Money, Politics & the Constitution – Panel One Transcript

Panel 1: Does the First Amendment Limit Reform of Money in Politics? Can Reform Enhance First Amendment Values?

Susan Liss:

I want to thank you all again for being here with us. I also want to thank the Congresswoman for starting us off with much food for thought, as we anticipated she would. I am Susan Liss, the Director of the Brennan Center's Democracy Program. In my opinion, I have the privilege to work with the best team in public interest law. Those here today – as well as many others from the Brennan Center – have worked very hard to make this day possible. Thus, I wanted to start by saying thank you to my fabulous colleagues. I also thank our wonderful panelists and all of our guests for making the trip to NYU from far and near.

The first panel is entitled: "Does the First Amendment Limit Reform of Money in Politics? Can Reform Enhance First Amendment Values?" You each have a program with biographies of each of our panelists, so I am not going to repeat that information now. But I urge you to review these bios, especially for those panelists you do not know, for each person here brings some very special talents to this conversation.

We are going to start with Dean Erwin Chemerinsky, who probably has the distinction of being the Dean of the newest law school in the country, and also the distinction of being a renowned constitutional scholar.

Erwin Chemerinsky:

It is really an honor to be here engaging in long-term thinking about money, politics and the Constitution. My point this morning is this: There is a need for a great deal of new theorizing in this area. Today, I will briefly identify three questions that would benefit from such thought.

One is whether spending money in political campaigns should be regarded as free speech. Second is whether corporations should be regarded as having the same free speech rights as citizens. And third is whether all types of elections ought to be treated alike.

In ten minutes, I am obviously not going to answer any of these questions or develop any new theories. Instead, I raise these questions with the hope that we will have a chance to talk and think about them today and in the longer term.

With regard to the first question, the assumption not discussed in *Citizens United* is that spending money in elections is the same as pure speech. This is what *Buckley v. Valeo* said. But this has not always been assumed. When the DC Circuit ruled in *Buckley v. Valeo*, for example, it rejected the argument that spending money in election campaign is pure speech. In fact, J. Skelly Wright gave a famous speech at Brown University, which was then published in the 1976 Yale Law Journal, sharply criticizing the notion that spending money is speech. On the current Court, only Justice Stevens has consistently questioned whether spending money is speech. In 2000, in *Nixon v. Shrink Missouri*, he said, "Money is property; it is not speech." In fact, in every other area of post-1937 constitutional law, spending money would be something that could be regulated so long as the government meets a rational basis test. In sum, many have said that this metaphor takes a figurative expression – "money talks" – quite literally.

Those who argue that spending money ought to be regarded as speech typically make a couple of arguments. One is that spending money is a way of conveying support for a candidate. In this way, spending money is conduct that communicates. If you go back to the D.C. Circuit opinion *Buckley v. Valeo*, this is exactly what the D.C. Circuit concludes. That spending money on behalf of a candidate is conduct that communicates that should therefore be subjected to intermediate scrutiny under *United States v. O'Brien*. It should not be treated as pure speech.

Buckley also made a point that is often forgotten: Spending more money is not necessarily more conduct that communicates. Additional spending may communicate nothing more than the additional wealth of the speaker.

Most of those who equate spending money with speech do so by saying that money facilitates speech. Well, of course this is true, but that still does not make spending money the same as speech. To me, this argument raises difficult questions such as, what is the relationship between facilitating speech and the First Amendment? After all, many things facilitate speech. The availability of government property for speech facilitates expression.

But the government has traditionally been able to regulate the availability of property for speech – so long as the regulation meets immediate scrutiny, time, place and manner restrictions on speech are allowed. The availability of the media facilitates speech. What is its relationship then to the First Amendment? Most profoundly, education facilitates speech. If that which facilitates speech is entitled to First Amendment protection, what might that tell us about a right to education?

It also raises important questions in terms of the relationship of money to other constitutional rights. So many constitutional rights depend on the expenditure of money – for example, the free exercise of religion, the right to counsel, and certainly with regards to the right to abortion. How does the relationship of money to these rights relate to the spending of money to facilitate expression?

I would say this is a difficult question because there are certainly areas where the Supreme Court has protected the spending of money to facilitate speech that have not been controversial. When the government has tried to limit the ability of people to be paid for their expression, the Court has unanimously found this to be unconstitutional. In *United States v. National Treasury Employees Union*, the Supreme Court unanimously struck down a federal law that limited the ability of federal employees to get paid for their speech. In *Simon & Schuster v. New York Crime Victims Board*, the Supreme Court unanimously struck down a state law that kept perpetrators of crime from being paid for their speech. So, in that area we accept that there is a relationship between money and speech—how does this relate to the campaign area?

The second question I pose – Should corporations have the same free speech rights as citizens? – is one that received a great deal of attention, especially in Justice Scalia's concurring opinion and in Justice Stevens' dissent. All I want to suggest is that here, too, a great deal more theorizing is necessary. In part, the theorizing is necessary because of the inconsistent ways that corporations are treated under the Constitution. Corporations have no privacy rights under the Fourth Amendment. They have no privileges against self-incrimination under the Fifth Amendment. They have no protections at all under the Privileges and Immunities Clause. Why, then, do we give them the same rights as citizens under the First Amendment?

