BRENNAN CENTER FOR JUSTICE
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TRANSCRIPT

Money in Politics 2009 Conference

Panel Two: Money, Politics, and the Constitution: Is Campaign Finance Reform on a Collision Course with the Supreme Court?

Monica Youn: Welcome to this afternoon's presentation. My name is Monica Youn, and I'm counsel at the Brennan Center, and as Laura mentioned a bit earlier, I spend quite a bit of my time defending campaign finance reforms in court.

Professor Lessig had mentioned this morning that the term Fair Elections Now Act might be like waving a red towel in front of the Supreme Court. And I have to confess that as a litigator, as I was hearing some of the phrases that were being used this morning, phrases like "enhancing participation" or "promoting competition" or, God forbid, "level the playing field," I had to cringe a little bit.

I know that some of our clients who are in the room we have taught to cringe a little bit at hearing those words because the Supreme Court in recent years has determined that those goals can be hostile to the First Amendment.

And I think that the title of today's panel is "Money, Politics, and the Constitution: Is campaign finance reform on a collision course with the Supreme Court?" Those of us who litigate in this area have been very busy recently both bringing and defending a multitude of lawsuits.

All over the country new challenges to campaign finance reform systems keep popping up even as we here in the room are discussing what new reforms we want to put onto the table.

The cause of all of this activity is pretty straightforward. With the Roberts Court, certain opponents of reform have reason to believe that a five member majority of the court is skeptical of campaign finance regulations.

In fact, in his majority opinion in Wisconsin Right to Life, Chief Justice Roberts said, with regard to campaign finance regulation, "enough is enough."

The Roberts Court has struck down all three campaign finance laws that it has considered: Vermont's contribution and expenditure limits in Randall v. Sorrell, the application of the Bipartisan Campaign Reform Act to corporate campaign ads in Wisconsin Right to Life, and the Millionaire's amendment to BICRA in the Davis case.

The result Rick Hasen has called the greatest period of deregulation since the passage of the Federal Election Campaign Act, and we now find ourselves in the midst of a concerted effort to constitutionalize and deregulate campaign finance reform, which would both strike down existing

systems, but also take many future options off the table.

I have asked this panel to concentrate on, I think, two major fault lines in the case law about campaign finance reform, two questions that the court will need to answer and two questions that reformers find themselves asking both as a result of recent developments in the 2008 elections and in the economic meltdown and as a result of the development in the case law that we're aware of.

The first question is, of course, the fundamental one, which is, can money be considered to be speech in the First Amendment sense? And, if so, what, if anything, can constitutionally be done to regulate the impact of money in politics? And second, what state interests can be used to justify reform? Is corruption now the only legitimate reason that this court will accept in serving as a state interest that can justify campaign finance reform?

Just briefly on the money equals speech equation, you know, in the 2008 elections and with recent political scandals and the causes and consequences of the current recession have caused many of us in both the pro reform and the anti reform communities to focus with renewed emphasis on what does it mean for money to function as speech.

For example, when we see a 90 year old woman write a $3.12 check to her chosen candidate together with a handwritten note that says she just wants to do whatever she can afford to show her support, it becomes very hard to say that there is no expressive value that goes along with that check.

But, on the other hand, when AIG turns out to be one of the all time top contributors to federal lawmakers and has given hundreds of thousands of dollars to lawmakers charged with regulating the insurance industry, things tend to look a lot less savory.

But what else, as we've heard this morning so many times, can you expect from a system where legislators commonly raise money by calling exactly those interests who are about to appear before their committee?

But just to say that money in politics may have some First Amendment value is, of course, not the end of the question but only the beginning. And it may be possible that we are reaching a point in time where versions of the First Amendment clash with each other.

For example, in the FDR era we recall that the Supreme Court used the Fourteenth Amendment protections on freedom of contract to strike down a great deal of New Deal social welfare legislation, and Cass Sunstein, among other constitutional theorists, has argued that the way in which the court is rarifying the money equals speech analogy in the campaign finance reform jurisprudence is a modern equivalent to the reifying of freedom of contract that we saw from the New Deal court.

If money in politics has First Amendment value, how does it affect the constitutionality of campaign finance regulation? And, secondly, what are the interests that justify campaign finance reform?

The case law has tended to focus on the question of corruption, not only corruption conceived narrowly as quid pro quo arrangements, but also in a broader sense that would encompass the appearance of corruption that Professor Lessig spoke about, and also circumvention so that ways of various end run, various games that we know that political players will play are also brought into that overarching concept of corruption.

However, the Roberts Court has expressed some impatience, I think, with the expansion of this idea of corruption to that extent, and one question that I guess constitution scholars are considering is are there other interests that can be used to justify reform.

Zephyr Teachout recently published a very interesting article in the Cornell Law Review—we were hoping she could be here today, but she was not able to—which traces the history of what she calls the anti corruption principle back to the framers.

And what Professor Teachout suggests is that like separation of powers, like checks and balances, anti corruption and the constitution should be considered to be a structural principle of constitutional law that would itself be a constitutional interest. So you wouldn't have a state interest going against the First Amendment, but you would have two constitutional interests weighing against each other. And there are other interests that the case law has not focused on to the extent that it might.

For example, all of the dialing for dollars that we heard Representative Pingree speak about, that we have heard Senator Durbin speak about, the shear amount of time and money that members of Congress spend in those little rooms talking to rich people and corporations and not talking to their constituents, is that something that the case law is going to give due regard to.

In the Davis case, Justice Alito's opinion for the majority suggested that leveling the playing field in the sense of leveling electoral opportunities for candidates of different personal wealth was not a legitimate governmental objection. And one question that comes up is does this rejection of that narrow level the playing field focus preclude a larger view of political equality? Does it make those catch phrases that we were talking about earlier of promoting participation, of enhancing competition, of those sorts of things, are those values now off the table for reformers?

