about money -- financial dependence, financial independence, what it means to be sufficiently autonomous to be able to protect Americans from atomization. This is the idea that Mr. Kolb expressed when he spoke of the group that expressed the concern that it could be "burned overnight." I think some exempt organizations are beginning to worry a great deal about that. But, on the other hand, a government contract or grant is not a property right, and the Spending Clause jurisprudence is not unreasonable.

Financial dependence is a central fact in the operational reality of many associations. Developing a jurisprudence of association must take account of it. We as scholars can try to get rid of the state action doctrine and, at the very least, not make it a pillar of a new jurisprudence of association. We can think deeply about how the Spending Clause should be conceptualized and administered.

Professor Glenn Magpantay: Thanks so much. Hi, my name is Glenn MAGPANTAY. I'm with the Asian American Legal Defense Fund. And my work is largely around as a practitioner looking at *Citizens United* through lines of racial justice and civil rights. And so one disclosure, these are my organizations comments, not just mine.

However … I do want to know that they are my organization's comments, but we are not necessarily a fan, we are not a fan of *Citizens United*, but there are some concepts there which we think has some residence in things that might actually work. So like Professor Geoffrey Stone last night talked about, you know, he doesn't necessarily like it, but there are issues there, I wanted to do that, so please don't throw eggs at me later on if you disagree.

But you'll see in the concept of how we do this work, particularly in my practice area, is in the enforcement of the Federal Voting Rights Act and bilingual ballots, we come to this, and some of my scholarship and writing is around the intersections of race, language and democratic structures. And some of these issues will emanate from the concept of Asian Americans being perpetual foreigners.

And there's a lot of scholarships of Asian Americans consistently being from another country. You walk downtown and you're asked if you speak English, or where are you from? And we're like, Jackson Heights, in Long Island. Right? So even in this country you're born here, there's always this context of others. And we see this with particular groups, Japanese Americans in the internment, Chinese Americans of Wen Ho Lee, South Asians after 9-11.

And we want to look at this concept with the First Amendment issues particularly protecting individuals and protecting associations through organizations. So *Citizens United*, and some of the response about this disclosure, and even Obama's comments, talked about the unlimited foreign contributions and foreign influence that would fly in the wake of U.S. elections. And there's truth and concern about that.

However what you would think that was particularly interesting about this issue is that … is regarding, I was around in 1996 where if you remember there was this big campaign finance scandal with Vice President Gore, who went to a Buddhist temple in Los Angles and made some money. And Mr. Huang and others gave a lot of money to the Democratic national party, which was money from China, which was a foreign influence here. And there was a number, Mr. Huang was indicted, there was a number of concerns about it, the White House started looking – not the White House, excuse me, the DNC started looking at all their donors, and they said, oh, they're Asian, return the money. So every Asian name, by virtue of race and identity, which said, you must be, and not here, you must be a foreign entity, you know, we'll return the money.

And then one time member of the United States Commission of Civil Rights was actually stopped from entering the United States because she must've been from China, and she could not have been a Commissioner. And some of those issues really give us pause, particularly the Asian American community, when you look at the political participation of Americans. The way that Congress responded to that was by limiting the ability and, they didn't pass this, a number of bills were out there, and continues to fly there, limiting the abilities of legal permanent residents from being able to contribute to political campaigns.

Now the issue there, for us, is that we do believe that there is a legitimate interest for legal permanent residence, it's non citizens, foreign born Americans, to be able to participate in the political process. That is a form of speech. And for us, and for Asian Americans, it is political speech. In fact, as a non citizen, to get to a political campaign, is a form of democratic participation. And so in that concept, in *Citizen United's* stand of the concept of as money as speech, and the democratic participation is wielded though money, Asian Americans have a particular experience with that where we actually like that. Where that is actually a beneficial item, because so many of us can still be drafted. So many of us still have to pay taxes, so many of us are still here, but so many of us cannot vote because we have not yet achieved the levels of naturalization that we want to.

