# Money, Politics & the Constitution – Panel Three Prepared Remarks Transcript

## Panel 3: Should We Look Beyond the First Amendment to Other Constitutional Principles?

**Ciara Torres-Spelliscy:**

Good afternoon. My name is Ciara Torres-Spelliscy and I am Counsel at the Brennan Center. I have the pleasure of introducing our third panel. When I was younger, my father used to say to me, "Ciara, remember to ask the big questions." I think this is precisely the marching orders we gave this panel. One of the questions that we're asking is "should we look beyond the first amendment to other Constitutional principles?" Professor Tokaji, could you start us off?

**Daniel Tokaji:**

As we previewed our remarks in the conference call that preceded this conference, it occurred to me that the theme that links together the various ideas that I think are going to be presented today is: "What are the underlying values in the debate over campaign finance regulation?" which in turn raises an even bigger question of: "What are the underlying values at play in our democracy," something that the previous panel also got into.

My argument can be boiled down to a single word: Equality. That is the value upon which I'm going to focus. I think it to be the central value that's been missing, that has been taken off the table by the line of Supreme Court decisions beginning with *Buckley*. And if we're talking about building a new jurisprudence, I think it to be the value that we most desperately need to reintroduce into the discourse. To be clear, I'm not talking about equality in an atomistic sense, in a sense of an individual right to be treated the same as similarly-situated others, but rather, in a systematic or structural sense. If I may be a bit more specific, I'm talking about the problem of the have-nots in our society having a lesser voice than the have-a-lots, both in the outcome of elections and also in the decisions that are subsequently made by the folks that were elected to office.

My argument, further, is that our impoverished, I would even say, anemic debate over campaign finance regulation can be traced to the Supreme Court and its taking off the table equality as a permissible basis for limiting campaign spending in *Buckley*.

Seen in this light, I have to say although the *Citizens United* decision is undoubtedly an important case for what it represents, and I wish it had come out the other way, I think it is a decision that is more consonant with the rest of existing campaign finance law and that *Austin* really was the outlier in recognizing equality within a very limited context. So I'm going to say a few words both about the Supreme Court's jurisprudence and how I think it's affected and indeed distorted the public debate, but first I want to say a bit about how I come to this issue.

My background is as an advocate with the ACLU, and at the same time, with Common Cause as former Chair of Common Cause's California Board, as a member of the National Governing Board. Since entering the academy in 2003, I've pretty much entirely stayed away from talking about campaign finance regulation. This is a decision that was not accidental. It's partly a function of my perception that this area has become something of a quagmire, and, moreover, that it is very difficult to do anything meaningful in the area of campaign finance regulation given the constraints the Supreme Court has imposed. The advantage, I hope, of having been away from this area for some time, or at least not writing about it, and being a bit out of the weeds, is that, I hope, and I think it has, provided me with a little perspective on the debate.

In the courts, it seems to me that the discussion of campaign finance regulation and its constitutionality has gotten sidetracked on this question of whether money is speech. I confess, and I'm not the first one today to express this sentiment, that that is the wrong question. It seems to me that there's indisputably a connection between money and campaign speeches. Richard said, I don't know if it was during lunch or in the first panel, "It's speech-y enough." That to me is simply the beginning of the constitutional inquiry and not the end of it.

If we accept the basic proposition, which I think we have to, that there is a connection between money and speech – that money facilitates speech, or at least that speech getting heard in the context of elections – then the corollary of that proposition is that those who don't have money, and a significant amount of it, don't have speech, or at least the ability to have their voices heard in democratic discourse to the same extent as the have-a-lots.

Now, *Buckley*, of course, foreclosed the kind of argument that I just made, at least as a basis for limiting campaign spending with its famous – or infamous, depending on your perspective – line, that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Austin* said something different. I think what *Austin* said was in direct tension if not direct conflict with this line from *Buckley* I just read. "Michigan's regulation aims at the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form." This, I take to be, a form of inequality rationale, albeit one confined to a narrow area, that is, corporate expenditures on candidate elections.

Now, Marshall in the next sentence denied, sort of, that this was an equality rationale, saying that Justice Kennedy's dissent was wrong to characterize the majority rationale as an attempt to equalize the relative influence of speakers on elections saying that this is a distortion rationale, not an equality rationale, but I guess I don't buy that. For what else could the Court have meant by "distortion"? To speak of distortion is necessarily to have a normative vision of what an

undistorted political discourse would look like. There is a word for that, and I would say that word is equality.

And so, to have a system in which the have-a-lots have a much greater voice than the have-nots, is anathema – anathema to the concept of "one person, one vote" and, maybe a more direct analogy, to *Harper v. Virginia*, the poll tax case, where the Court says that wealth may not be the basis for excluding people from the polity.

Now, *Citizens United*, of course, eliminates this anti-distortion – what I think to be an equality rationale – putting the last nail in the coffin on it. And, as I said, I don't really think the decision is all that terribly significant in terms of its results. Corporations could pretty much do already what *Citizens United* allows them to do. But it is very significant for its burial of this equality rationale.

So with all this said, it may seem like an odd time with my perspective to be re-engaging in the debate over campaign finance regulation, at what would seem to be the most hopeless moment. But I see it differently. I see this as providing us with an opportunity to change the discourse in the long-term and to get equality back into the conversation.

Now, as has no doubt been clear from my remarks, I am not someone who thinks that the deregulation of campaign finance is constitutionally required, as do some. At the same time, I am not someone who believes that the Courts have no role to play, or no significant role to play in terms of judicial review, when it comes to campaign finance regulation.

I think that we've been engaging in a bit of, I guess I'd call it a shell game here. Not only in terms of the real justification, or at least the strongest justification, for having campaign finance regulation, which I take to be equality rather than corruption. But also in terms of what the risks or dangers of campaign finance regulation are, that sometimes do justify judicial intervention. Mostly, this has been couched in terms of a certain type of liberty interest.

There are speech rights at issue here and the normative vision is one consistent with, at least, the dominant strand of First Amendment jurisprudence. The government would just stay out of this area.

But I think the real risk and the reasons why there is an important place for the courts in judicial review of campaign finance law is not so much that, as the danger to political competition. The danger in particular that campaign finance laws will be drawn with an eye towards advantaging incumbents at the expense of would-be challengers. That is really the point, in my view, on which courts should focus when they engage in judicial review of campaign finance laws.