And to talk a little bit to begin with about the history of the Supreme Court's case law in this area is Rick Hasen, who is a William H. Hannon distinguished professor of law at Loyola Law School in Los Angeles. And I'm truncating the biographies somewhat in the interest of time, but he's, of course, one of the nation's leading experts on election law, the co editor of the Election Law Journal, and I get at least six updates from his election law blog pretty much every morning when I turn on my computer. So we welcome Rick Hasen.

Rich Hasen: Thanks very much. And sorry for sending you so much email. At least their not tweets.

I don't tweet.

So my task here today, as I understand it, is to give the background, especially for those who might not be well versed in it, on the Supreme Court's approach to campaign finance regulation.

And thinking of the appropriate metaphor to use, the title of this panel, "a collision course," which sounds like a crash, and I've often described the Supreme Court's approach to campaign finance as a swinging pendulum, and we just finished a period of extreme deference where the Supreme Court was willing to uphold just about any campaign finance regulation to a period of deregulation swinging the other way, but I was thinking about this this morning, that maybe the best metaphor in terms of how the Roberts Court is approaching the constitutionality of campaign finance regulation is to think about those experiments where they take an insect and they slowly turn up the heat very slowly so that by the time that the insect knows that it's being fried to death, it's too late for it to move off the panel. And I think that the approach of the Roberts Court to campaign finance regulation has been an incremental killing of the possibility of regulation.

And this is showing up more as we see how the FEC has been approaching recent cases, how state regulatory agencies, how state legislatures have been considering reform, that slowly but surely, the move is towards deregulation and towards limiting the possibilities under the constitution of having meaningful campaign finance regulation.

And I'm just going to spend about 10 minutes walking you through the history and then turn it over to Don Simon, who's going to talk about the cases that are currently in the pipeline.

So there are basically a few different major types of campaign finance laws. There are contribution limits that limits how much money a person or entity gives to a candidate or a committee, there are spending limits limiting how much money a person or entity spends independently supporting or opposing a candidate, there are disclosure rules, there are public financing laws. Those are kind of the—and federal law has at least started with a mixture of all of these things.

In 1974, Congress passed the amendments to the Federal Election Campaign Act to impose a thousand dollar contribution limit on individuals, imposed a thousand dollar spending limit on individuals spending relative to clearly identified candidates for office, put in disclosure rules, established a voluntarily public financing system, and created the FEC.

In Buckley v. Vallejo, which is a 1976 case, the Supreme Court set the major rules which still more or less govern today. The court upheld contribution limits against a First Amendment challenge. The court struck down spending limits as violating the First Amendment, upheld disclosure rules, and upheld the public financing system because it was voluntary, struck down the composition of the FEC, which Congress then changed, and the FEC has been functioning since then.

My focus is on the contributions and spending cases, although there's an interesting issue now pending in the Citizens United case about disclosure which maybe we'll get into a little bit later, and I want to contrast the changes from the pre Roberts period to the Roberts Court.

And so just talking about contribution limits first, the Buckley court said that so called exacting scrutiny would apply, and there's been a debate ever since as to what to exacting scrutiny is. When you're trying to figure out whether or not a contribution limit limiting the amount that can be given to a candidate or committee is constitutional, you would apply this exacting scrutiny, and what the court said is that there's a First Amendment interest in giving money to a candidate, it's mostly symbolic, it's not so much the amount but just the act of giving, and that there would be only a

marginal restriction on speech if the amount was limited, but that contribution limits served the important anti corruption goal of preventing the quid pro quo dollars for political—dollars being exchanged for politicians doing the bidding of contributors.

So the court said that contribution limits were okay under anti corruption principle. The government had a strong interest in preventing corruption or at least the appearance of corruption. There's been a lot of talk and thousands of law review pages spent on this appearance of corruption idea.

As we went through to the period where I talk about the period just before the Roberts Court—I call it the new deference period—the court decided a series of cases in which it made it easier for governments to impose various campaign finance regulations. So on the contribution side, the court upheld a very low contribution limit.

In the Shrink Missouri case, the court upheld the ban on soft money. These were large contributions being given to political parties. In the McConnell case—that was the case that upheld the major portion was the McCain Feingold Law or the Bipartisan Campaign Reform Act—the court upheld limits on contributions to candidates by non profit ideological corporations in a case called FEC v. Beaumont, and the case upheld limits on party contributions to candidates in a case Colorado Republican 2.

And so the trend before the Roberts Court was it would be hard to imagine any campaign contribution limit that the court would strike down as unconstitutional. Very deferential.

The Roberts Court has moved in exactly the opposite way. We've had two cases dealing with contribution limits. First the Randall v. Sorrell case, which was mentioned a few minutes ago. This was the first time the court struck down a contribution limit as too low. Much less deference. There was no majority opinion. I got the sense that justice Brier, who wrote an opinion for himself as well as Justice Alito and Chief Justice Roberts, was looking at a rear guard action to try and forestall a more significant opinion suggesting that even more contribution limits would be unconstitutional. He imposed a test that would look at how these limits might affect competitiveness.

And it's not clear exactly where the line is, but it is clear that some contribution limits are now too low as to be unconstitutional under the First Amendment.

The other case, FEC v. Davis, which was also just mentioned, this was a case that the court recently decided. And the case involved a provision of the McCain Feingold Law that said if you were running as a candidate against a millionaire candidate, you could collect larger contributions if you faced this millionaire candidate who's self funding. And the court, in an opinion by Justice Alito, not only said that that system was unconstitutional but also said things, which I'll talk about, about the quality rationale for campaign finance regulation, which suggests that there's a majority of the court that is extremely skeptical of such rationales for regulation.

On the spending side, as I mentioned, the original 1974 amendments to the Federal Election Campaign Act said you couldn't spend more than a thousand dollars relative to clearly identified candidate. There's a whole issue as to what “relevant to” means and if you could easily get around that by avoiding magic words of advocacy.