So there's one set of issues that are out there that thwarts the Asian American community that we want to pay attention to.

The other are the associational interests, and it's particularly my experience as a litigator where we look at some of these issues. At the Asian [American] Legal Defense Fund we really do believe that strong associational rights to sue on behalf of their members and constituents, because of fear of retaliation or oppression is something that we think is a benefit in and of themselves. And here we really do see the crossing of the First Amendment and the right to petitioning the government for redress with Article III standing.

So standing, and the standing doctrine looks at whether the individual could bring a federal lawsuit in court, whether there's an injury in fact, it looks at causation, it looks at new re-dress-ability. And within that there is an exception to organization standing doctrine in which it looks that the membership organizations can sue on behalf of their organizations, matters are of equity, injunctive relief, not money damages, or matters of law.

And so we see that certain entities: unions, trade associations, non profits, have the ability to sue and have the ability to stand for their members. But over the years we have seen a narrowing in the ability of organizations to sue on behalf of their organizations. We at the Asian American Legal Defense [Fund] actually see, like you see that right expanded a little bit more, because it gives individuals cover.

So there's a number of cases that we worked on in all this, the *Chinatown Voter Education Alliance v. Ravitz* which is a matter of here, actually co-counsel with Steven Reiss who is on the Board at Brennan Center, so we thank you for that support; the *U.S. v Boston*, in which we sued on behalf of Asian American voters and organizations under the Voting Rights Act for the bilingual ballot in New York or in Boston.

And it was clear that the individuals that under the law, individual voters always have a standing to sue under the Voting Rights Act, but not necessarily organizations. The problem is we could not get a voter who would want to sue under the Voting Rights Act.

Asian Americans come to the American political system from a very different perspective than U.S. native born Americans. We often come from countries which lack a history of voting, or a very different political structure, where if you vote the wrong way you get punished. There are countries, Taiwan, which was founded, or entities, maybe it's not a country, that's a political issue.

Dale Ho: It's an association.

Professor Glenn Magpantay: It's an association, thank you, in Taiwan, which are founded because people spoke out against the government, and then something happened to them and they got pushed across the river to another land. And so there are very real issues that Asian Americans have when it comes to retaliation about the government. And following constitutional cases, what do we look for? And we look for state action. The problem is that the people who are victimized by state action, the new citizens of the United States are not the individuals who want

to sue the government. They just go there. They just naturalized. They don't want to shake things up. And then I say, no, you'll be protected, it's okay, the First Amendment allows you to do this, they're like, prove it to me. I don't believe it. Something will happen to my sister if I speak out about this issue. And my sister is in immigration proceeding, where she's becoming a U.S. citizen. Or I show them the First Amendment, and it's all in English, so I can't read it anyway. So they really don't believe me. And so what we do is we actually in our litigation strategy is to try to sue on behalf of organizations, in additional to the individuals, we haven't yet gotten into this mission, although we know that that will be challenging, but we do think that the organizations, and we know this, is that the organizations give our individuals cover. That the individual voters feel supported and protected if they are not standing alone, but they are standing with others in the vindication of their rights and responsibilities under the law.

And so we do see that there are positive benefits of associational standing. We do see that there are areas in which we need to hide under organizations because people are fearful whether that is real or not, the experience that Asian Americans have in this country is largely very often a fear of reprisal and repression and that some of the work that *Citizens United* might allow for that, and support that for the protection in our communities. Thank you.

Professor Tobias Wolff: Thank you. So before I begin I just feel the need to answer the question that Professor Ortiz kind of left hanging, which is sort of why should Barbara Streisand be able to sing when poor Warren Buffett doesn't have a voice and so forth. And the only answer to that question is because she's Barbara Streisand. C'mon.

I actually am very interested in a lot of the same issues that Professor Ortiz discussed in his remarks relating to the different ways of understanding what set of values the First Amendment is seeking, the speech clause in the First Amendment is seeking to protect. And I'm going to explore these distinctions between what I'll refer to as speaker issues and speech issues under free speech clause analysis, and how they play out in a particular context, in the court's cases, over the course of about 35 years and that's the compelled speech cases, which I think are one of the most interesting areas in which these two explanations for what the court, the First Amendment might be about, are actually very much in powerful attention to each other.