In fact, there are inconsistencies with regards to the First Amendment that have not been raised enough since *Citizens United*. Just four years ago in *Garcetti v. Ceballos*, Justice Kennedy, writing for the same majority in *Citizens United*, said there is no First Amendment protection for speech of government employees on the job in the scope of their duties. The Supreme Court there said that the First Amendment protects only speech as citizens. Now I am very critical of that. I do not think I give up my citizenship when I walk into my government office building into work everyday. But if it is true what Justice Kennedy and the majority said, that the First Amendment protects only speech as citizens, how is *that* to be reconciled with what the Court says in *Citizens United*?

In terms of theorizing, it is also necessary to go back to the question of why speech is protected at all. There is a whole wave of scholarship in the 1970s and 80s about underlying theories of the First Amendment that very successfully criticized the marketplace-of-ideas metaphor. I think a consensus began to emerge amongst scholars that autonomy is the primary rational for protecting speech. I am thinking here about an article that Professor Martin Redish did. Well, if autonomy is the primary rationale for protecting speech, then it is vey hard to justify why corporations have free speech rights, since we do not equate autonomy with corporate governance.

Also, if we are going to say that corporate speech is protected based on a marketplace-of-ideas notion that more speech is inherently better, it certainly raises questions of whether there can be regulations against distortions of the market place. Can there be anti-trust type regulations of speech, as there are in other marketplaces? The underlying question seems to be a very difficult one. Is the more speech that comes from corporations more desirable then the potentially distorting effects of corporate wealth?

There is one more thing, if we are going to theorize about corporations. There is a great deal of scholarship in earlier generations about how we should think of corporations, particularly

relative to the Constitution. In the early 1950s, Adolf Berle wrote a whole series of articles saying that we should regard corporations as entities of the state so that everything corporations do should be regarded as state action. Given what has happened to the state action doctrine in the last couple of decades that seems fanciful. But I do think it is worth going back to that scholarship to think through how we want to regard corporations.

The third and final question I raised is should all elections be treated alike? Now this was not something that the Court needed to address in *Citizens United*, as it was only dealing with a federal law in federal elections. But I do think it is an important question for the future. Most obviously, should judicial elections be treated the same as other elections? One of the places where I am most worried about the effects of *Citizens United* is in state judicial elections where the costs of running are ever escalating. Last year in *Caperton v. Massey Coal*, the Supreme Court recognized the potentially corrupting effects with regard to changing judicial decisions, as well as the actual risk of bias from the spending of large amounts of money by corporate officials. I think that case might open the door for arguing that corporate expenditures in judicial elections can be viewed differently. I realize that *Republican Party of Minnesota v. White*, decided in 2002, might make it hard to treat judicial elections differently, but arguably spending money is different then the kind of speech that was involved there.

Also, is there an argument that state and local elections should be treated differently than federal elections? Especially when you are dealing with small local governments, or local governments for special purposes, is there an argument that the principles of *Citizens United* apply differently?

The right has been so successful for decades in theorizing, and then, over time, has seen those theories come into practice. Campaign finance is an example that there is such a need for that kind of theorizing by progressives. I hope this day is the start of that.

Susan Liss:

Thank you very much. Next is Professor Kendall Thomas.

Kendall Thomas:

Thank you very much. I'm going to cut straight to the chase in order to maximize my ten minutes. But let me just say how grateful I am to have been invited and how honored I am to be sharing this panel with so many distinguished and admired colleagues.

If I were to give my remarks a provisional title, I'd borrow from that great critic of money markets and power, P. Diddy who recorded a song a few years ago called, "It's All About the Benjamins." My title would be "It's Not All About the Benjamins: Money, Politics and Neoliberalism in First Amendment Law." I want to take the recent opinion in the *Citizens United* case as a point of departure and offer some thoughts about a couple of overlapping issues.

My first set of observations has to do with the way the Supreme Court imagines corporate capitalism in that case and with the relationship the Court envisions between the market economy and democratic politics. Now, for reasons I trust will become clear, I hope to show that

the vision of democracy under capitalism, advanced by the *Citizens United* majority, represents a new under-theorized and easily overlooked ideological shift in the Court's thinking. I then want to say a few words about the nature of the work that pro-democracy advocates and activists must be prepared to do in the aftermath of *Citizens United*.

Now, of course, to talk about *Citizens United* is not to talk in any global sense about the question of money and politics but specifically about the problem (if it is such) of corporate money in politics. I'm going to leave the task of unpacking the substance of the Court's constitutional justifications for overturning the federal ban on corporate spending in candidate elections to others. I instead want to offer a couple of quick thoughts about the fused idea/image that animates the Court's constitutional analysis and serves as both a descriptive and normative baseline for the Court's discussion of the constitutional problem it presents.

I'm thinking, in particular, of a moment in the text of the opinion where the Court is summarizing the decision in *Austin v. Michigan Chamber of Commerce*. The Court references language from that case characterizing the First Amendment as being meant to prevent corporations from obtaining "an unfair advantage in the political marketplace" by using "resources amassed in the economic marketplace." Those of you who have read the decision will recall that this takes place in the context of a discussion of the so-called anti-distortion rationale for restricting corporate political speech.

Now, there are a number of things one could say about this metaphor. But the one point I want to make concerning the dominance of the political marketplace metaphor is that it has a history. And it has a specific history in terms of what it has done for legal and policy discourse on the role of money in politics.