But even putting that aside, the court said spending limits go to the core of the First Amendment, that strict scrutiny needs to apply, and if you have a limit on what people can spend independently, that's going to shut out everyone except for candidates, the institutional press, and parties from being able to participate in the process. And the court said, therefore, those limits were unconstitutional.

The court said the government's interest in preventing corruption was too attenuated because if the spending is truly independent, it might be at cross purposes with the candidate. And the court also rejected the equality rationale for regulation as being wholly foreign to the First Amendment, an argument which in a later case Justice Brier said cannot be taken seriously, but it seems that the current Supreme Court is taking it very seriously.

Buckley did not reach the question of whether spending by corporations and unions would be constitutional. There was an existing ban on corporate and union treasury funds being spent on campaigns. Corporation and unions could spend separately through PACs but not spend their treasury funds.

Buckley didn't address the question of whether that would be constitutional, but in a 1990 case, Austin v. Michigan Chamber of Commerce, the Supreme Court upheld a Michigan law very much like the federal law that limited corporate spending in candidate elections.

The Austin rationale was preventing the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public support for the corporation's political ideas. The court called this a, quote, different kind of corruption. I think it is actually better understood as an equality rationale. The idea is that there's something wrong with spending that's out of proportion with the public's views on an interest.

While the court didn't call it an equality rationale, it was at least intentioned with Buckley's statement that equality could not be taken into account, leveling the playing field could not be taken into account. And so this case has been out there. It's been out there for—since 1990. It's not been overturned.

In the McCain Feingold Law that was passed in 2001, among other things, it expanded this ban on corporate and union direct spending from their treasury funds, imposing a PAC requirement on so called electionary communications, electionary communications, ads on TV or radio broadcast in the period before the election that reach enough people and that feature the candidate for office.

So it might say, you know, “Call Barack Obama. Tell him what you think of his plan for Social Security,” and that this would be—if it was broadcast on TV or radio in this period, it would be subject to the same rules. Corporations and unions could not pay for it from their general treasury funds.

In the McConnell case, by a five to four vote, the Supreme Court upheld this rule and it said that the Austin case remained good law. For that to happen after Chief Justice Rehnquist switched his vote from agreeing with Austin to disagreeing, Justice O'Connor switched her vote the other way when

she switched back from where she used to be, and so by the narrowest of margins, this was upheld.

But now, under the Roberts Court, we're moving into a period where the court is poised to strike down the longstanding ban on corporate and union spending.

In a case called Wisconsin Right to Life 2, with the replacement of Justice O'Connor with Justice Alito, you had a very fractured court. Three justices are ready to overturn Austin outright. The controlling opinion by Chief Justice Roberts and Justice Alito is kind of a death by a thousand cuts approach rather than saying it's unconstitutional, but to create a loophole that covers almost all the ads that would be broadcast.

And so that's where we are on the spending limits. If we have time later, I can talk about exactly how that happened.

Let me just conclude by mentioning again the FEC v. Davis case, which was a case involving contribution limits. But the most troubling thing there is the statements there about leveling the playing field and equality. Very strong statements by five justices against that idea, which seems to call into question Austin.

And so especially as we get to the end of the term, it would not be a shock to me if we saw the Austin case overturned this term by the Supreme Court in the Citizens United case.

And I will leave it at that.

Monica Youn: Don Simon, who will be up to speak about three cases that are in the pipeline at various stages in front of the federal court on their way to the Supreme Court, I think beginning with Citizens United, and Don Simon is counsel to Democracy 21 and is a partner at Sonosky, Chambers, and a leading expert on campaign finance and election law issues. He's previously been executive vice president, as well as general counsel, to Common Cause. He was instrumental in crafting the Bipartisan Campaign Reform Act and in defending that act in the Supreme Court.

Don Simon: Thank you.

Well, that was sort of depressing, Rick.

Rick gave us a good view in the rearview mirror about what's happened. I want to look through the front windshield and talk about what's coming at us in terms of the cases the Supreme Court is likely to be dealing with over the next couple of years.

Let me say by way of disclosure that in each of the three cases I'm going to discuss, I'm co counsel for either a party or an amicus, so I don't come to the discussion with the sort of purity of heart and soul that an academic like Rick does. But for these purposes, I'll try to be dispassionate and not engage in advocacy.

The reason I think it's important to think about the cases in the pipeline, the courts are passive

institutions. They can't reach out and decide things that are not before them. They can only deal with the cases that come to them.

So the cases coming to them in this field and the issues in those cases will importantly determine what happens to the doctrine and the jurisprudence on campaign finance issues.

The first case is a case at the Supreme Court that will be decided sometime before the end of next month, and that's Citizens United v. Federal Election Commission. It's really a follow on case to the Wisconsin Right to Life case that Rick talked about, and it principally addresses an issue left open by the court in WRTL, which is when you have an election and you're in communication, that is not the functional equivalent of express advocacy and therefore cannot be subject to the funding restriction, the restriction on using corporate funds to pay for the communication. Can it, nonetheless, be subject to a disclosure requirement?

Now, there is another issue in the case, which is an issue that seemed to be secondary at the initiation of the case, and kind of as the case moved its way through the court system, has taken on greater and greater prominence and virtually dominated the discussion at the oral argument, which is whether the funding restriction, the ban on using corporate money to pay for electionary communications, can apply to the type of communication at issue in this case, which is a 90 minute documentary as opposed to the way we typically think about this provision in the McCain Feingold Law of regulating 30 second or 60 second broadcast ads.

The facts here, Citizens United is a 501c4 non profit group. It produced a 90 minute documentary which discussed and criticized Hillary Clinton while she was a presidential candidate last year, and it was going to be disseminated by cable in the states in which she was running in the primary election in the immediate pre-election period, and therefore it qualified under the statutory definition of an electionary communication and would, therefore, be subject both to the corporate funding restriction and the disclosure requirement.