I'm going to say a few words about how the court has treated those different ways of framing the First Amendment in the campaign finance context and actually go back a bit further than Professor Ortiz did and talk a bit about the [*First National Bank of Boston v.*] *Bellotti* case, which I'm sure is familiar with everybody in the room, and remind us of a few things the *Bellotti* case said. And it's one of the most interesting campaign finance cases in this, you know, there are all of these 5,000 page opinions in this arena, right? And *Bellotti* is actually relatively short and analytically elegant and very interesting even if you don't like the outcome.

And then say a few words about how the *Citizens United* case treats these issues. And I actually have a slightly different view about *Citizens United*. I think that speaker autonomy arguments are playing an important role in *Citizens United*, in exempting the court, or making the court feel like it can exempt itself from offering careful and satisfying answers to the speech questions about what impact it has upon democratic processes and public discourse for corporations and corporate entities to have the ability to use unregulated funds for political expenditures.

And time permitting I'll say a couple of words about what I think might be ahead of what these theoretical issues say about possible strategic considerations for future litigation. And I want to thank, and please pardon me if I'm mangling your name, because we haven't met, but it's Ciara Torres-Spelliscy, close enough; for her initial framing of these issues at the beginning of the day.

I just want to remind you, and I had planned to say something about this myself, you know, we talk a lot about corporations as things that exist in the world. And in many important senses they are. But another way of understanding what the issue is that we're examining when we talk about the practical consequences of *Citizens United* is to ask in addition to the ability of corporate managers to use their own considerable often funds to engage in various forms of political advocacy and political expenditure. Should they also have the ability to use general corporate treasury funds to engage in such expenditures? Or is it acceptable to require them to use segregated or political action committee funds in addition to their own personal funds when they want to engage in political expenditures.

And I think framing the issue that way it's more than just a rhetorical device. It's an important reminder of what is actually happening in these cases that often gets layered over with the construct of the corporate entity and the corporate form, which once again is real and important, but doesn't do as much essential work under the First Amendment as I think people always assume that it has to.

So very quickly, this distinction between the role of the First Amendment in protecting the autonomy of speakers, and the role of the First Amendment in protecting public speech values, right, of robust, free, open debate on ideas of public importance. It's a very important distinction. And it's an important distinction particularly in the arena of talking about corporate speech and corporate entity speech, because if one looks at the idea of speaker autonomy not as an instrumental way of protecting public speech values, but rather as a value onto itself that one might seek to protect in recognizing certain kinds of First Amendment claims by corporations, it's very unclear exactly what it means, right? And there's a scholar at Berkeley Law School by the name of Meir Dan-Cohen who has done some very interesting and good work in this field, he has a book called *Rights, Persons and Organizations* that I recommend to you if you're not familiar with it.

And he's talked a bit about the idea that autonomy, when we speak of it in relation to an individual is really about preserving a stability of internal sort of psychic architecture and the stability of one's relationships with a set of commitments when it comes to how we experience the world and how we structure our lives. And the point of the corporate forum is actually to be changeable and malleable, and adaptable to changing circumstances in light of a set of instrumental goals. The idea that a corporation has autonomy is a little bit sort of hard to square with the way corporations actually operate.

And in the arena of compelled speech cases, the role that autonomy has played in corporations being able to make First Amendment claims has been really quite fascinating. There's a series of cases, I think beginning most notably with the *Miami Herald* [*Publishing Co.*] *v. Tornillo* case, which I think was mentioned earlier today, in which the court has recognized compelled speech claims on behalf of corporations.

The *Tornillo* case is often views as a sort of easy case. It was a case involving the so called right of reply statute in Florida where the Miami Herald and other newspapers were required to give space on their pages for a response from politicians or candidates running for political office when the paper itself engages in editorial comments. And the court said you can't do that. It's a form of impermissible compelled speech.