Now, it is easy to forget that, throughout most of its history, the metaphor of the political marketplace has been just that – a metaphor. It has been a way of thinking about politics, but not an institutional fact that describes our political life or the practice of politics. The Court in *Citizens United* not only mobilizes this metaphor, it connects it to another venerated First Amendment metaphor, that of the marketplace of ideas. It is wrong as an intellectual matter and dangerous as an ideological matter to treat these metaphors as though they are the same. In fact, we are talking about two different markets. There is a kind of semantic infiltration or semantic shift, a sleight of hand if you will, in the Court's deployment of these different conceptions that places them in a relationship of symmetry. This should be contested.

Another thing I want to say about the political marketplace metaphor is that *Citizens United* demonstrates that it is no longer just a metaphor but a concrete material reality and a feature of contemporary American political life. The question for me then becomes: What does the political ontology of this metaphor as fact tell us about the current state of the always uneasy relationship between capitalism and democracy. As Crawford Brough Macpherson reminded us in his 1965 book, *The Real World of Democracy*, the liberal democracies that we know were liberal first and democratic later. For much of its history, the idea of democracy was a threat to the liberal state, not a means to its fulfillment. One of the ways in which the tension between liberalism and democracy was managed was through the emergence of constrained or embedded liberalism, to use the phrase of David Harvey. Embedded liberalism is shorthand for the

economic regime that existed from the end of World War II, roughly speaking, until the 1970s. It is meant to describe the welfare or regulatory state in which economic institutions and activities were, in Karl Polanyi's words, embedded in social and political relations.

We have heard a lot of talk in the last couple years about the new face of American capitalism. The common wisdom is that the chief marker of contemporary capitalism has to do with globalization. As Robert Skidelsky noted in last year's Oxford Union Society conference on the new face of American capitalism, the neoliberalization that we call globalization is a uniquely American-driven process, driven by distinctly American ideas, pressures and policies. One of the lessons I take from *Citizens United* is that the contemporary globalization of American market ideology has to be understood as a force which not only operates across foreign borders but within our domestic borders. Attention to the impact of neoliberalism inside the United States forces recognition of the ways in which neoliberalism is a reorganization of American capitalism and of American politics.

That is one of the reasons it is possible for someone like Judge Richard Posner to have published a recent book with the title *The Crisis of Capitalist Democracy*, which sees a consonance between capitalism and democracy. This has not always been part of the standard way of looking at the relationship between politics and the economy. I'm trying to map here a movement over the course of the last few years from embedded liberalism, understood both as an economic and ideological political formation, to neoliberalism, understood with regard to transformations within American society that have to do with economic, social, political and cultural change. This is a paradigm shift.

In reading the opinion of Justice Kennedy in *Citizens United*, I was struck by the gap between his vision of the role of the corporation in a capitalist democracy and the views of the corporation embraced by not-so-radical members of the Court like the late Chief Justice Rehnquist or the late Justice White. Justice White, dissenting in *Bellotti*, wrote that "the state need not permit its own creation to consume it." So the notion embraced by the *Citizens United* Court of the naturalness of the corporation as a participant in the political marketplace seems to be an index of the triumph of neoliberalism as a feature of our political and constitutional thinking. And that notion means that neutrality requires inaction on the part of the state with respect to the corporate use of market power to pursue its political goals.

In short, the political marketplace language has become the dominant language of politics and our understanding of the corporation as a political actor largely owes its force to the neoliberalization of American politics. This can be seen, as I have said, in terms of the baselines that provide the Court with the terms of its analysis.

In terms of its thought style, the Courts' vision of the corporation and its role in democratic capitalism are uncannily like what Karl Marx described in *Capital* as the fetishism of commodities. What we are seeing here through the logic of neoliberalization is a phenomenon by which qualitatively different commodities and objects – donations and speech, corporate personhood and human beings, politics and markets – are made to be what they are not, equal.

So now the question is – what is to be done? One of the things we could do, and Deborah Hellman will talk about this in a minute, is to make political speech non-monetizable. We could see political speech as a non-market good and accept – as a matter of democratic legitimacy – the right of legislators to cordon off certain kinds of political speech as non-monetizable. Or, to put the point more radically, we could – to use Jamie Raskin's very vivid metaphor – erect a legislative wall of separation between politics and the corporation. Both of these perhaps entail the implicit rejection of the idea of politics as a market and of market-based thought styles in politics.

Another thing we could do is engage the contradictions. A couple of years ago, Pamela Karlan argued that politics is what Margaret Jane Radin calls an incompletely commodified process – there are some aspects of politics that we think about in market terms and some aspects that we don't.

Or we could follow a double strategy. In the short term, we could discuss the incompletely commodified character of politics and, in the long term, work towards the erection of a wall of separation between politics and the corporation.

In concluding, I would simply say that this work involves not just reform of existing laws but a re-visioning of democracy. In short, we need to contest the vision of politics and the vision of politics embraced in *Citizens United*, which views citizenship and constitutional democracy as part of the world of commodities. One of the things that this might mean as a constitutional matter is to adopt some of the strategies of certain critical race theorists who have insisted that we must read the First Amendment through the lens of the Fourteenth and recognize the equality norm which is embodied by the Equal Protection Clause.

I don't think this work is solely or even primarily legal. The most important work that needs to be done is political and cultural. We must understand and advance a vision of the First Amendment as a description of political culture and not just as a legal norm. And, we must understand the way in which the Constitution can be used to do important cultural work in that regard.

So the problem of money and politics is a specific instance of the broader crisis of capitalist democracy in America. After *Citizens United*, we cannot possibly hope to understand, much less address, that problem without also confronting the contemporary crisis of American law, of which the neoliberal interpretation of the First Amendment is both a cause and a consequence. As I've tried briefly to suggest, effective mobilization against the neoliberal legal project will require a new vision of democratic invention.