In addition, Citizens United produced 30 second ads that it wanted to broadcast to promote the film, sort of commercials for the film. It was widely accepted, and the FEC agreed that those ads were not the functional equivalent of express advocacy because they were, in the parlance, susceptible of a reasonable interpretation as being something other than advocacy against Hillary Clinton; i.e., they could be understood as commercials for the documentary.

Citizens United filed suit to argue that the documentary should not be subject to the funding restriction because it was not the functional equivalent of express advocacy. It maintained it was an educational film about Clinton or discussed issues relating to the campaign, but it was not advocating against Clinton's election. And it also claimed that the money spent for the commercial, for the 30 second commercial, should not be subject to the disclosure requirement because that was not the functional equivalent of express advocacy and, therefore, could not be subject to any regulation, including disclosure.

The district court, a three judge district court, rejected both claims, and it said the documentary clearly was advocating against Clinton, it was very critical of her and attacked her character and fitness for office, and it upheld the disclosure requirement on the basis of the court's decision in the

McConnell case, which on a facial basis had said the disclosure requirement was constitutional.

Now, when the case got to the Supreme Court, a couple of interesting things happened. First, Citizens United changed lawyers, and with it, it really sort of changed the focus of the case and the nature of its argument.

And it really launched a kind of reinvigorated attack on the funding provision, the corporate funding provision, and it made a whole series of arguments, sort of layers of arguments.

First they said that the funding restriction really shouldn't apply to a 90 minute film, a documentary type film, that what that restriction is about, what that provision of the law is about, really is more classic types of political commercials, the sort of 30 and 60 second ads.

Next they argued that, well, even if in general it's going to apply to the documentaries, there's something about the dissemination of this documentary which should make it not apply, and that's because their plan was to disseminate the documentary via cable but through OnDemand video so that a viewer would have to go into the cable system and affirmatively choose to see the documentary. And they said that's a very different situation than the typical situation of a viewer sitting there watching, you know, Grey's Anatomy and having a commercial come on where there's no affirmative specific choice by the viewer to see the political message.

They also argued that the prohibition should not apply to a group like Citizens United, which was a non profit group, and even though it took some money from business corporations, it says it was substantially funded by individuals and therefore should be exempt from the funding provision.

And, finally, as Rick mentioned, and most dramatically, they said the corporate funding restriction is unconstitutional, and you, Roberts Court, should overrule the Austin case, and I think, fairly read, it would also mean overrule McConnell case in which the longstanding ban on corporate funding of political messages of expressed advocacy has been sustained. That's the broadest ground for the ruling.

So this case I think will give a good indication of where we're going to go with the Roberts Court.

On the disclosure point, I think it's important to note that the issue was not addressed in WRTL because in that case WRTL said, look, we shouldn't be subject to the funding restriction, but we're happy to disclose where the money came from, so there was no challenge to the disclosure provision.

And in McConnell, prior to WRTL, the court, by a vote of eight to one, had upheld the disclosure provision of McCain Feingold on a facial basis, and you had Justices Kennedy and Scalia, who voted to strike down the funding provision, nonetheless, say the disclosure provision was constitutional. Only Justice Thomas dissented on that point in McConnell.

So for the disclosure provision to be struck down here you would have to have at least those two justices, I think, change their mind, which would be surprising, I guess. And I think it would be, again, surprising to find a disclosure provision struck down. Disclosure provisions have almost

always been upheld by the court over the last 30 years in this context, and it would be pretty striking to have the disclosure provision struck down, even on an as applied basis.

On the funding restriction, in the first instance I think there's plenty of opportunity to uphold it, even for the Roberts Court to uphold it, on the ground that in WRTL they said the funding restriction can apply to the functional equivalent of express advocacy, the documentary constitutes such, and it can constitutionally be applied to this kind of documentary.

But if it's struck down, I think what will be critical is the grounds for doing so. They could say it doesn't apply to this ad on very narrow grounds, such as the context of OnDemand video, or they could approach that question on the broad grounds Rick mentioned of saying that the corporate funding prohibition is unconstitutional entirely and overrule Austin.

Let me just quickly mention the other two cases, because they're a little further down the line.

There's a case brought by the Republican Party against the Federal Election Commission which is sort of a parallel case to WRTL, and seeks to do to the soft money ban provisions what WRTL did to the electionary communication provision and basically say that the soft money ban, although constitutional on its face as upheld in McConnell, is nonetheless unconstitutional as applied to certain activities that the RNC wants to engage in.

And what the RNC is saying is, look, we want to raise and spend soft money for certain activities which are not going to affect federal elections. There's certain non federal activities like litigation or like grassroots lobbying or like spending on state and local elections, and because those activities do not affect federal elections at all, they can't be subject to the ban on soft money.

The party is seeking to be able to kind of roll the clock back prior to McCain Feingold, open up soft money accounts, raise non federal funds, soft money, and spend it for these non federal activities.

What's going to be interesting there in the court's approach is whether it adheres to the analysis the court used in McConnell to say the issue with the soft money ban is not what the money is spent for but how the money is raised and the problem of corruption and the appearance of corruption that is inherent in the act of a national party raising and spending these very large non regulated funds.

That case, still in district court, probably will be decided next fall, and there's a direct appeal to the Supreme Court after that. So that could well be on the court's docket by next winter.

The last case is a case also in District Court brought by a group called Speech Now which explores a kind of scene in the Buckley decision. Buckley said you can impose limits on contributions, you can't impose limits on expenditures. This case poses the question of can you impose limits on contributions raised by a group only for the purpose of making independent expenditures.

Speech Now is a 527 group that really qualifies to be a political committee, and, as such, would be subject to a $5,000 contribution limit. It's saying it wants to use its money only to make independent expenditures, and the contribution limit, therefore, can't constitutionally be applied to a group which wants to spend money for that purpose.