So in brief, what I'm suggesting is that the values that we've been focusing on both sides of campaign finance, at least predominantly, are wrong. It's not properly speaking an argument between liberty on one side and anti-corruption on the other. It's best thought of as a conflict or tension between equality on the one side and anti-competitive practices on the other.

**Ciara Torres-Spelliscy:**

Thank you. Professor Alexander, could you keep us going?

**Mark Alexander:**

Thank you everyone, for paying attention and being here, and thank you to the Brennan Center, of course. I've heard so many comments thus far today that have reminded me of what I'm going to say, so I feel like I'm either clairvoyant or extraordinarily unoriginal. I think there is so much that we've talked about that is essential to where the debate goes to sorting it out, but I think that Dan has moved us very effectively into the next set of questions and really introducing this idea of equality. I also want to talk a little bit about reality as well.

I think what one of the more disturbing things to me about this decision is that it really reinforces the sense of putting the power of money over the power of the people in our system. That to me is very disturbing, that the impact that money can have always has been an issue and I think this exacerbates it.

Part of what bothers me about the opinion itself, which I want to talk about for a moment, is that I do feel like it is completely infected with an air of unreality. That's actually a term in which Justice Souter talked about in a criminal procedure case, talking about bus sweeps and searching bags, but it's always stuck with me that it was kind of amusing to hear someone like David Souter talk about an air of unreality. These nine individuals, they are bright and dedicated to the law, but their strong suit is not exactly reality, to have one, particularly Justice Souter, go on that. So that term just came into my mind here and we've heard different ways in which the Court has talked and scholars have talked about money and politics.

We certainly know about the analogies to the hydraulics of campaign finance reform, the famous line of money, like water, will find a way. Money has just a huge impact. So there's this reality that I think we have to bring to bear in this, but I feel like one of the problems with the opinion itself and with the Court itself, is that there is a predominance of theory – First Amendment theory, in particular – over reality. And the reality is that money can buy access, and it can influence, and it can shape outcomes. There is no doubt. There are not perfect correlations, and there's lots of studies that show different ways money moves things, and some ways in which it doesn't, but money does have a huge effect.

Now, for me, I've had the good fortune of a life sort of running between academia and electoral politics, most recently helping to run the Obama presidential campaign. One of the things I think we did really well is we engaged people in a way that really had not been done before at the national level. One of the things we did, people very much talk about -- how we would engage low-dollar donors: in all kinds of clever ways, we brought people in. So you could say that's part of our story, but the reality is we raised huge amounts of money from people with lots of wealth as well.

There are lots of ways in which money still flows in the system, even though I think ours was one of the campaigns money changed so much, but still the fundamentals aren't different. Money does have such a huge affect, we have to see how we can put that into the equation.

Now unfortunately, I think that's one of the things that is really missing in the conversations by Justice Kennedy, Chief Justice Roberts in particular, as they go on their path of thinking about corporations just like everyone one of us natural, living human beings who have an ability to participate. They are not recognizing that corporations' money and their unlimited funds – building on that *Buckley* premise of money and speech being equated – they somehow forget that corporations really aren't quite the same as natural persons. They are fundamentally different and Justice Stevens spoke to it quite eloquently in his dissenting opinion.

But I think there is a reality that there is a huge, significant good that corporations perform for our nation. I've put my retirement money in their stocks, I buy their stocks because I want them to give me money so I can then retire on a beach or something like that. They make money and they're doing it in certain ways, but that does not mean that they're the same as people. That does mean that they can amass money from different sources that are not the same as when an individual chooses to speak.

My concern, of course, is then that with the power of money, with corporate spending that may be possible in elections, that spending then does have the effect of corrupting the process. I'm not talking about *Buckley* quid pro quo corruption. I think we need to move out of that concept at some point. Bribery is bad, fine, we can all assert that we don't want to support bribery, but the corruption of the system where it drowns out, and this is the sort of the drowning-out rationale that the Court did not buy into, but that corrupts the system so terribly by excluding people who want to be a part.

It's rather simple, I think, when we think about how money does drown out speech, and if you've got larger amounts you can buy the bigger megaphone or whatever analogy you want to use, but that is the effect that we may face. People, then, as they get drowned out then ask that question of equality, getting back into that. How do people participate, and what is there meaningful participation? How do they feel then removed from the system?

What we know is that, I would guess for most of us in this room, it's possible for us to make a contribution. $100 to a candidate, a lot of us can give more than that, and find 100 friends to give $100, we know people, we run in circles where we know folks. When the money adds up more and more, there are people who want to participate in some ways who feel like they are left out. And there's an inequality that starts to happen. There's an inequality where some people with money and access to money have a greater influence in the process.

I think about, we would sometimes get checks in the Obama campaign for a few bucks and some change from someone who was on a fixed income. And they said, "This month, the electric bill came in a little less." And there was a sale on some of the food I was going to buy, so I have a few extra bucks. So that $3 and change is a whole lot more meaningful to that person. Their contribution, that's one thing that they could do, but otherwise, what can they do? They're probably going to try to find some way to talk to a friend, they're going to try to knock on some doors, maybe if they can make some calls or they can get to a headquarters or something like that. But that was the most meaningful money contribution they could make, and that gets drowned out. And the more money that flows into the system, the more we can see these inequalities play out.

And so, it makes me think about how we participate in the system. What I think we need to look at – and I think this is part of what Geoff Stone was talking about, and partly the response afterwards – is how we actually engage in this. I think that you were pushing us towards a place – whether you're intending to or not – where you're asking, how do we engage in the system, and how can we make it work one way or the other? I think we have to engage that reality – that people may participate in certain ways, but with the money increasing, with the potential that so much more money can invade the system, that that then has a dramatic effect on people's individual participation. So the individual without the resources gets pushed farther and farther away. The equality that has to be a part of the concept of our democracy gets pushed farther and farther away.

So we lose sight when we have this theory, which I think the Court so heavily relied upon, First Amendment theory without reality. You start where Justice Kennedy starts, with his view of reality. I think he fairly logically gets to the point where he ended up. Logically, fairly unassailable. But I think if you start with a different view of reality, and you start to talk about the equality at stake here and the need to participate, and the desire to participate in one's democracy, then you start to get a whole bunch of different answers.