Susan Liss:

Thank you very much, very provocative. Deborah Hellman comes next.

Deborah Hellman:

Thank you. I'm honored to be included and thankful to be here. My remarks follow nicely from the two that came before so this will work out very well.

I'm taking up Dean Chemerinsky's first question and trying to do some of the theorizing that he invites. I want to challenge the orthodoxy of the view that restrictions on giving and spending money constitute restrictions on speech and are therefore subject to heightened judicial review under the First Amendment. I think this is particularly important to do now because of how *Citizens United* treats this claim as beyond argument.

In the beginning of the *Citizens United* opinion, the Court says that the law restricts the ability of corporations and unions to expend their general treasury funds. Then, when the courts turns to the First Amendment analysis, it says this law is an outright ban on speech. It actually provides no argument at all for its jump from the claim that the law is a restriction on spending money to the claim that it is an outright ban on speech. This has become so much a part of the fabric of our constitutional doctrine that the Court needs to give no argument, not even a citation to *Buckley*, which is interesting. Obviously there are citations to *Buckley* later in the opinion, but not at that point.

I want to challenge the orthodoxy of that view and to at least require that the other side provide an argument because I think that there is not a very good argument for that quick move. I also want to suggest an alternative way to go. So, what are the reasons for thinking that restrictions on spending money might be restrictions on speech? Professor Chemerinsky has foreshadowed the rationales already: Money facilitates the exercise of speech, money incentivizes speech, and the giving and spending of money themselves can be expressive activities.

The first thing to note is that only the third one – that giving and spending money can be expressive – is uniquely connected to the First Amendment. Because, of course, money facilitates and incentivizes the exercise of almost any constitutional right that you can think of. That's because money is useful, right?

I'm not going to say anything actually about the expressive aspect of it. I think the argument that giving and spending money are expressive activities and therefore should be protected by the First Amendment is not that strong, so I'm just going to put that to the side and instead focus on what I think is the argument that primarily motivates the Court in *Buckley* and in later decisions as well as many commentators. That is the argument that money facilitates or incentivizes the exercise of our First Amendment rights. The Court says in *Buckley* that virtually every means of communicating ideas in today's society requires the expenditure of money. That's the facilitative function of money.

Well, the Court is surely right that money facilitates the exercise of speech. But, as I said, money facilitates the exercise of other constitutionally protected rights too. For example, money facilitates the right to abort a previously viable fetus; you pay an abortion provider to give you an abortion. Money facilitates the right to own a handgun; if you don't already have one, you need to buy one. Money facilitates the exercise of procreative liberty; if you're infertile and you want to pay a surrogate to gestate a child or – indeed – if you'd like to buy a baby, that would be facilitated by money. Money would certainly facilitate the exercise of the right to vote. If we

were to pay people to vote, then surely more people would show up. It could also facilitate the exercise of the right to vote if you could take a taxi to the polls – it's less cumbersome. And that's just a few examples – for almost any right we could think of, money could facilitate or incentivize the exercise of it. Obviously there are tons more I could give you.

In the case of some of them, our intuitions might say the right to spend money in connection with that right ought to be protected within the penumbra of the underlying right. But in others, we would say no, no, no, it wouldn't be protected as part of the penumbra. If that is true – if we don't think that restrictions on the right to pay people to show up to vote constitute an infringement of the right to vote, but we do think that a limitation on the right to buy a handgun would be a restriction on the right of gun ownership – then the first conclusion is this: That money facilitates the exercise of a right is not sufficient, on its own, to establish that the right in question includes any penumbral right to spend money. We need something more than simply noting that money facilitates the exercise of the right.

In order to begin to develop what that something more would be or how we can separate those rights that include a penumbral right to spend money from those that do not, it might be helpful to begin a list of instances where we think the underlying right, at least in a particular context, does not involve the right to spend money. I'll just give you a few examples. The right to direct one's medical care doesn't include the right to buy organs. The right of procreative liberty doesn't include the right to buy babies. The right of sexual intimacy from *Lawrence* doesn't include the right to pay for sex. And the right to vote doesn't include the right to pay people to vote. These examples all involve cases where democratic decision makers have decided that some good in question that's connected to the right should be distributed via non-market principles rather than via the market. That, I think, provides a clue to help us develop a theory. When does a constitutional right include a penumbral right to spend money?

The first point I want to make is we ought to frame that question generally, not in particular about the First Amendment and its connection to money, but rather as a general question about the connection between money and rights. That is, when do constitutional rights include a penumbral right to spend money? Obviously this would have implications for the First Amendment and for campaign finance, but it's not uniquely connected to the First Amendment.

So here's what I want to say about the answer to that question of when constitutional rights include a penumbral right to spend money. My answer is obviously preliminary; I have a paper out at the table putting forward this view and I welcome any comments or criticisms or whatever you have to say about it.

First, the decision by democratic decisionmakers about what goods are to be allocated via the market and which goods are to be allocated via some other distributive mechanism strikes me as an incredibly important one. It is almost an identity-defining decision for a community to make. Therefore, it is very important for democratic decisionmakers to retain that power. Think of the current health care debate. In large part, it's about whether we going to provide health care on the basis of need rather than on the basis of ability to pay. These decisions about how we're going to allocate various goods – whether they're going to be in the market or outside the market

– are important decisions for our community to make and should be made by democratic decisionmakers.