That, again, poses very important questions that really have not been resolved by the courts since that limit was enacted in 1974. It's going to be—it's on kind of an unusual procedural track. There's a district court here in Washington that's going to certify a factual record probably sometime over the summer to the D.C. circuit. The case will be argued and heard by the D.C. circuit sitting en banc, the whole court together, which is very unusual, probably sometime next winter, and after that there would be the opportunity for an appeal. And because the case is central and important and presents an unresolved issue, I think there's a very good chance that that issue could be decided by the Supreme Court essentially two terms from now.

Thank you.

Monica Youn: Thank you so much, Don.

Trevor Potter is our next speaker. And Trevor is the founding president and general counsel of the Campaign Legal Center and was also general counsel to the McCain 2008 presidential campaign. He is a partner in the political activity law practice at Caplin & Drysdale, former chairman of the FEC, and was also part of the team that defended BICRA in the lower and Supreme Courts. Thank you.

Trevor Potter: Thank you. We've moved to the part of the panel where we all have our disclaimers that we actually have dogs in these fights. Like Don, I and the Campaign Legal Center are involved in these cases as amici in making arguments on one side or the other. And Allison can do her own disclaimer when we get there.

It occurs to me, listening to all this, that I hope those of you who are lawyers in this audience are busy billing this to somebody—

—because otherwise it's an awfully complicated discussion to sit through.

I also hope that those of you who are not lawyers have now been convinced that you do not want to go to law school—

—because this truly is watching the sausage being made.

You heard Rick talk about the Roberts Court. I think in this area I would refer to it as the jurisprudence of the post O'Connor court, because what we really are talking about here, which makes it a very interesting subject to law students and law professors in terms of the behavior of judges and the value of stare decisis, is we're talking about what a court does when one vote essentially has changed.

And Justice O'Connor, as you heard, was essentially the fifth vote in the McConnell decision and changed her position on the Austin case to get there. Her departure from the court, her replacement by Justice Alito raises the question of is the court's jurisprudence based on the decisions it has made and the rationale or is it subject to change as the justices change.

I know that sounds a little loaded, so let me take some of the load off by saying that critics of McConnell will, of course, point out that they don't think there was a very clear decision in McConnell, that the votes were there, but it's not clear what the rationale was and the reasoning, and that therefore Justice O'Connor's successors have less to work with or are bound less by that decision.

But then we had the Roberts confirmation hearings in which he made a point of talking about the value of stare decisis and saying that he believed also that court decisions ought to be narrow rather than broad, they ought to deal with the narrowest possible result to decide the case.

So you have this interesting situation where the Chief Justice is on record talking about value of stare decisis and narrow decisions, and you've seen, I think, in some of the cases that Rick outlined that influence in the Chief Justice in independent and controlling opinions, as in Wisconsin Right to Life 2, laying out a standard that does not overrule the previous precedent, and you've seen passionate comments in the opinions of, for instance, Justice Scalia saying this is all phony, you are overruling it, why don't you just stop being a chicken and say you're overruling it.

So you've got this ongoing debate, and I think those issues are in all three cases that Don has outlined and that I've been asked to talk about a little bit as they reach the court.

I will say, given our time, I'm going to abbreviate my remarks a bit so that we have some time left for questions and more general discussion. So I'll just hit what I think are the highlights in these three cases and where I would hope the court would go in them.

The first one, the Citizens United case, as Don correctly said, I think everybody came away from the oral argument with a feeling that the case had evolved significantly from where it started in its early briefs.

There is an opportunity here for a narrow decision by the Supreme Court. It'll be interesting to see if they take that opportunity. I think they should. And that is to simply say that this speech, this OnDemand 90 minute video, was not, in fact is not, covered by the statutory provision on broadcast, cable or satellite communication, that it is somehow different than what the ad covers, not just or even because it is 90 minutes, although that was a big part of the oral argument, was 90 minutes different than 30 second ads that Congress was allegedly trying to reach, how do we know they weren't trying to reach longer videos, et cetera, but that its method of delivery with the video on demand requiring the affirmative decision of the viewer to say I want to order that is fundamentally different than the sort of undifferentiated, unasked for advertising that McCain and Feingold was trying to cover.

So that, it seems to me, is the perhaps ideal outcome of Citizens United and avoids the broader questions. And as you've heard, in order to get to those broader issues, the court essentially has to overrule Austin, which it's just upheld in McConnell. I think that's a significant U turn and perhaps not attractive.

I did want to comment on Rick's introduction in which he talked about Austin suffering death by a thousand cuts in Wisconsin Right to Life. I think that's really open to debate at this stage. There's no

question that it can be read that way. It may have that result. It depends really on the different or supplemental ongoing argument of exactly what the functional equivalent of express advocacy is.

The Chief Justice, in his opinion, essentially the deciding opinion, talked about whether an ad met the test of the functional equivalent of express advocacy. That test itself was somewhat murky in the chief justice's opinion. The FEC has regulations on it, and the FEC has, as commissioners present today can attest, an ongoing battle over what that test is and how broad or narrow it is, resulting in a whole series of 3 3 ties, and then the commentators on the FEC have an ongoing battle over whether the 3 3 ties decide the issue or merely leave it for another day.

So we don't really know where Wisconsin Right to Life leaves us. I think you could see, under different circumstances, a FEC saying no, a lot of this is still covered, and then that issue moves to the courts, or we could see, as Rick has, I think, predicted that Wisconsin Right to Life essentially opens up all this advertising, and that will depend on the commission and the courts. So that's the Citizens United case.

The RNC case, working its way through the courts and, thus, not yet at the Supreme Court, is a basic challenge, what I would regard as a basic attempt to relitigate McCain Feingold legislation, the ban on soft money and the party's role in soft money fund raising and spending and the McConnell decision where this very provision was upheld.

I know the litigants bringing this argue that McConnell was only a facial challenge, and this is applied challenge. But the reality here is there isn't any difference. The facts that the court was presented with in McConnell were party soft money fund raising. That's exactly what they're now saying should be permitted. It was the national committees that were raising it pre McCain Feingold, and it was the national committees who were in that case saying we have a right to continue doing so, at least at it affects state elections, and if you're going to ban us from having federal candidates involved, you can't ban us from our right to engage in election activity in the states.