I guess I would say let's take on that air of unreality. Think about how the system really works and really consider the importance of putting equality into this notion and debate on what the direction is and what the future should be on campaign reform.

**Ciara Torres-Spelliscy:**

Thanks so much. Professor Hill, what are we missing?

**Frances Hill:**

Well, I'm sure I won't catalogue everything that we're missing, but I want to raise a concept that has gone through the discussion today, but I'd like to make it central. I'd like to begin with the observation that most Americans participate in elections as voters. Now, this can be incredibly energizing, or it can lead us somewhere, and you'll decide which it is. But if we're voters, we have to ask why voting matters. And does the Constitution say anything about this?

And of course, if we're looking for the Constitution to say – "Voting is…etc." – in a separate article, maybe, we will be sadly disappointed and so we think the Constitution says nothing. But I believe, in fact, that the Constitution says everything. And it says it in the first sentence.

It is a principle of consent, as a structural principle of the Constitution, which defines the legitimacy of government in terms of consent, which is participatory, not perfectly so, but has become better over time. The Constitution, of course, begins, "We the people of the United States…do ordain and establish this Constitution for the United States of America." That is not quite like saying, "I'm happy to be here in New York at this lovely conference." That's true, I am not creating a legal problem for myself. But when the Constitution says, "We the people of the United States…do ordain and establish this Constitution," do we really think that was a one-shot deal? I think in fact it is a theory of continuing consent for government legitimacy.

To what are the people consenting? The Constitution. The entire range of activity. And when we put that in a context of participating in an election as voters, it ranges from the campaign through governance. As a corporate tax lawyer in the old days, and still today, I think we've got the transaction wrong when we are talking about campaign finance, and certainly in most areas of the law. If we don't get the transaction right, we're likely to get the law somewhat messed up as well. So the first question really has to be, "What is the transaction?" And to me, the transaction is a theory of continuing consent that goes through governance.

We can, if we just carve out speech in campaigns, get really interested in candidates. And indeed, since my husband has run for office, since I've been married to him, I'm very interested in candidates, I bear them all a great deal of understanding and ill-will and share your comments about the lack of reality about what actually goes on and the understudied area of what the wives do, don't do, know and will say. But we keep the enemies list, in case you're wondering, more effectively than anyone else. But if we begin with the candidates and contributors, it's entirely reasonable to worry about which theory of the First Amendment applies in that section of the campaign. And that's fine, and that's important.

But if we say the transaction is governance, selecting people who are going to be public officials, whom we will relate to on the basis of consent, then we look at other things. Participation, the ability to associate, and the concept of representation, which I think are elements of consent that we have to look at. Obviously, I'm not going to talk about all of them today.

But to me, participation in that campaign phase is captured in the question, "Can a voter ask a question?" I understand that there is a robust theory of First Amendment rights based on letting us all listen. But that really isn't good enough for democracy based on consent. I don't want to sit around and listen. I don't want to just yell at my television. I live in Florida, we are a swing state, we're likely to be a swing state, we have more speech than we can reasonably deal with.

So can a voter ask a question, and how would a voter ask a question of those series of image-driven ads with kittens and balloons for the good guys and bad lighting and really evil-looking images for the other side, which is not all that informative.

So, what we have to have, if the transaction we're looking at is consent. From everything through the campaign through governance, looking at democracy whole, we need a theory of where voting fits. A couple of times in our national history, we've had these theories.

After the Civil War in such cases as Yarborough and Siebold the Court talked about voting precisely in terms of the legitimation of government. Because that was the issue on the table. I hesitate to bring up the next instance, but the white primary cases were virtually a cottage industry in academia now, to which I've also ratcheted up my lathe and contributed. Talking about the white primary cases – which I see as looking at why voting matters in a structural sense and not only at race, important as that is – but the white primary cases are also absolutely fascinating because as we begin to look at voters in relation to associations.

What we learn, of course, when we think of consent as participation, association and representation, is that the associations to which we're supposed to be able to participate can deny

our rights. The white primary cases, but also the transport of the expressive association jurisprudence of the First Amendment into election law. Dale California Democratic Party. We have, in a sense, this theory of associational exceptionalism, accepted from the idea of participation.

Now this leads us to Florida again. You don't want to hear this because we were so famous in 2000. But in 2008, our entire vote was negated in the presidential primary by both parties. We were thought to have misbehaved. We didn't need to vote again. But not by the government, by our political parties. And this, even after we counted all of our votes without drama. We didn't have any Brooks Brothers rioters racing through our vote counting process, there was no drama at all until the parties just negated our votes. And what they did basically was: We had broken their rules, in which we basically haven't participated, and therefore, our votes did not count in picking the candidates in either party.

What I have been suggesting is that consent theory needs to protect participation in public discourse, in participatory lobbying, and in ensuring the accountability in representatives.

And I would like to say, as someone who has written a long, footnote-laden treatise on exempt organizations, widely available for a huge amount of money, with thousands of footnotes, if you're into that sort of thing, that non-profits are not the answer. And taxable corporations may be more participatory because they have shareholders. We all set up non-profits, not to have members to vote for the board, because that, we think, wastes money that can be used on the charitable or advocacy mission. So non-profits are governed by self-perpetuating boards. I am incredibly bemused by quoting Tocqueville, a nation of joiners to support an entire sector of America that has non-participatory impulses throughout its entire governance.

So, how to get consent? This is of course, a question of reshaping the role of voters, realizing that we have a stake in the campaigns, and putting a ballot in a box, and hopefully having it counted, and holding representatives accountable. And to me, association is the central point of it all, and without participatory association, and a new approach to participatory association, then consent is simply kind of a little metaphor that will mean nothing. Tracing out where consent breaks down, where consent issues enter into this big transaction, in a series of smaller transactions, is at least what I intend to think about a while now going forward.

**Ciara Torres-Spelliscy:**

Thanks very much. Professor Teachout, could you explain to us the anti-corruption principle?