In a way, I see this to be an upshot of the lesson from *Lochner*; just as we ought to be cautious about imputing any particular economic theory to our Constitution, we ought to be cautious about seeing our Constitution as including a conclusion about which goods are to be distributed via the market and which are to be distributed via other means. Now don't take the point I'm making here to be the New Deal for the First Amendment point that people have made; its something more modest, namely, that our democratic decisionmakers ought to retain the power to decide the appropriate distributive mechanism for various goods.

Now there's a worry that this view could provide a way for democratic decisionmakers to do kind of an end-run around rights. That is, rights are meant to be either immune or resistant to incursions by democratic decisionmakers, and we certainly don't want it to be the case that a democratic decisionmaker could say, "Oh you have a right to an abortion, you just can't pay anyone to provide one for you." Or, there's a right to own a handgun, but guess what? You can't buy any bullets. It can't be the case that democratic decisionmakers can take certain goods out of the market in order to eviscerate rights.

The solution I want to propose is an answer to the overarching question. Democratic decisionmakers can decide on the appropriate distributive mechanism for various goods, market or not. But, if a good is distributed via the market, as medical services are (especially abortion services in our current regime), then the right dependent on that good must include the right to spend money as part of the penumbra of the right. If a good is not distributed via the market, say the way votes are not, then the right which depends on that good does not include the right to spend money to effectuate it. Voting is a good example because votes are distributed on the basis of age and citizenship; thus, the right to vote doesn't include the right to spend money.

Now this approach obviously has implications for campaign finance reform but they're not clear cut. It depends a lot on what, in fact, democratic decisionmakers do, but I think the approach provides some kind of roadmap or method of analysis for thinking about what would be permissible in the campaign finance realm. I think that Congress or a state legislature could make electioneering a non-market commodity. One of the most straightforward ways of doing that would be a public funding mechanism. Obviously there could be debates whether something short of that would be enough to take electioneering out of the market, but to the extent that the democratic decisionmakers take a particular commodity out of the market and provide an alternative method for distributing it, then a right which is connected to that good doesn't include the right to spend money. In that way, the right to spend money on electioneering would not be a restriction on the right to speech because electioneering and electioneering communications would not be distributed via market norms.

So I'll end there, and I look forward to discussing it.

Susan Liss:

Thank you very much. Floyd Abrams is our next speaker.

Floyd Abrams:

Thanks so much for inviting me. It's a special honor for me to be on the same panel with and part of the same day of discussion with scholars of the enormous breadth and skill of the people here today. I appreciate being invited for that reason. I also appreciate being invited because, as my friends at the Brennan Center know, I do not exactly share their views on the issue which I will be talking about, I was counsel to Senator McConnell in the *McConnell* case and represented him before the Supreme Court in *Citizens United*, so we're not exactly in accord on all aspects here.

So let me start with what may sound like a rather immodest articulation. I think I speak for Justice Brennan in dissenting from the view of the Brennan Center and perhaps most of you today. I speak of the Justice Brennan who joined *Buckley v. Valeo*. I speak of the Justice Brennan who joined the plurality opinion on the *Pacific Gas & Electric* case, which I will come back to in a few minutes. I speak of the Justice Brennan, most of all, who cared so much for the protection of political speech, whoever the speaker, that it would have been very hard indeed to get him to accept the proposition that because the speaker takes a corporate form it should not be able to engage in precisely the same speech we protect when an individual does it.

I'm going to talk in the main today about press-related subjects – press coverage, the Press Clause, and the like. Having represented the press reasonably often in my career, I have been struck by the fact that journalists, newspapers, magazines and the like– with the exception in general of particularly right-wing oriented ones – have denounced the *Citizens United* opinion. These are the same journalists who would go to the barricades to defend the right of Nazis to march in Skokie, or who would write editorials of the strongest, strongest sort defending the rights of pornographers to put their stuff on the Internet, or people engaged in the vilest sort of hate speech to have their say on the Internet, or who would support the right of journalists not to reveal confidential sources under any circumstance.

Those journalists have sort of coalesced around the proposition that this decision is awful. They've done it, I think, for a few reasons. One is quite consistent with the view of those who are critical of the opinion because they believe that money in politics is dangerous and that the decision significantly cuts back the ability of our society to deal with that problem. They do it also, I think, because they are suspicious – even disdainful – of the five members of the Supreme Court who wrote and joined the majority opinion. I think they do it as well because they are frustrated by the fact that their loss in the case, so to speak, was in the name of the First Amendment, which they often think belongs to them.

Consider the number of cases cited by the Supreme Court in Justice Kennedy's opinion for the proposition that corporations do receive, have received, and therefore perhaps ought to continue to receive, broad and sweeping First Amendment protection when they engage in political speech. Justice Kennedy cited 25 cases for the general proposition that corporations have received broad First Amendment rights when they engage in such speech. Seventeen of the 25 cases involved the press in one form or another – newspapers, broadcasters, magazines, and the like.

Now, in my view, the Court cited and reaffirmed prior rulings to the effect that political speech does not lose First Amendment protection "simply because the source is a corporation." From *Pacific Gas & Electric*, it quoted that "the identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." The majority of the Court was therefore reaffirming the viability of these quite press protective rulings.