And the court basically, in McConnell, says no, that's not what happens here. What happens here is, instead, Congress has merely said you have to use money raised under federal limits when you do activity in the states just as when you do activity in federal elections, and that's constitutional.

So they really are, I think, asking for an overturning of that piece of McConnell. I would note that there's obviously a lot of politics here. This case was not brought before the November general election when John McCain was the nominee of the Republican Party, it was brought right after the election when the RNC didn't care what John McCain thought of them and when the litigants in this case were also litigating who was going to be chairman of the RNC, and I think this was part of the battleground over there on that.

So our view is that soft money is still the same danger that it was before. Nothing has changed. The argument that somehow only having party officials raise it makes it acceptable is not something that the court accepted in McConnell and I think, as a practical matter, is simply not realistic.

For those of us who have seen Washington, you know that if the chairman of the RNC asks you to

do something, you're going to feel that being done on behalf of the party and its prominent office holders, and there's nothing to prevent, then, the chairman from saying, you know, our senate minority or majority leader is really grateful or hopes you'll do this or would love it to meet with you, et cetera.

So enough of that. That's the RNC case working its way through.

Finally—and my time out has already been flashed at me so I will be quicker on Speech Now, partly because it's still working its way well through the process. But this is not only—this is a case that potentially is a fundamental challenge to the

Buckley v. Vallejo case itself and the dichotomy between unlimited expenditures and the constitutional permissibility of limiting contributions.

And you can argue about whether this is a piece that never got decided in Buckley or not, and all the legal scholars will point to various footnotes in other cases, but the issue here is going to be is this a contribution, in which case it can be limited, or is this speech that can't be limited.

And I think the best reading of that is going to be that it is a contribution because it is given to someone who then makes the decisions about how to spend it and it's fundamentally different from an individual going out and spending his or her own money.

The other piece of this that I would leave you with is that argument is made, well, if it's independent, then there's actually no coordination with candidates, there can't be any corruption.

Again, with due deference to FEC commissioners in the audience, the coordination regulations, those of us who have worked in the area know, are a complete minefield, whatever version they're in nowadays after various court decisions. The FEC has had a terribly difficult time identifying coordination, investigating it, coming to an agreement about whether it has existed.

So I would just say what you and I mean by coordination in a common sense way and what we claim doesn't exist in these independent groups is sometimes miles different from what the FEC will end up saying was or wasn't coordination, and it's miles different in a way that means you can have a great deal more activity discussion back and forth between these supposedly independent groups and candidates than you would expect without reaching the legal definition of coordination.

So I think when you're looking at the constitutional issues in that case, you have to think about the practical ones as well, namely, that there will be what we would all consider to be coordination, or at least the legal possibility of it, and that affects the outcome.

So those are the three. I now turn this over to Allison Hayward for what I presume will be a completely different take on them.

Monica Youn: So our final speaker, Allison Hayward, is someone who combines the supposed purity of the academy with some experience getting her hands dirty in practical politics. She is an

assistant professor of law at George Mason University and serves on the board of the Office of Congressional Ethics, and she also has broad experience on campaign finance issues both in private practice and as counsel to the National Republican Congressional Committee, to FEC commissioner Brad Smith, and to the Senate special investigation of the 1996 presidential election.

Allison Hayward: Okay. I think—I think before I begin, besides the Office of Congressional Ethics relationship that I have that I should probably disclose, in an effort at full disclosure, I am also on the board of the Center for Competitive Politics, which is on the deregulatory side of the reform debate, and so they're involved in suits. I'm happy to say that I have not done any work on any of their lawsuits that they've been involved with, but nevertheless, because I am affiliated with them, I wanted you to know that affiliation.

Now, how should we think about the court and campaign finance? The main problem today is the problem of scope. But it's a big problem.

I mean, there's no question anymore about does Congress have the authority to regulate primaries, which was a dispute for quite a while. Do states have plenary power when it comes to election rules? That was a dispute for a while.

The problem today is, okay, conceding that the federal government has broad latitude to regulate a variety of interactions, what's the appropriate scope?

Now, a chronic problem in campaign finance has been how to accommodate independent non coordinated political activity with the regulation of corruption. Now, Trevor has rightly pointed out just now that what we call common sense coordination may not be what legally right now they're wrangling with at 10th and E Street, which is where the FEC is.

But let's just talk about common sense coordination for a while as I take this sort of big picture view of the challenge.

It's been a debate since the Anti Saloon League, and its temperance program swept the nation. What kinds of groups are pernicious kinds of groups that we ought to regulate in politics?

Then the Anti Saloon League said it need not comply with restrictions on political committees because it was involved in public education, not politics, because it was involved with temperance, not the presidency.

Well, I submit [to you] that the people who supported the Al Smith campaign had little distinction over whether or not temperance was a huge issue. It was. It was the social issue of the day.

I know it's hard now in the 21st Century to really take the notion of alcohol in society as seriously as they did, but it was the abortion issue of the day, it was the gun issue of the day, it was the everything issue of the day wrapped up in one. It had tremendous ethnic components to it, it had tremendous political components to it, and it had a lot of money on both sides.

So the Anti Saloon League. What about it? It had a very political program, it had a political program at the state and local level as well as the federal level, it was involved in campaigns.

Happily, allocation questions—which the campaign finance lawyers in the room will go, oh, God, allocation—allocation questions were still a force in the future. We didn't know that word yet.

But the fact remains that just days ago it could have been the Anti Saloon League instead of EMILY's List arguing before the D.C. circuit that certain of its activities were not federal and, thus, not susceptible to federal regulation.

Both cases would demonstrate the truth that's eluded many, including Justice Clark Cotelli, that regulating the manner in which you fund political communication limits that speech. It obviously does.