**Zephyr Teachout:**

I am honored and delighted to be here, thank you. I am betting on Burt's bubble. The argument I'm about to make was explicitly rejected by the Supreme Court in Citizens United, so I have to bet that a future Court might be more sympathetic to this kind of argument, as well as the person to my left, who I just learned will be taking it on in his talk.

There's a tendency to reject or to try to look beyond the corruption interest and anti-corruption interest because it has been so weak and ineffective in campaign finance law since Buckley. What I argue is that the corruption interest for the past 30 years has been too weakly understood. There is in fact, embedded in the Constitution, a structural principle, akin to federalism, akin to separation of powers, that should act like these other structural principles, and it's an anti-corruption principle.

In the last 30 years, instead, we've seen an anti-corruption principle that we've here talked about as important. Scalia and Thomas largely don't seem to think that corruption doesn't exist as a concept – beyond bribery and criminal quid pro quo, there really isn't such a thing as a corruption, which fits with both Hobbes' philosophy and the law and econ philosophy that doesn't understand corruption as a meaningful concept.

But if we look back at the founding generation, we find that anti-corruption and concern with anti-corruption animated both the creation of the Constitution itself, and most importantly, during the Constitutional Convention, led to the provision of dozens and dozens of clauses. It motivated the Constitution, it was the topic of the Constitution, and it is how the Founders themselves understood what they were doing. Mason, Hamilton and Madison all talked about their task in terms of trying to create representative government at the same time limiting corruption. Mason said, "If we don't limit corruption, we'll be at an end." Hamilton talked about how they tried to create every practical obstacle against corruption during the Convention.

Those who've read Wood and Pocock and Bailyn have seen this larger history surrounding that. Founders, especially during the Convention period were looking both at Rome – the Decline and Fall had just been published – and at Britain. And in both cases, they saw examples of a form of democracy which they admired but then had been corrupted, which then directed their own task to create something that was admirable but less corruptible.

In the paper and in the book I'm working on how, I lay out the dozens, I've identified 25 actually, there are a few more, about 30 different particular clauses that are directly motivated by concerns about fighting corruption. I'm just going to mention three very briefly.

One is the veto power. One of the reasons that the veto power was put at the number it was, two-thirds, is the concern that with a larger veto, the President would be able to buy a small number of Senators and put them in his pocket. So there was a discussion in that particular structural provision.

The second, one of my favorites, is one of the most petulant clauses in the Constitution, the Gift Clause. Unlike many others, which say thou shalt not do this, the Gift Clause says that if you hold an office of the United States you may not take a gift of any kind whatsoever from a foreign prince or dignitary. This arose out of concerns that Franklin and Arthur Lee received jeweled gifts from the King of France, and this might infect their attitude towards foreign policy. These were not in the context of particular cases of bribery, but rather, out of concerns of shaping the allegiance, identity and dependence of these particular agents.

And finally, there's the Ineligibility Clause, which Mason talked about as the cornerstone of the republic. The concern that the officeholders would also be civil servants and basically create offices for themselves while they were representatives. This was heavily debated throughout the Convention. If you're interested, a list of all the clauses are on page 355 of my article.

So you see for the first 100 years or so a continued implicit commitment to this anti-corruption principle, and then you see a real drop-off. Briefly, I think there are four reasons for the drop-off. The first is the ascendance of the First Amendment, which has been talked about some here. The second is the progressives, and by criminalizing corruption, they cabined the space in which corruption was talked about. So instead of being talked about in public law cases and election law cases, it was more often talked about in terms of federal laws against bribery. The third is the nature of the Court. I was glad to hear others talking about being affected with an air of unreality. We now have a Court with no member with significant political experience, and if you read the cases talking about corruption, you'll see a consistent correlation between those most concerned with corruption and those who've had political experience themselves. They tend to have a much more textured understanding of the kind of dependencies that can arise in the political process. And finally, the effective rise of the law and econ ideology, which does not recognize corruption as a meaningful concept.

So what should we do about this? If you accept that there is this anti-corruption principle embedded in the Constitution, it has several different roles. The first, more modest role, is as a gloss. It helps one understand other clauses. In particular, the First Amendment, but also, other clauses. It's interesting how the constitutional clauses, had they been passed as statutes right now up against the First Amendment, would the Gifts Clause, if it were a statute, actually survive the robust, aggressive understanding of the First Amendment as it now exists? And that should help us understand what the First Amendment is and is for, is this anti-corruption principle.

The second is as a free-standing principle. So that inasmuch as you want to continue with the Buckley kind of weighing, I thought earlier panels were fantastic at talking about a different understanding of the First Amendment, but also weighed against a much stronger anti-corruption principle than the weak, important – sort of important the way stealing lead pipes is important – kind of principle that is often talked about in modern case law. And finally, referring to Donna Edwards' speech this morning, it has a public effect. If we understand that one of the great originalities of the Constitution is the Founders' dark imagination, not just their imagination of liberty, it changes the way the public looks at these kinds of types of reforms. And sees, in fact, campaign finance reforms, matching funds, as a fundamentally patriotic act, and not just as a limiting act.

I'll conclude by saying I think my argument is unoriginal. You mentioned Yarborough. Yarborough says, the purpose of a republic is to fight against corruption and violence. This was so taken for granted for the first 120 years of the country, and what I'd like to do is to revive that and hopefully reach Justices and individuals who might otherwise not be reached.

**Ciara Torres-Spelliscy:**

Thank you. Professor Redish, your offering of refutation.

**Martin Redish:**

The paper that I'm writing for the symposium is a response to Professor Teachout's very provocative article and, though it will be a very critical response, I should mention that I've determined through inductive examination that there is an inverse relationship between the extent to which I've criticized First Amendment scholars and their success in their careers. For example, several years ago, I wrote a series of articles rather critical of Robert Post's free speech theories, and next thing I know, he's Dean of Yale Law School. A coincidence? I think not. In contrast, I had a control group of free speech scholars about whom for the most part I have never said anything critical, and their careers have languished to obscurity. So the article will help Professor Teachout a lot.

However, I have decided that I owe it to myself and to the First Amendment values that I have held dear for many years to make a broader statement. It will cover to some extent, Professor Teachout's argument, but I have basically felt here – and I don't want this to sound ungrateful, the Brennan Center's hospitality has been tremendous – but I have felt like the Greeks in the movie "300," sort of standing at Thermopylae. And I need to make a broader statement.