Indeed, the Court in *Citizens United* went further, concluding that the anti-distortion rationale of the *Austin* case which the Court rejected in *Citizens United* would "produce the dangerous and unacceptable consequence that Congress could then ban the political speech of media corporations." To which I would add that I think a contrary decision would have at least put at risk decisions such as *Mills v. Alabama* and *Miami Herald Publishing Co. v. Tornillo*, which both involve the press. In the *Mills* case, the press was banned in Alabama, just on election day, for the purpose of having clean elections. Just on election day, for raising some new issue in an editorial not previously raised, so that the public wouldn't be confused because it wouldn't have the chance to hear the answer. Nine-nothing, the Court struck that law down as alien to the First Amendment. In *Miami Herald*, in an election context, the Court said, although the idea of allowing someone to respond if you attack him is interesting, that requirement violated the First Amendment on its face. Both were unanimous decisions.

The dissenting opinions' response in *Citizens United* to these articulations seemed so brief, so perfunctory, so nonresponsive – a paragraph in Justice Stevens' 90-page opinion – that it's worth reviewing. Justice Stevens wrote a single paragraph addressing an issue that the majority had gone on for pages about. He wrote that the majority had "raised some interesting and difficult question about Congress's authority to regulate electioneering by the press," that it was "not at all clear" that *Austin* would permit the press to be covered by the statute in light of its unique role, but that, since the statute itself contained an immediate exemption, the dissent need not address those issues.

First of all, as someone who has appeared before the Court on occasion and who has been questioned by Justice Stevens hypothetically, again and again, about difficult issues which were not before the Court in order to test whatever theory I or other lawyers were articulating, the notion that "well, that really wasn't before the Court so we won't address the issue of what happens to media corporations" seems unpersuasive. Consider the following hypothetical:

Citizens United did its documentary about Hilary Clinton, denouncing her. It costs money, by the way, to make a documentary or anything else that appears in a film. Suppose that it had not been Citizens Union but Time Warner that had made precisely the same documentary. Time Warner could show it on television and be protected by the media exemption in the statute. Citizens United could not because it would not be protected. So the question would be, what about the First Amendment? Time Warner would presumably be protected by the First Amendment. The dissenters in *Citizens United* did not believe that Citizen United itself was protected by the First Amendment for doing precisely what Time Warner would have been protected for doing. I find that very disturbing.

Or consider Justice Kennedy's three hypothetical questions, or examples, none of which were addressed at all in Justice Steven's dissenting opinion. He wrote, "The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. senator supports a handgun ban; and the American Civil Liberties Union creates a website telling the public to vote for a presidential candidate in light of that candidate's defense of free speech." All that advocacy would be criminal under the statue that the Supreme Court has now held to be unconstitutional, and the dissenters regrettably seem to accept that proposition. But if an editorial in the *Philadelphia Inquirer* said precisely the same things in those words, I think we know, at least under current law we know, that it would be protected by the First Amendment. It would be an extremely disturbing result to say that there should be different First Amendment results in these circumstances.

Now, it's perfectly understandable that the dissenting opinion would not take up the challenge. These are hypotheticals; they don't have to do it. But I don't think there are good answers to those hypotheticals. Now there is, of course, the possibility that the Press Clause language of the First Amendment – "Congress will make no law abridging the freedom of the speech or of the press" – could be held to provide special protection for what has been called the institutional press. That's a position advocated by Justice Stewart in a fascinating speech he gave in the 1970s in the aftermath of Watergate. It does not appeal to other members of the Court. I wrote an article, read by no one, supporting Justice Stewart about that.

What I think is impossible to accept is that only media corporations can receive First Amendment protections when they say exactly the same things as corporate websites, pamphlets by corporations, and corporate speech on public issues. The Supreme Court's rulings in the case I mentioned earlier, the *Pacific Gas and Electric* case in 1986, says this with respect to bills this highly-regulated gas company sent out to the public. They included with the bills a newsletter which commented on matters of public interest along with tips about electricity. The California state entity concluded that that extra space, so to speak, belonged to the public since the company was so regulated, and that therefore, one out of every four issues could be written by someone else who didn't agree with the gas and electric company.

The Supreme Court, in a close vote, struck it down. The plurality opinion, joined by Justice Brennan, had some of the language quoted in *Citizens United* as protecting free speech for corporations. Now remember, this is an ultimate for-profit corporation – the gas company – and when they sent out their newsletter the Court said that was protected by the First Amendment. Justice Brennan and his colleagues – the opinion that was written by the Chief Justice – said that the order violated the First Amendment because the gas company had the right to be free from governmental restrictions that abridged its own rights in order to enhance the relative voice of its opponents. That quotation comes, of course, from *Buckley v. Valeo*.

Let me conclude with a brief comment on Representative Edwards' proposed constitutional amendment. An amendment which, if adopted, would be the first constitutional amendment ever to limit the First Amendment in our history. It does two things, First, it permits the regulation of "the expenditure of funds by any corporation," *any* corporation. Then, it says "nothing contained

in this article shall be construed to abridge the freedom of the press" So it seems to me clear enough that free speech rights of (to use the examples I cited earlier) the Sierra Club, the NRA, the ACLU and PG&E and all the for-profit corporations would all be overcome by the amendment.

That is to say that the democratically-elected Congress would have the right to overcome what the Supreme Court has held to be the free speech rights of those entities. The *Belotti* case would fall. *Pacific Gas and Electric* would fall. So would, presumably, cases protecting *Hair* and other theatrical presentations, which are generally viewed as more speech than press. Cases protecting movies and records, which again probably are more speech than press, and perhaps even cases concerning corporate Internet speech, would fall. Everything corporate that is not the press could be regulated.