And there were very powerful institutional arguments supporting that outcome, the distinctive role of the press, and press outlets, in being powerful independent voices. There were public speech arguments that you could identify here that the newspaper argued and the court believed that this would warp their own coverage of issues, that they would feel that it was a reprisal if they were going to have to give up space in their paper, right? So they wouldn't want to cover these political candidates or criticize them.

And the idea of the autonomy of the newspaper never really entered into it, right? You didn't talk about the newspaper as a speaker except as an instrumental step towards talking about these institutional and public speech values.

So then the court decides another compelled speech case in 1986, the *PG&E v. Public Utilities Commission* case, and this is a case about PG&E, you know, the California West Coast Utility Company not wanting to include, by a California requirement that they include environmental literature in four out of their twelve bills. So it's this whole regulatory thing where the state finds that the extra space in the bill, because there's leftover without jacking up to another postage level that that belongs to the state, or the rate holders who are represented by the state, right?

And so the state says we have the power to tell you to include information to educate consumers in the extra space in the bill. And PG&E objects to this, and they bring a First Amendment claim under the rubric of compelled speech and they win.

And here it's much less clear what the sort of public speech value concerns are. There aren't any institutional concerns. PG&E is not an institutional speech actor in any significant way. PG&E makes a set of arguments about well, you're sort of working public debate by forcing us to include information based upon its content because it has an environmental message as opposed to a protracting message, or whatever the case may be.

And that was a colorable public speech values argument. And then there was this sort of pure autonomy argument, right? Our rights as speakers are being infringed upon because you're forcing us to carry this message that we disagree with, see *Wooley v. Maynard*, right, the license plate case from Live Free or Die.

And the court moves much more towards ascribing autonomy values to corporations as way of allowing them to take advantage of the compelled speech arguments. And the apotheosis of this – I need like 15 more minutes, what are you talking about?

The apotheosis of this, the line of cases that are exemplified by *United Foods*, a recent decision, I guess it's ten years old now, in which agricultural companies are claiming a First Amendment right not to have to contribute money to a fund, a government administered fund, that then

engages in sort of generic advertising for their products. Mushrooms, in the case of netted foods, and the court recognizes a compelled speech claim for big, you know, agro business, for not having to contribute these relatively small amounts of money to this fund, but then has these Got Milk ads, or Mushrooms, They Do a Musty Part of your Garden good, or whatever the ads were.

And this was an instance where the only conceivable argument for giving a corporation the ability to take advantage of these compelled speech doctrines is ascribing autonomy values to them. There's no public speech value here. There's no debate that's being worked, there's no intrusion upon their speech, there's no burdening their expressive activities. This is just them not wanting to support speech that they don't like. And that's all the opinion is about. And it's ascribing without quite saying so in so many words, it is ascribing autonomy values to corporations, you know, separated from the instrumental values that might in some other context makes those other autonomy values make sense. Okay.

So in the *Bellotti* case, and I have all these quotes that I can't read to you now, the court strikes down this Massachusetts statute, this is way back in 1974, or '78, strikes down this Massachusetts statute that prohibits corporations in Massachusetts from engaging in political expenditures on ballot initiatives. And one of the arguments placed before the court is well, corporations don't have First Amendment rights in this sense. This is one of the first times the court has confronted this question directly, at least in the context of campaign finance. And what the court says is that's the wrong way to frame the issue, because the First Amendment protects a set of values that go far beyond the rights of individual speakers, there are public speech values here. And it proceeds to decide the case based upon a really quite nuanced analysis of public speech values. Once again one could agree with it or disagree with it, but it frames the analysis in a very smart way. And it basically acknowledges that corporations don't have autonomy rights in this way, but they are speakers, and that there's an important value in the speech that they generate and contribute into public debate.