I want to start with a story, and apologies to Geoff Stone, who heard this at a panel at the University of Chicago, but I don't think anyone else has. And I think itsets the tone for my concerns here. Back in about 2001, I wrote a book called "Money Talks," it was published by NYU Press, in fact. And it was a defense of free speech rights of corporations and commercial advertisers.

And I gave a copy to my colleague and old friend Steve Presser, a well-known legal historian and constitutional scholar. Steve is about the most right-wing person I have ever met in my entire life. And he sent me back an email after I gave him the book, and I thought he'd say, "Congratulations, best of luck, thanks for giving me a copy." It was a one-line message. It was "Redish: I always knew you were a closet Republican." Now, not only am I not a closet Republican, I ran Students for Franklin Roosevelt 20 years after his death. I have been a Democratic committeeman, and my children were never allowed to watch Fox News. So I thought I'd give Steve Presser a lesson in First Amendment theory. I wrote him back the following message: "The fact that I defend the free speech rights of corporations and commercial advertisers no more means that I'm a Republican than the fact that people criticized the suppression of Communists in the 1950s meant that they were Communists." And I got back a one-line response. It said, "Weren't they?"

And what that underscores to me, is that there is an ideological undertone going on here, and don't kid yourselves. Steve Presser had his own ideological undertone that was on the other side. But there is a very troubling kind of unstated elephant in the room, and maybe that's not the appropriate reference, that this regulation is not being imposed behind a Rawlsian veil of ignorance. As the bank robber Willie Sutton said when asked why he robbed banks, he said, "Because that's where the money is."

We know where the money is here. We know whose side it's on. That doesn't automatically mean the regulation is unconstitutional, but it means we should have some pause. In my own writings on constitutional law, if my theories ever come out coincident with my own political views, I immediately go back and rethink it, to make sure that I have not played with it subconsciously. I'm not sure I've seen that kind of effort by those involved here.

And I think what underscores it is the way everybody has just sloughed over the corporate media distinction. Virtually every reason given for restricting the rights for non-media corporations and/or exempting from the First Amendment, by all logic, should apply to the media corporations. They are not humans. They are not individuals. They are creatures of the state. They have enormous power. I knew long before the New York Times that the Iraq War was going to be a disaster, but they had the power, I didn't. By that reasoning, you should logically accept limits on media corporate expression just as much as you do on non-media. But no one does. And what's the response? "Oh, that's the Press Clause." As if that's somehow an explanation. I've never heard anybody give a "therefore" after they cite the Press Clause. "That's the Press Clause, therefore there are the following distinctions."

If the non-human, robotic profit-maximizing nature of the corporate form, the artificial nature of the corporate form removes a speaker from the speech protection, why doesn't it remove the media from the press protection? Is there something inherent in the concept of the press that would protect powerful, dominating, perhaps evilly motivated (remember William Randolph Hearst basically started the Spanish-American War for newspaper purposes), is there something that excludes them from everything you said about non-media corporations?

Well, perhaps it's a matter of Framers' intent. Perhaps we can go back to those who drafted the First Amendment, and see that they meant to cover the corporate press. First of all, the First Amendment was not discussed in Philadelphia at the Convention. What basically happened was they didn't put a Bill of Rights, state ratifying conventions said, "We're not going to ratify this without a Bill of Rights." They said: okay, so one Sunday Madison sat down watching the Patriots game drinking a bottle of Sam Adams and he put it out on his word processor. Nobody really knows what that Amendment meant.

But the one thing I can tell you I know it didn't mean was that the Framers intended to protect the corporate press. Because you know why? Because that is anachronistic. It didn't exist. Nothing approaching the modern form of the corporate press existed then. The modern corporation didn't exist then. It was ironically basically in the Jacksonian period that we got something approaching the modern corporation, so it's not Framers' intent.

So then what is it? Why would Congresswoman Edwards proposed amendment – I thought we could add on the flag burning amendment just to cover all the First Amendment things together – why would that exempt the press? Because we know we're not going to like what corporations say. Corporations contribute, when they have the power to contribute through PACs, contribute to Democrats as much as they do to Republicans, basically because they're covering their flanks. But when they take out ads, they're not going to be able to do that, especially when you add the Supreme Court's requirement for disclosure. They'll seem incoherent if they take out ads on both sides.

So corporations, ex-ante – all of them probably not – is a pretty roughly categorical rule, are going to oppose regulation. The only time they'll advocate regulation in a public choice sense is if it'll hurt their competitors. They are out for self-interest. By corporate law, they're out for self-interest. When the Tribune Company owned the Cubs -- and I hear on the sports stations; They shouldn't care about the bottom line, they should just go out and try to win, Wrigley Field is going to be filled whether the Cubs are in last place or first place. It probably would be ultra vires for them to spend money just to win, and maybe that's why they never have. Because corporations are profit-maximizing entities. And you know what? People have been out for self-interest for years.

And this is part of my response to Professor Teachout. I'm not sure what historical American world she's living in, but interest groups played an important influential role in American politics since the framing. Just go back to the debates on slavery at the framing and read Gary Wills' "The Negro President" about Jefferson.

And you know what? The First Amendment is not the preserve of Mother Theresa. It is not required that people be looking out for the common good. When people use the phrase "common good," I immediately check to make sure I have my wallet. Because there is no way to know what means. What it usually is going to mean is the speakers own view trying to co-opt the opposition.

I just close with a specific comment about Professor Teachout's paper, but something that extends more broadly. It is my annoyance at the use of the word "corruption" here. Because I believe in free and open debate, and even self-interested motivation speech that will inform the electorate, I must believe in corruption.

If you look at modern dictionaries and modern thesauruses, the synonym is dishonesty. People basically identify corruption with bribery. Was that the way the Framers intended? I don't know but they also dressed funny. I don't really care what they understood it to mean.

Today when you use the word corruption, it basically creates a kind of distortion and confusion in the debate. It's when the Republicans use the word socialism to describe everything that Obama does. You first have to get past that barrier. Bribery is not acceptable. It never was. That doesn't mean that people can't be looking out for their own personal gain and try to use the expressive system and the democratic system to advance those interests.