I don't think Justice Brennan would have approved of that. An approach which views the First Amendment as an impediment as opposed to a protection, as a disagreeable, painful limitation to be overcome, evaded, or eluded rather than as a shield against the government, is not a good idea. Thank you very much.

Susan Liss:

Thank you. That's an excellent segue into Professor Vicki Jackson's discussion about the constitutional amendment.

Vicki Jackson:

Thank you very much for the opportunity to be here. There are many risks to going last on a panel, particularly when the prior speakers are so distinguished and knowledgeable. In this case, there's the added risk that I am the person standing between this amazing audience and the opportunity to talk. So I'll try to talk fast.

Many Americans take great pride in the longevity of their Constitution, viewing it as having been the product of an unusually public-spirited act of law making. The Constitution was designed to be difficult to amend. Many believe that that difficulty has contributed to the stability and relative continuity of our constitutional democracy. But I am at least thinking, albeit in a very tentative way, about whether the *Citizens United* decision, with which I disagree in contrast to the prior speaker, may call for a constitutional amendment.

As a matter of design, the Supreme Court was not intended to have the final word on all matters constitutional. As everyone in this room probably knows, at least four amendments have become part of the Constitution in order to overrule Supreme Court decisions. The Eleventh Amendment in 1798 overruled the *Chisholm* case, the Fourteenth Amendment in 1868 overruled *Dred Scott*'s pernicious interpretation, the Sixteenth Amendment in 1913 responded to the *Pollock* decision about the constitutionality of an income tax, and the Twenty-Sixth Amendment in '71 overruled the portion of the decision in *Oregon v. Mitchell* concerning the eighteen-year-old vote.

So the question I'm puzzling over is whether the time has come for the American people to, once again, express their disagreement with the Supreme Court over a fundamental aspect of American constitutionalism. And I'm thinking maybe so, although I'm not sure. The prospects for the doctrinal fixes that Michael Waldman suggested this conference should be primarily concerned with, for all the creativity in this room and elsewhere, face considerable challenges. Given the scope of reasoning in *Citizens United*, the vision upon which it rests as Professor Thomas discussed, and the likely foreseeable stability of the five-Justice majority, the challenges are clear. I think this decision makes a significant change in the structure of American campaign finance law, a structure that has been in place since well before the reforms of the 1970s, dating at least to Taft-Hartley in 1947. Then, Congress extended the ban that had previously existed since the beginning of the century on direct contributions by corporations to candidates to bar independent expenditures. And these provisions, which were in place for more than 60 years, are now undone leaving three potentially significant and adverse consequences for our constitutional democracy.

First is the use of enormous concentrations of wealth (made possible because of the legal fictions created in order to facilitate the accumulation of capital in a market economy) to influence elections. To allow those concentrations to directly influence democratic decision-making seems to me in tension with the primacy of voter equality. Markets and political democracy may reinforce each other in healthy ways. But this decision threatens the premise of democracy, which is the equal standing of each voter. Allowing citizen associations not engaged in for-profit activities to pool their resources for political speech seems to me quite different from allowing business corporations to take profits made from market activities and funnel them into the electoral process.

Second, the risk of allowing such corporate expenditures, and the threats thereof or the fear thereof, may greatly increase the likelihood of legislatures at the national and state and local level, who are, in a certain sense, bought, paid for and primarily accountable to business corporations, not to voters. It is a challenge inherent to being in a legislature to combine the ability to both represent your constituents and to think independently about the public interest. That's endemic. It's a particular challenge for legislatures to keep their eye on a broader conception of the public interest when they have to raise a lot of money to fund their campaigns. But although individual access to wealth varies greatly, candidates can appeal to millions of people of ordinary income and still have a shot. Allowing corporate expenditures of this sort, even if nominally independent, may well result in our democracy having many more legislatures who feel beholden or accountable primarily to business interests, at least so long as the fact of the business corporations' expenditures are made public.

Third, and relatedly, the change brought by the Court's decision risks a rapid progression into a culture of corruption. Legalized corruption, to be sure, but corruption no less, in both American politics and business. Given corporate profits, the cost of trying to buy elections may seem relatively small. There may, though, be an increased risk of expenditures on political campaigns, should an escalating arms race of corporate interests occur – consider, the tech industry against the agriculture industry – in efforts to have their favorite candidates in office. This will enhance the impact of corporate money, possibly to the detriment of ordinary voters. But it may also function to the detriment of the market economy if corporate attention is too much focused on

purchasing political power rather than on continually innovating in order to improve what's available in the way of material goods. Moreover, it is much more likely to be well established industries rather than newcomers, who may be the most important sources of innovation, who will have the corporate treasuries to engage in this.

So is it time to consider adding an amendment to the Constitution?

For a number of reasons, I think that a narrow amendment, perhaps one more narrowly drawn than the one Representative Edwards talked about, designed to allow legislatures to prohibit corporate expenditures (prohibited since Taft-Hartley) to directly influence elections, should perhaps be considered. This is the core of what *Citizens United* overruled, and I worry it is a threat to maintaining a democratically legitimate election process.

I do have some concerns about broader proposals, for example, those designed to permit regulation of all corporate speech. Why do I have concerns about broader proposals?