So you get to the *Citizens United* case. There's a lot of water under the bridge at this point and in a series of decisions the court has expressed great skepticism towards some of the public speech arguments that might have justified various forms of regulation of corporate speech in the political context that the court actually acknowledges very powerfully in *Bellotti*. *Bellotti* leaves open a lot of doors that then get closed over the next several decades.

But in *Citizens United* what the court does, and this is where I want to sort of offer a friendly amendment to Professor Ortiz's comment, in very sort of subtle ways, it begins deploying arguments about speaker autonomy as a way of closing off these public speech value arguments about why it might make sense to regulate corporate money.

Let me just give you a couple of very quick examples and then I'll close up.

In talking about PACs as an alternative for corporate speakers. The court says Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. A PAC is a separate association from the corporation. So the PAC exemption from Section 441b expenditure ban, and it cites it, "does not allow corporations to speak." It's a formally different entity, therefore the corporation is not speaking. Well, why does that matter?

Right? Well, the court goes on to say, and what's more PACs are burdensome in various ways and therefore it might intrude upon speech and more public debate in at least some circumstances. But its first way of explaining why PACs are not a sufficient alternative is to say the PAC is a formally different entity from the corporation, so the corporation is not speaking. Well that only matters as an argument in of itself if the corporation has a right to speak in the sense that there is value ascribed to the corporation as a speaker in being able to convey a message not through a separate entity, but through itself as the entity. And the only way in which one could make sense of that is when it ascribes to the corporation as an entity a set of sort of quasi autonomy values for why it has an interest as a speaker in getting its message out instead of its brother, the PAC, which it could just as easily create, right?

A second place in which this comes up in the court's opinion is when it is talking about the idea that the BCRA is burdening disfavored speakers. And the court says, "quite apart from the purpose of effecting regulating content, the government may commit a constitutional wrong, when by law it identifies certain preferred speakers." By taking the right to speak from some and giving it to others the government deprives the disadvantaged person or class of the right to use Speech to strive to establish worth, standing and respect for the speaker's voice. Now how does that make sense if the corporation has the alternative of speaking just through a different regulatory mechanism? Well it makes sense if you're ascribing to the corporation the status of a person who has an individual autonomous right to be the one who is engaged in the speaking. Right? Perhaps the court could have offered a more thorough explanation in instrumental terms about why the impact upon public speak values would be contrary to the First Amendment. But I think not, and those parts of its opinion are rather weak. There is, I'm going to borrow a term from Professor Janet *Halley* a really brilliant member of the Harvard Law School Faculty that's she's used in a different context. There is a sort of literary device that she refers to as a chiasmus going on here, where you have two types of arguments that are operating in parallel and when one of them does the work more effectively that one slips into the ascendant. And then when the other one is needed to sort to elide some problem in the analysis that argument number one might produce, then the second argument into the ascendant. Right? And if you read *Citizens United* carefully there's a bunch of places where autonomy arguments are sort of slipping into the ascendant and effacing what would otherwise be problems or weaknesses in the public speech value arguments of the case, and so my last one, you've let me go way over. I apologize. But my last word is going to be that looking ahead, I think that there are opportunities, particularly in the context of disclosure. And if people are interested we can talk more about this in Q&A, to really focus the court on the distinction between these arguments and to press on framing regulation of corporate speech and corporate expenditures in terms of public speech values and not in terms of autonomous rights of individual speakers. Thanks.

Questions and Answers

Mark Ladov: Well thank you guys, all very much. And I would encourage everybody to put on this call. And I'm going to start with the first question, but I would also encourage people to start lining up at the mics if you have questions and actually I did want to start with disclosure which is obviously been a big theme of today and I think Dale has really done a huge service by reminding us of the historical context of the *NAACP* case. I mean, I think anybody who read the op ed co-authored John Yoo, I mean, we have I mean just deeply offensive about comparing the