**Ciara Torres-Spelliscy:**

Thank you very much. Professor Briffault, you don't have the ultimate word, you have the penultimate word, but wrap it up for us.

**Richard Briffault:**

It may be more than a few words, but my comments actually relate to something that Rick Pildes said at the very end, his final rebuttal of the last panel, which was about the role of the courts, or the courts in campaign finance law. My point is that the Supreme Court has made a hash of

campaign finance law, its campaign finance jurisprudence has been marked by closely divided decisions, fragmented majorities, sharp shifts in the law and doctrinal incoherence.

This is not surprising. The Constitution gives no concrete guidance concerning the rules of how to govern the regulation of election finance, nor does democratic theory. Indeed democratic theory points us in multiple and often potentially conflicting directions with no clearly required right answer.

Nor does the political science of campaign finance tell us much definitively about the influence of contributions on government, the influence of money on elections, or the influence of campaign law on democratic practices. And even if it did, there is little reason to believe that the Court could make better judgments about the empirical workings of campaign finance than Congress or the state legislatures.

We would be better off if campaign finance law were de-judicialized and left to the political processes of Congress, the fifty states, and thousands of local governments to consider. This would not involve complete judicial abdication. The courts could still be set the outer bounds of permissible regulation. But much of the balancing of competing democratic values – of equality and free speech, of transparency and privacy, or prevention of corruption and of opportunities for influence – as well as the more practical concerns about the relative roles of corporations and unions, individual donors, parties and non-party activists – would be left to multiple political processes.

I will address each of these points briefly.

First, the doctrinal mess, the pattern of fragmentation, division, and inconsistency. Let's begin with *Buckley v Valeo* in 1976 which was joined in full by just three of the eight participating justices. Two decades later, the Court that decided *Colorado Republican I* (1996) splintered into three groups, with no single set of views commanding majority support. A decade after that, the Court in *Randall v. Sorrell* (2006) issued six separate opinions, no majority opinion, and a plurality opinion announcing the judgment of the Court that was signed by just three – and, in one key part, just two – justices. The *WRTL* court in 2007, was divided into groups on 2, 3, and 4 justices.

The Court's treatment of corporation and union spending is, of course, the poster child for inconsistency. In 1978, the Court divided 5-4 in *First National Bank of Boston v. Bellotti* on the question of corporate spending. A dozen years later in 1990, the Court went 6-3 the other way in *Austin v. Michigan Chamber of Commerce* on the constitutionality of the limits on corporate spending. *Austin* was endorsed and extended in *McConnell v. FEC* thirteen years later by a 5-4 vote, with a more lopsided vote in favor of the ban on corporate contributions in *Beaumont*. But *McConnell*'s holding on corporate expenditures was then eviscerated in *WRTL* and ultimately overturned 5-4 in *Citizens United*. So, too, standards of review have shifted in a twinkling, from *Shrink Missouri*'s very deferential approach to contribution limits to *Randall*'s very searching review, much as the definition of election-related spending has shifted sharply from *Buckley* to *McConnell* to *WRTL*.

All these twists and turns have produced some pretty bizarre results. We have been told (1) that parties are capable of spending independent of their candidates, and that such spending is constitutionally protected, but that parties can be restricted when they cooperate with their own candidates; (2) that the proper response to high levels of spending is more spending, but that it is unconstitutional to make it easier for a candidate facing a wealthy, high-spending self-funded candidate to raise money; (3) and corporate independent spending in ballot propositions is not corrupting, but that for 20 years corporate spending in candidate elections can be corrupting; and (4) most famously, that contributions can corrupt but that expenditures that expressly advocate the election or defeat of a clearly identified candidate cannot so that contributions can be limited but expenditures cannot  The latter anomaly – the *Buckley* doctrine – is so strange that it is probably the case that a majority of the Court has for at least a decade (since *Shrink Missouri*) rejects the rule – but that it remains the rule because there is no doctrine that would command majority support to replace it.

This incoherence is not surprising, since neither the Constitution, nor democratic theory, nor political science provides definitive guidance as to what to do. The Constitution gives Congress the power to regulate the time, place and manner of elections; to guarantee a republican form of government to the states, to prevent the states from denying their citizens the equal protection of the laws, and, of course, it prohibits Congress and now the states from abridging the freedom of speech.

But the endless ink spilled over this question over the last half-century demonstrates that there are both good arguments that this means Congress and the states cannot limit campaign money and that it does not prohibit Congress and the states from adopting reasonable limits. Certainly, the First Amendment was not seen as barring spending limits in the late nineteenth century through the mid-twentieth century. So, too, such limits have been found to be acceptable in other democratic countries, such as Canada, which also have speech protections in their constitution.

On the other hand, it is also undoubtedly the case that money limits do affect the ability of candidates, parties, and other interested participants to present facts and arguments that are highly relevant to the central question in a democracy – the election of public officials. And foreign courts such as the European Court on Human Rights, have recognized this, too.

The First Amendment is clearly relevant to campaign finance, but it is not clear what it tell us about viewpoint-neutral rules focused on the levels of giving and spending. Certainly, it's hard to say that the First Amendment answers such questions as the differential contribution limits provided by the millionaire's amendment struck down in *Davis* or whether parties are capable of engaging in independent spending.

Nor does democratic theory give us concrete guidance. Campaign finance law is the law of the financing of democracy. As a result it carries within it all of the complications, tensions, and uncertainties that are built into the notion of democracy itself. Democracy is predicated on, requires, or advances  many values – public participation, freedom of speech and association, an informed electorate, fair and open competition, political equality, government accountability to the electorate, a government capable of implementing the preferences of the electorate, transparency, openness to change, long-term political stability, majority rule, and minority rights.

Although many of these values go together, frequently they are in tension, if not outright conflict. So, too, democracy can take multiple forms – there are parliamentary and presidential systems; two-party and multi-party systems; systems based on the representation of territory, or of ethnic groups, or of party lists. Despite their differences, all of these can be democratic. Smaller differences – the selection of party candidates by convention, by primary, by open or closed primary; the use of legislatures or independent commissions to draw district lines; the use of first-past-the-post elections with plurality winners, or of runoffs, or of approval voting, or of instant runoff voting – is consistent with democracy.