First, even if one does not conceive of corporations as having rights like human beings, one can conceive of governments attacking or suppressing corporate speech because it disagrees with it in ways that might diminish the vibrancy of our discourse. Moreover, corporate spending on issue advocacy might have serious benefits in bringing facts to the public. And that kind of advertising on issues will ordinarily be met by other interest groups that will respond. Given the very large number of elections for public office, if you think about the federal, state, and local level, I fear that corporate capacity to outspend the non-profits sector in elections for particular offices poses a far greater risk of distortion or corruption.

Finally, as a matter of practicality in obtaining agreement to an amendment, I think there might be some large corporations that might not be unhappy if there were a uniform rule in place prohibiting corporate expenditures directly involving particular candidates, as long as their competitors were also prohibited from those expenditures. I don't think corporations will readily give up the whole range of speech rights that the jurisprudence gives them, but they might be happy to be relieved of the need to respond in election after election to expectations or threats about particular candidates. So, the need may not only be pressing, the moment might be right. It seems to me that this is an issue around which progressives on the left and populists on the right might well be able to agree. And, if very narrowly tailored, corporations might find it in their own enlightened self-interest to agree as well to a rule to take the issue of direct expenditures to influence elections off the corporate table.

Now there are, I told you my thinking is quite tentative. There are many objections to this course, some of which worry me a lot. First, the First Amendment is a very important bedrock of our constitutional system, and in order for it to continue to be so, I think we benefit very much from a tradition that we don't amend the Constitution when the court makes a decision under the First Amendment that's unpopular. The First Amendment would provide scant protection to minority speakers if that were the course.

On the other hand, we may think the Court has profoundly misinterpreted the First Amendment, in a way inconsistent with the structure of our public law for the last 70 years, and has done so

on behalf of much more powerful speakers. So, I'm not sure that we should not, after due consideration, put the amendment route on the table.

Second, efforts to enact a constitutional amendment might be viewed by some as an undesirable concession that *Citizens United* was correctly decided. I do not agree that it should be so viewed, and nor do I think that this a substantial reason not to go forward with it. Our history has a number of examples of successful efforts to change doctrine that occurred while serious efforts to amend the Constitution on the same issue were in play. Consider the move from *Hammer v. Dagenhart* to the later New Deal cases while the child labor amendment was pending. Consider the escalating standard of review of gender discrimination issues while the ERA was pending. True, the pendency of an amendment might be taken by some justices as a reason for caution – I think there's an opinion by Justice Powell in one of the gender cases that went in that direction – but on the other hand a popular movement on behalf of an amendment might contribute to the shift in understandings of current constitutional meanings that Robert Post and Riva Siegel have described in their work on popular constitutionalism.

Third, if an amendment were successfully adopted, some might have real concerns about the scope of its interpretive effects across the whole Constitution. There is uncertainty. Narrowly crafted amendments, on occasion, have been read very broadly. This was the case with the Eleventh Amendment. But in the first generation or so, I think it is reasonable to predict that the amendment will accomplish pretty much what its drafters intended if it is narrowly and carefully drafted; protections for the press will be an important part of that. Beyond the first generation, we're in the realm of constitutional interpretive politics in which there will be contests over meaning.

Fourth, it might be argued that resort to the difficult and time-consuming amendment process should not be pursued until other approaches are exhausted – for example, different statutes. Or, that pursuing an amendment will sap political energy away from a successful legislative approach. Do I think it's good to not go to a constitutional amendment as a first reaction to a decision with which one disagrees? I think there's much to be said for that. But I also have some worry that we're in a moment where change in corporate practice may become entrenched if action is not taken sooner rather than later. I don't feel relaxed about timing. And on the question on whether a move for an amendment will sap energy from attainable and effective legislative solutions, this worries me a little, although some of the legislative fixes – like the shareholder approval fix – still leave me a little uneasy, as it makes the question of the use of corporate funds for political action in the electoral sphere depend on market capacity, not on the equality of persons that should control.

Now one of the central functions of the Constitution and of the First Amendment is to establish the preconditions for successful, self-governing democracy. And having lots of information out there is absolutely central to that for voters. But the idea that there is the constitutional right that business corporations have to spend money directly to influence elections, directly to influence who the people elect as representatives, doesn't fit well with my own sense of what the Constitution stands for. And it is this sense of affiliation, and in an offense to the democratic sensibility that in part motivates my thinking about this. I think Representative Edwards talked this morning about people owning their Constitution, right? I resonated with that.

One last point. The hesitation of people to seek amendment of the Constitution is understandable, and, in many respects, wise. But at the same time, I worry that "amendaphobia" or a tendency to discount amendment as a possible response to a seriously mistaken constitutional decision might also sap the overall system of an important method of reinvigorating our Constitution, and of maintaining an appropriate balance between judicial interpretation and public decision-making over what the Constitution should mean. Barry Friedman argued in his recent book, *The Will of the People*, that the events of 1937 represented a decision by the people that constitutional amendment through interpretation was legitimate if the interpretation was within some mainstream. It would be, I think, a great loss to the democratic component of democratic constitutionalism if one were to conclude that the Article Five amendment process has been or should be abandoned as at least one method of legitimate constitutional change. If the First Amendment is critically concerned with maintaining the pre-conditions for a self-governing democracy, surely it should not prevent the people from working to reclaim the better meaning of the First Amendment through the amendment process.

Susan Liss:

Thank you very much. I'd like to thank all of the panelists for giving us probably enough food for thought for about four or five days worth of conversation. We have ten to fifteen minutes, at least at this moment, and as we do want to give our very distinguished audience the opportunity to respond, and we open the floor.