NAACP members played in 1958 to the harassment that Target would face for donating to MN Forward. But for the sake of playing Devil's Advocate, if we accept as the Supreme Court has said that there is some sort of a harassment exemption I guess the question I have is where do you draw the line? Because there's certainly the *Socialist Worker's Party* case, the Supreme Court said members of this leftist political party could be exempt from disclosure because of the potential for harassment. The Communist blacklist, which is another really shameful period in our nation's history, is basically an example of economic boycotts of individuals based on their political point of view, and I think that that's at least somewhat comparable to what, whether they're credible or not, it's somewhat comparable to some of the claims that are being made against disclosure today. And I think also that Glenn really brings in an interesting analogy about litigation. The First Amendment presumes that the courts are open to the public, but in certain situations where we think that there's a value to having anonymity, the courts can balance that right of transparency against the plaintiff's fear of harassment and decide that there is a case where disclosure, that would traditionally be the norm and that we would all just assume is the norm, is not required. So there are instances where disclosure should be trumped by the fear of harassment. Where do we draw the line, and in particular where do we draw lines that can make sense in this field of kind of campaign finance disclosure that we were talking about today?

I don't know, Dale if you want to start. Not to put you on the spot, if somebody else wants to start, you're welcome.

Dale Ho: That's fine. Well I think, it is a difficult question. When I spoke about the, say, the *Protect Marriage.com* plaintiffs I didn't mean to suggest that there were no set of circumstances under which those plaintiffs couldn't have a valid claim to needing anonymity, just that in the particular facts of that case, it didn't really seem to me to measure up nor did it to be a court when hearing their motion for preliminary injunction. So I think there's a really good question, it's a hard question to answer, with a sort of general set of principles without sort of looking at each specific factual context. Now I think if you, if I can back up for a second, I think you can, you know, look at this from two different perspectives, the ones that we've, different members of the panel have talked about. So if you look at it first from say like a public value perspective where we're not thinking about say the rights of the speaker but really more of the listener, I think really the question that you have to ask yourself is, is there a viewpoint being lost here from the public debate. Right? Certainly if the NAACP can't speak, sorry, can't remain anonymous in the 1950's in Alabama, you lose a viewpoint from public discourse all together and public discourse therefore suffers. Right? If that's not a risk, in a particular factual scenario so maybe one or two speakers will in fact be, you know deterred, from speaking but if those speakers have to be members of a majority viewpoint which is getting lots of airplay from other speakers who aren't afraid of public criticism then maybe you don't have the same kind of problem that you had in *NAACP v. Alabama*. Right? Because the need for anonymity is not a need to be shielded from public criticism for the speech that you engage in. Right? If that is sort of the standard that we adopt then you're actually working I think at cross purposes of the goal of having a robust public debate. Right? We want their actually, in fact to be robust criticism. Now if we use this sort of public value model we take, the sort of individual rights model, then you have to come up with a line at which you know point threats, and harassment rise to the level that we think that the harm to the individual speaker outweighs whatever sort of interest the government has and you know it's not an easy line to draw. I would suggest that the lawful

exercise of consumers to patronize or not patronize particular establishments as an expression of their own political views is distinguishable from a black list for employees, but I admit that there are some parallels which make these issues difficult.