Each of these alternatives advances a particular strand of democracy, perhaps at the expense of another. Different countries – Canada, Australia, New Zealand, the United Kingdom, France, Germany – do these things differently, as do many of the states within our own country. Yet, despite these differences they are all broadly democratic (or if they are not, its not because of these differences).

The same tensions, and the same openness to different rules and institutional forms to advance different aspects of democracy, appears in the study of campaign finance law. Leaving aside the states (whose capacity to experiment has been curtailed by the Supreme Court), democratic nations do campaign finance law in different ways. Some restrict candidate (or party) expenditures; some do not. Some restrict campaign contributions; some do not. Those that restrict contributions or expenditures set those restrictions at very different levels. Some provide free air time to candidates and parties; some do not. Some provide public funding; some do not. And those that do, provide very different levels of support. Some provide tax breaks for campaign contributions; some do not. Most require some disclosure of campaign finance activity, but the degree of disclosure required very differently.

And the laws don't always cluster together. Until very recently, Canada which had ample public funding did not restrict corporate contributions. Similarly, the United Kingdom restricted some expenditures tightly, but had only loose rules governing contributions. Yet, all these countries, with very different rules, some of which would plainly flunk the standards set by the United States Supreme Court, are free, open, internally politically competitive and democratic.

Campaign finance law requires holding together the many of the same competing concerns as democracy itself – freedom of speech and association, openness to public participation, openness to challengers and political newcomers, political equality, the need for funding adequate for candidates and parties to make their case to the voters and for voters to be informed, the place of parties and interest groups, and administrability of the system as a whole. There is no one right way of reconciling these competing concerns, of setting the balance. And nothing in the Constitution gives the Court guidance as to how resolve this dilemma.

It could be argued that judicial intervention is appropriate because of the danger that elected officials will adopt laws that are self-serving, incumbent-protective, and ruling-party-entrenching, so that something in the nature of John Hart Ely's representation-reinforcement review, or Issacharoff & Pildes's politics-as-markets require the Court's SEC-like or FTC-like intervention to break up incumbent control. The problems with that are, first, other countries with far more restrictive campaign finance rules, have seen sweeping changes in party control. In

Canada, in one election in the early 1990s the governing Conservative Party which had been in power for more than a decade went from 143 seats in Parliament to 2, and then over a decade clawed itself back to control. Spending limits neither locked them in when they were in power, nor locked them out when they were out. Second, given the advantages of incumbents in raising money, an absence of regulation can be just as incumbent-protective as regulation. There are no neutral rules here. Third, and this gets to my next point about the lack of guidance from empirical political science, even after many decades of study we still don't have a strong sense of how money affects elections.

Indeed, the counterpart to the argument that campaign finance is too political to be left to the politicians is that only politicians can understand how it works in practice. Today we have a Court in which not a single justice ever ran for or held elective office. It is perhaps not surprising that some of the justices most sympathetic to campaign finance regulation were justices who held elected office like Justice O'Connor or a justice who managed an election campaign, like Justice White. Campaign finance regulation entails empirical judgments about the practical impact of contribution limits, spending limits, public funding rules, disclosure requirements for which there is little clear political science guidance, which judges are not clearly better to make than elected officials.

In some sense, the campaign finance problem is another instance of the constitutionalization of democracy that Rick Pildes addresses, in a democracy whose written constitution says very little about the specific issue. The question then becomes whether the principles of democracy provide the courts with guidance for developing legitimate, workable rules for structuring the political process.

It can be argued that the one person, one vote doctrine for legislative apportionment did this. While not clearly required by either the constitution or democracy per se – which could permit representation for discrete groups – it clearly had powerful resonance with the value of political equality, did not offend any comparably powerful opposing value, was workable, earned rapid popular acceptance, and quickly produced a fairly coherent doctrine.

But the Court has failed to produce a comparable rule for campaign finance. Instead we have incoherence and inconsistency. To be sure, the Court has begun to move in the last five years in a more consistent, coherent direction. Incoherence may be less of a problem. But at the price of forcing out of the law equality concerns that clearly merit a place in thinking about campaign finance.

Despite Justice Kennedy's angry denunciation of complexity in *Citizens United*, some complexity in campaign finance law is inevitable given the need to hold together free speech, freedom of association, political equality, the prevention of undue influence on government, lowering barriers to entry for candidates, voter information, and administrability concerns. But that complexity should come from the political process since the balances and compromises that need to be structured are inevitably political and not judicial. There is no one right rule for holding them together. Although important principles are involved, balancing those principles and making the empirical judgments critical to setting the balance is the domain of politics not principle.

This is not to say there is no role for the Courts in policing the outer bounds of regulation, but just to say that the Court ought to stick to the outer bounds. One model for this might be the doctrines governing ballot access for third parties and independents. In *Williams v Rhodes*, the Court struck down ballot access rules that made it virtually impossible for new parties and independents to get on the ballot. Since then, though, the Court has upheld many burdensome rules on the theory that the states could advance the values reflected in the two-party system. The Court's rules prevent total entrenchment, but otherwise let the political process balance out the mix of openness and stability which is inevitably political.

Perhaps the Court's approach to gerrymandering in *Davis* and *Vieth* is another example of keeping an ultimate constitutional stick, but generally letting the political process work. Many people hate those decisions. But they reflect an appropriate concern that there is no clear constitutional or democratic rule for deciding ballot access or apportionment.

Campaign finance is the same. And like those areas – and from my perspective much more than those areas since the conflicts in democratic theory in campaign finance are far more profound – campaign finance needs to be de-judicialized and returned to the democratic experimentalism of Congress, the states, and the cities.

**Ciara Torres-Spelliscy:**

Thanks very much. We're running a little bit late on time, but we have time for a few questions.

# Questions and Answers

**Ciara Torres-Spelliscy:**

Thanks very much. We're running a little bit late on time, but we have time for a few questions.

Yesterday in *SpeechNow*, the D.C. Circuit said that after *Citizens United*, corruption is limited to quid pro quo corruption, were they right on the law? What does that mean for policy makers going forward?