So the fundamental issue now is how do we get at not candidates, not campaign workers, but these other entities out there who want to talk about issues, who want to talk about issues that are relevant in campaigns like temperance or abortion, and do a blend of things in politics?

In Speech Now what we're talking about is a group that wants to make contributions in politics, that is, direct money to candidates but—excuse me, wants to make independent expenditures in politics.

You're nodding. I know.

See, this is the problem is that I write in my handwriting and then I try and read it again and it's like [INAUDIBLE]. And I need reading glasses, too, because I'm getting to that age.

In Speech Now, what –

In Speech Now, what we've got is a group that wants to get together, you know, a group of individuals, and group their resources and make independent expenditures about campaigns.

Now, the fact is right now, under the law, an individual can do that. But once you get together with another individual, potentially you become a political committee and you're subject to a $5,000 per year contribution limit into your aggregate effort.

Now, one of the problems with scope in federal campaign finance is why is it that two people are treated so dramatically differently than one person acting alone or three rather one or a hundred rather than one? I mean, the number, as long as it's more than one, doesn't matter as far as the law is concerned.

In Citizens United, should we care about independent corporate spending and the sources of that independent spending when the communication is something that's pulled by the viewer rather than pushed?

I think that's analogous to the situation we had with the internet regulation in 2004 at the FEC, and I

think you can think about these two cases as being somewhat congruent.

In the internet regulation debate what we were worried about was, you know, people getting messages that they wanted to get, like, you know, pulling a book down from a bookshelf. You want to read the book, you know the book you want to read, you pull it down. Is there something about that communication that needs to be regulated when it's something you want to hear?

Same thing as accessing a web page. Same thing as this satellite delivery system for the Citizens United movie about Hillary Clinton.

Closer to candidates, but not entirely there yet as we are going along this continuum, is the RNC case, a national political committee whose sole purpose in life is electing people to office. Those people would be candidates and, thus, ultimately, office holders.

Should the federal government be able to restrict how that entity funds activity is part of its political purpose, but not all about electing those candidates. It's about redistricting, which is indirectly related to electing candidates, but not the same thing.

Supporting state candidates that are your farm team for your federal campaign. How far does Congress's regulatory authority reach into the inner workings of the RNC?

And then, finally, EMILY's List, which the other speakers didn't refer to explicitly, but I think falls in this continuum. This is a political committee that is registered, reporting under the act, doing all these wonderful things, with a non federal component to it sort of attached on the side, and how that entity has to account for money it raises and how it has to allocate money between its federal and non federal account for mixed activities.

Now, my predictions with the court now, and the way I could make this coherent and I could make the court's potential record here coherent, is to suggest that the court might look at these campaign finance cases related to how sort of closely they relate to candidates, who then become office holders, who then are the one actors that are in the position of engaging in quid pro quo corruption.

So the further you are away from the candidate, the more attenuated your connection with that person and their office, the harder it is to justify Congress regulating your financial activity.

So it would seem to me that Citizens United and Speech Now are in relatively stronger positions because they are these independent entities outside of the candidates.

There's a nice symmetry in the Citizens United case. Citizens United was the source of a complaint to the FEC in 2004 that Michael Moore's movie Fahrenheit 9/11 and its ads were political spots. It did not prevail on that case and subsequently I think decided that what was good for Michael Moore was good for David Bossie as well, David Bossie being the principal at Citizens United.

Now, I guess, in closing, it seems to me that we shouldn't think about groups as anything distinct from individual activity, just individuals working together.

In my view, that rubric applies equally well to corporations and labor organizations as it does to ad hoc community organizations.

The proffered reasons for the corporation and labor organization expenditure ban, not so much the contributions ban but the expenditure ban, I think are nonsense.

I think we need to refocus our concern about regulating corruption not on the individuals and groups out there that are trying to participate in politics but on the real vehicles of corruption, which are the office holders that hold the reins.

So ask yourselves—and this is my closing thought to you—as passionate reformers, how much of what you dislike about political funding is a problem of incumbency rather than a problem of money?

Monica Youn: In the interest of time, I'm just going to ask one question and then I'm going to open it up for Q and A from the audience.

It's always struck me, as someone who works both on litigation and on advocacy, as so many of us do, the divide between what is discussed in the case law and the public discourse surrounding the issue of campaign finance reform, and I think that the way—I see some nodding up here—and I think the way in which this panel's discourse has differed from what we were discussing this morning.

So I wanted to bring it a little bit back to a general question of state interest. We hear from Rick that the court may be skeptical of the equality rationale, as it was expressed in Davis versus FEC, and we see them nibbling around the edges of what constitutes corruption, how broadly we're going to define corruption, how wide that web is going to spread.

But I'm wondering, is there a way to get the court to take account of other state interests, the kind that are mentioned by reformers and the kind that we heard discussed this morning?

For example, the idea that Professor Lessig was discussing about citizens being able to trust their government, the discussion that Representative Pingree and Senator Durbin have discussed about how to keep our elected representatives from spending so much of their time dialing for dollars. Or the question of whether we could constitutionally super charge the small donor revolution and the amazing levels of citizen engagement that we saw in the grassroots in the 2008 elections. And I wanted to invite any of you to address that issue. Trevor?

Trevor Potter: Well, I would start by sounding like the raving radical that I usually don't.

I think all of these cases raise very fundamental issues that need—I mean, the court will, because it is the court, slice and dice them in a very legalistic way, but underneath them all—in Austin—the issue you have when we talk about are there five votes to overrule Austin, which sounds very boring, is who's democracy is this anyway? Why is it that entities of the people, something other than voters, are entitled to spend money in these elections?

We say there can't be any foreign national money in our elections. Why should there be corporate money in elections? Which is fundamentally what we're talking about, either as expenditures or contributions. Why couldn't you say, why don't we say that only people who are in fact qualified to vote may contribute to candidates. Isn't it their election?