Professor Tobias Wolff: I'll just add two quick points to that. Part of what is important about the progression of expressive association cases from *NAACP* through the *Jaycees* case, most jarringly to the *Boy Scouts vs. Dale* case and then the cases that have come afterwards, is the question precisely of what kind of factual showing you have to make in order to establish a burden to your ability to express a message. Right? So in *NAACP*, the court takes judicial notice of the fact of the terroristic threats that have been levied against the NAACP and their supporters in Alabama and basically finds as a matter of appellate fact that this disclosure requirement is going to likely result in the destruction of the organization. Right? Most of the expressive association cases that follow imposes what I think is an appropriate requirement which is the nature of your claim is that some form of governmental regulation of your association is going to prevent you from effectively communicating your message, you have to make some kind of showing, some kind of factual showing along those lines and what was I think terribly wrongly throughout and crafted about the *Dale v. Boy Scouts* case, is that in *Dale*, what the court did was to say the Boy Scouts don't need to make a factual showing. It is enough that they say in their briefs and the litigation that this is going to impact their ability to communicate a message, and indeed it's enough that they say in their briefs that when the boy scout oath says that a Boy Scout is straight, clean and something else, it means that he's heterosexual and not something else. And the unsustainability of allowing associations to exempt themselves from any form of government regulation based upon their mere assertion that this going to infringe upon my First Amendment rights without having to make some kind of showing of what the actual nature of the impact on their ability to communicate their core messages was a very pernicious feature of the *Dale v. Boy Scouts* case and the court cases since then, most notably the Solomon Amendment case, *FAIR vs. Rumsfeld*, have stepped away from that, at least somewhat and I think properly so. And so, in confronting expressive association responses to disclosure requirements. I think one thing that's very important to do is to emphasize that you know *Dale* was a bit of an aberration and that what we have traditionally required is factual showings and not just mere assertions about the impact that in this case disclosure or other forms of regulation would have upon the expressive activities in the association.

And second, I'll just mention this very quickly. The other thing about *Dale* which was analytically quite sloppy and potentially very problematic is that it conflated the court's compelled speech claims with a line of cases, excuse me, with this expressive association line of cases, and I actually don't think that *Hurley* is an expressive association case at all. I think that *Hurley* is a compelled speech case and that is how the court seems to have understood it at the time it decided the case, and I think that the disclosure requirements are properly analyzed as expressive association claims rather than this compelled speech claims and I think I think that will helpfully re-focus the courts on the public speech framing of those claims rather than the autonomy framing of claims that are so typical of compelled speech claims.

Professor Daniel Ortiz: Yeah, I would hate to hold Scalia up as the source of great insight here. But I actually do believe there's something to be said for a line of his that someone this morning quoted: that democracy is sometimes a very nasty business. I think the normative question here is

how much civic courage is reasonable to expect from someone, and that's a really difficult question. It's going to depend in part upon what at least one part of the world thinks about what that person is advocating. This runs right up against a fault line and doctrine in theory that I think fits well with what Tobias and I were talking about.

If you look at it just doctrinally, the big problem here is *McIntyre*. You have people like Justice Thomas saying well, *McIntyre* protects anonymity when it comes to a person in a school board election or a local election deciding to hand out a leaflet, right? Why has the Court gone to the mat there? How's a corporation different? Anonymity is anonymity. But what the Court is doing here is very strongly protecting individual political participation. Then there is the middle category of *Brown vs. Socialist Workers Party* where under some circumstances the Court will protect an expressive group, and, finally, when it comes to an economic corporation, a business corporation, apparently there's really no need for much protection at all.

More cynically, as a positive rather than a normative matter, I have to say that you get the feeling sometimes in some of these cases, that the strength of the court's protection of a particular group's anonymity depends upon how much or how little the court thinks that group's speech is actually going to matter. They seem interested in, as in the Socialist Workers Party case, offering strong protection for something that's really not going to make in the grand political scheme that much of a difference. So there may be a kind of cheap symbolism involved here.

Mark Ladov: So we technically have a little less than four minutes less, and I see Lee and Monica and since this is Monica's last day at the Brennan Center and we wouldn't have this symposium or last years without her, what I would like, maybe if you guys could both ask your questions and then we can ask the panel to kind of answer relatively quickly.

Lee Rowland: Sure. Thank you for a great discussion of the associational right. I'm wondering if you think that all associations are created equal. If there's still room under the law to treat unions differently than corporations and in part under the associational right because I presume that most people become shareholders for a different reason than they join an inherently kind of expressive or advocacy group and whether that's foreclosed by the jurisprudence or whether the are openings there for different levels of regulation.