**Daniel Tokaji:**

I believe that the *SpeechNow* decision that I read on the plane ride from Columbus to here was decided correctly under existing law. If corruption is the only rationale for campaign finance regulation, at least in the context of limiting spending, then it seems to me the Court was correct in its conclusion. But this, to me, points again to the need to consider an alternative rationale for campaign finance regulation of equality. Even if there's no real concern about corruption – and without distorting the concept of corruption. I personally don't think you can find one in that case, where we're dealing with individual contributions to a group making truly independent expenditures.

**Mark Alexander:**

I would just add on top of that, I think that you're saying that they're building on what exists, which, to be kind, is extraordinarily unimaginative case law from the Supreme Court. I think also – when Richard was talking about the complete disarray of case law, there aren't more than a handful of people in the country who actually really think this is a good state of affairs. I think that's what's important about what we're trying to push here is think beyond just the First Amendment implications; but I think there's a much bigger picture, particularly like Frances' thoughts, in thinking about the big picture of legitimacy in government and consent of the governed, there's a much bigger picture out here. And for us to think that bribery is the sole threat to our democracy is ignorant at best.

**Zephyr Teachout:**

I would just, again referring to Burt, I think they're right-ish, but that shouldn't mean that litigators should either abandon the factual record or the important historical or theoretical framework because Kennedy is an emotional justice in his way, and there are possibilities with new evidence and new frameworks for that to change, possibly.

**Frances Hill:**

I agree that Courts are in this game now and they won't get out as fast as Richard would like them. And I have some desire to see them step back as well. But I was taken aback not only by this assault on complexity as a bad thing, and thought they didn't like multi-factor tests in *Wisconsin Right to Life*, and I thought they possibly repealed the internal revenue code which uses the phrase "it depends upon the facts and circumstances of each particular case." That phrase literally recurs throughout the code and regulations, but in a different domain. With non-profits and advocacy, non-profits have revenue rules with 21 different cases, and we sit there and look at the facts and circumstances.

But the other point I'd like to make is that in *Wisconsin Right to Life*, Chief Justice Roberts expressed hostility to depositions. Now, this has taken me aback a great deal, because if we are going to be in courts, then we need to develop a factual record in these courts. I admit that I was not the most interested student that Ralph Winter ever had on evidence, but I really distinctly remember that he and Owen Fiss agreed that depositions were part of what lawyers did, and it was important to have a factual record. It seems now we have a Court, at least in this area, that doesn't like complex tests, but it also doesn't like the development of a factual record. I don't know where that leaves us.

**Martin Redish:**

I think we need to place the Court's concern uniquely in the context of the First Amendment. I don't think that comparisons to the internal revenue code are very helpful. The more complex the test, the easier it is to manipulate, the less guidance it provides to the speaker, and from the Court's point of view, often, the facts don't matter. The issue in *Wisconsin Right to Life* - was this just an issue advocacy situation or was this advocacy on the part of a candidate? For a

speaker to have to worry about that kind of decision before he or she speaks would create an enormous chilling effect. So Fran, I don't think you can talk about the issues of depositions generically and mock Roberts that way. Heaven knows that he deserves mocking for lots of other things. But we're talking about a realistic, legitimate concern about manipulable, unpredictable tests in the First Amendment area.

**Richard Briffault:**

Just on the *SpeechNow* decision, actually, I don't think it was directed by *Citizens United*, it was directed by *Buckley*.

**Frances Hill:**

I would just like to say briefly that advocacy organizations and participatory organizations, many of which have figured into the major cases in campaign finance, have all been 501(c)(4) tax exempt organizations. And whether we, as tax lawyers, like it or not, and First Amendment lawyers like it or not, the Internal Revenue Code, the guidance for the IRS is now increasingly in the mix.

And yes, it would be a better world if we didn't have to think about the code. But we're now at the point with *Citizens United* – in what is likely to be a pushing at the limits, quite properly, by some exempt entities for greater participatory rights as they see it – to begin to worry about how the approach to tax law – which is general, really in the code across almost all types of activity – is going to fare under the approach to litigation that – if you read *Wisconsin Right to Life* together with *Citizens United* – would seem to be inconsistent with the way those rules operate, and the result of this is likely to be a major issue in the not-too-distant figure about the tax-exempt status. The side of these cases that the Court has quite conveniently ignored for decades and may now be here.

**Michael Waldman:**

I have, what I think is in some way, a wrapping-up question that can help us as we go forward in litigation, and in trying to craft rationales in future cases. Several of the speakers in effect have talked about unringing the bell, in other words, about finding sources of doctrine that predate the current cases and predate *Buckley v. Valeo*. In some ways, going back to the Founders, but certainly, when you look back at the line of cases before *Buckley*, where so many of the things that perturb us now weren't even contemplated as being First Amendment issues. As a matter of argumentation, how do you think about making arguments that urge courts to in effect, turn back the clock in that way, or find long hidden continents of Constitutional doctrine? It hasn't worked so well for people looking at the Constitution in exile, but it's a real challenge here. Have people given that much thought?

**Mark Alexander**

I think one of the points that was made was that we don't know the composition of the Courts going forward. And I would think that at least one of the purposes of our time today is to think

about how to build theories that will be presented to courts going forward over the years. But also, it's not just the question of going back in time, pre-dating *Buckley*, etc. But I think when Sam was talking before about the purpose of elections, and Rick was adding to the pieces of what that is, I think what would be helpful is to build on a conception of what our democracy demands and what our elections are about. And that may pre-date *Buckley*, that may be going to *Reynolds v. Simms*, or maybe going to *Harper* or going to *Buckley*, but I think it's building a conception and saying what are the components of our democracy, and developing a strong theory so we can get out of this really significant quagmire of case law that really depends on some fairly weak and not very well respected arguments.

**Daniel Tokaji:**

As you were asking your question, Michael, I have to admit that the response that immediately came to mind was there is a reason why I'm not longer a litigator, but in the academy. Because I really don't think with the current Supreme Court, the situation you're in is an enviable one. What I do think that means is that there is work to do for people like me and in terms of laying the groundwork for a new jurisprudence when we have a better Court. And as I understand the purpose of this conference, that's what we're largely trying to do here, at least some of us.

**Ciara Torres-Spelliscy:**

I'd like to thank our panel for an excellent discussion and I'd like to ask Professor Lani Guinier to give some closing remarks.