When you look at the RNC case, there are justice after justice that have looked at this and said of course the size of a contribution makes a difference. You would have to be under a rock to think that there was no difference between a one dollar contribution and a hundred thousand dollar or million dollar contribution in terms of its effect on office holders, on not just the appearance of corruption but the reality of corruption, and therefore it is reasonable to limit that.

And yet, you know, here you have the RNC coming back to say, well, you know, large contributions, unlimited contributions, really shouldn't make any difference in our context.

So, yeah, I think these are very fundamental issues. We have seen them being fought back and forth over this battleground for most of the 20th Century and now into the 21st, but the importance of the underlying issues is not diminished.

Monica Youn: Rick?

Rick Hasen: If I could be the house pessimist, which is a role I've been taking on a lot lately, I find it hard to believe that this—that the five more conservative justices on this current Supreme Court would find any of these other interests any more palatable than the interests that have already been put out there.

I mean, I think since Buckley there's been a lack of candor in a good part of the campaign finance reform community in talking about what the interests are when there's a lot of concern about leveling the playing field, but everything has to be couched in an anti corruption way in order to satisfy the Supreme Court's interest, as was mentioned this morning about the name of the public financing provision.

So I think that what's at stake in a lot of these cases is not about corruption but about promoting equality, and it's going to take a change in Supreme Court personnel for there to be a change in what interests are going to be accepted and how those things are going to be balanced.

Don Simon: I'm going to take a position a little bit between Trevor and Rick.

I think Trevor is right that there are a whole bundle of important interests that are at work in these cases: Competition, equality, time preservation, so forth.

And in the long run I think that there may be cause to think that a different court might be more open to a broader range of interests in weighing against the First Amendment impact of these kinds of laws.

In the short term, I agree with Rick. I mean, we're dealing with a court that seems to be, at best,

skeptical of these rules. So it seems unlikely that this is the court that's going to expand the playing field of what kinds of justifications can be used to support these laws.

And as lawyers, we all want to win the cases we bring, so we're sort of forced to use the language that the court gives us in order to try to mistake the case within the framework of the doctrine as it exists.

Monica Youn: Allison?

Allison Hayward: Yeah, just my two cents.

I agree with Rick, but I don't think that it's a pessimistic view. I think it's an optimistic one.

Rick Hasen: That's why I'm pessimistic.

Allison Hayward: Why shouldn't we put Congress to the test of corruption when what we're talking about is their ability to write the rules by which they're elected? Why should they get more and broader interests to, post hoc, justify, potentially, rules that change things in clearly a way that incumbents are going to prefer because they're, after all, the people who get to vote for the law.

I mean, I think there's a lot of appealing feel to some of these competing values, but think about, in practice, what it means to provide members of Congress with greater latitude, to restrict the activities of outside groups in politics.

Monica Youn: Would you have that same skepticism about systems that were passed through voter initiatives, for instance, as those that were passed through legislation?

Allison Hayward: Yes. Because I don't really think that an initiative is—I mean, what we're concerned about here isn't just incumbent bad motives but bad motives of majoritarian interests against minority interests or well organized minority interests. I mean, still it is making a decision, playing out in politics, about the fundamental ability of people, other people, to do stuff. And I think that's very problematic constitutionally.

Monica Youn: Okay. In the back?

Joel Gora: Yes. My name is Joel Gora. I'm a professor at Brooklyn Law School, and I've been dealing with the constitutionality of campaign finance laws since the time of the Buckley case, which I helped argue in the Supreme Court.

I'm also the proud coauthor of a new book called “Better Parties, Better Government, A Realistic Program for Campaign Finance Reform,” with my coauthor and friend, Peter Wallison, American Enterprise Institute.

The first half of this book I think most people in this room will agree with. It's a harsh critique of our current campaign finance system. It says that it's in the thrall of the special interests, it is

contrary to change, it discourages challenges to incumbency.

We also feel that public finance with limits, mandatory limits, is not a good way to go either because the limits are the ones the incumbents want to make life easier for them.

We have a modest proposal that we think will solve the problem of too much influence by special interests, of not enough support for challenges for new ideas, and that is to eliminate the statutory restriction on political parties' ability to use hard money, regulated money, limited money, from human beings money, disclosed money, kosher money—

From being able to use that kind of money to support their candidates in any way they want.

So in effect what we advocate—and here's my question—

—is a statutory change of the outcome in the Colorado 2 campaign finance case. So my question really is for Rick and anybody else. Do you think that pendulum that you're worried about swinging back is going to knock over the Colorado 2 case as well and bring about the result we think is good reform constitutionally or do you think that Congress might be willing to take a look at that.

Rick Hasen: I'll defer to Trevor and others who follow what Congress might do.

In terms of the court, I think the first step is striking down Austin. If you're going to think about the long term Roberts program, the first step is striking down Austin. The second step is Speech Now striking down contributions, independent expenditure committees, and then this question of what comes after that. There's not going to be much left besides disclosure after those two steps occur.

Trevor Potter: Well, I think Colorado 2 was an abhorrent decision to anyone involved in parties, politics, et cetera. I recall watching the argument in the court, and the advocates on both sides said to the court when they saw, with horror, where things were going, “Oh, for goodness sake, don't say this is an independent expenditure.”

The party wanted a constitutional right to do this, the other side said it should be banned, but nobody thought it was independent. It was just a way for the court to cut that corner and get where they wanted to go. And political scientists ever since have been saying it's a bad result.

So it wouldn't surprise me if Congress, or otherwise, did something about it. That's an issue in the RNC case as another piece of that where the RNC is arguing that it's unconstitutional, and they're basically, again, asking the court to relitigate Colorado 2. It seems to me that's not an invitation the courts are going to take up. That would be more appropriate for Congress.

Monica Youn: I'm afraid I'm going to have to cut off questioning in the interest of time, but I'll just mention that a lot of these issues are going to be a subtext for our next panel, which discusses innovations in campaign finance reform, so if you could hold your question.