Monica Youn: And my question kind of follows off of that because I think in *Citizens United,* what the Supreme Court does is it puts kind of a source blind vision of speakers, that is very similar to I think what Dale was talking about when he said, well they manage to de-racialize discrimination, to divorce that from its context and I was particularly interested in that movement with regard to the Chief Justice Roberts' opinion in *Doe v. Reed* where of course the Court upheld disclosure requirement against a facial challenge on an 8 to 1 basis, but suggested that the door was still open for as applied challenge based on reasonable probability of harassment and in framing the issue, Chief Justice Robert says a very interesting move where he says not according to the harassment based on groups which is you know where cases like *NAACP v. Alabama* and *Socialist Workers Party* have traditionally then based on harassed groups ,minority groups, but instead he bases it on the controversialness of the issue, which means that the Chamber of Commerce weighing in on gay marriage is subject to the same anti-harassment exemption as a group of individuals who would reasonably fear bricks through their windows.

Professor Frances Hill: I think part of the answer is that we are in danger always of losing sight of associations of all kinds being both entities, looking outward to other entities, and aggregates of associating individuals or associating other groups and if we lose that idea that both things have to be accounted for, it makes it much harder to draw distinctions among groups that are principled as opposed to simply capricious and based on outside factors. I'm not going to take the time to play out this argument, but entities is only one theory of an association, the other is aggregates of participants. They're both there in the Constitution. I disagree somewhat with Professor Wolff. I have read all those food cases about which Dean Sullivan and Dean Post have had one of the most hilarious academic exchanges you could hope to read. The food cases are about the rights of members who don't want to promote what the group wants to promote and the question is, is political speech different? And that question should not be lost sight of if we're playing with other people's money. Justice Brandeis is right. Looking at facts, a few Brandeis briefs wouldn't be such a bad thing in the modern world. Not everything is high theory and sometimes high theory is Aristotelian, we count the legs on the grasshoppers before we then develop a jurisprudence.

Professor Daniel Ortiz: If I had 15 more minutes, one of the things I would have gotten to is exactly this question about treating union members or unions differently from business corporations. And it seems to me that normatively one of the advantages of recuperating the associational-individual perspective on all of this is that it actually does view unions as a different kind of beast than business corporations, which are defined as a nexus of contracts. And this may be way back in the mind of Justice Scalia when he works very hard in *Citizens United* to erase these kinds of distinctions. And, remember *Austin*, which was decided more under this perspective, expressly makes this distinction between unions and corporations at least as a matter of constitutional permission, not as a matter of constitutional requirement.

I think on the federal level it's not ever going to be much of an issue because parity of treatment between unions and business corporations has long been one of the political facts on the ground on the legislative side. So it's very hard to imagine, even if the Supreme Court changed its whole way of viewing things, Congress getting together and making very meaningful distinctions between the two. But I think they are very different beasts, and certainly under the individual-associational paradigm you can treat them differently. Whether you have to or not is a harder question.

Professor Tobias Wolff: And I'll just add to that. I think that focusing on unions is also valuable in recalling the difference between a group made up of individuals and a group made up of entities, and I mean I guess my response to Professor Hill would be that yes, *United Foods* is about a group that was a member that was unhappy about having to subsidize the activities of the group, but if the member is a billion dollar multi-national agro- business company then I think that raises a different or should raise a different set of concerns and the reasons I think *United Foods* is wrongly framed and decided is because the Court analyzes that as though it doesn't. I think that focusing on unions, I mean unions raise different issues in a lot of ways that people in this room understand perfectly well, but they are associations and individuals in a much more directly identifiable way than is true of large corporations.

Professor Frances Hill: One of the interesting thing about the food cases, apart from being somewhat hilarious in their own way, is that a number of them are based on the claims of farmers (e.g., the organic individual farmers versus the conventional individual farmers) and sometimes you've got food processors. It would be mind-numbing but possibly jurisprudentially productive to read those cases extraordinarily carefully to see what differences emerge given the kind of members in those groups.

Mark Ladov: Glen or Dale, do you have anything quick? No. Okay. I think we could talk about this for much longer and I will encourage everybody to stick around and have a drink and keep this conversation going after our last speaker. In the meantime, please, a really warm round of applause.