Money, Politics & the Constitution – Panel Two Prepared Remarks Transcript

Panel 2: Do Voters Have First Amendment Interests at Stake in the Financing of Political Campaigns?

Monica Youn:

In this panel we're going to focus a little more closely on a particular question. And the question here that has been presented to these panelists is: when we think about elections in the First Amendment context, can we think of elections as a bounded sphere of First Amendment activity. That's a little bit abstract, but one way of thinking about that is: Should we think of an election as being more like a commercial marketplace, where whoever spends the most money has the right to have primacy within that marketplace? Or should we think about an election as something that is an institution devoted to democratic deliberation, and if so, what implications does that have for First Amendment doctrine?

We will start out with Dean Robert Post of Yale Law School.

Robert Post:

Thanks. So, I'm going to talk a little bit about how we might imagine what First Amendment rights could be in the context of an election—not necessarily are, but could be. And to think about that question, we have to first ask, "Well, what is a First Amendment right?" How do we think about what a First Amendment Right is? And to answer that question, we have to ask something about the scope of First Amendment rights. When is it that First Amendment doctrine is triggered, such that we subject government regulation to the specific tests that are characteristic of the First Amendment?

The particular way in which the boundaries of the scope of the First Amendment right were imagined in the first generation of justices, like Black and Douglas, or scholars like Tommy Emerson, was to make the distinction between speech and conduct. First Amendment doctrine was triggered if it was speech, and it wasn't triggered if what we were regulating was conduct. So, of course, that raises the question: How do you know whether it was speech or how do you know whether it was conduct? And that turns out to be a really hard question.

So the way in which the Court has answered that is to say: well, it's speech if it tries to communicate something that's been tested. There's an attempt to communicate a particularized message, and if it's reasonably likely to be understood, then we have a speech. And then, therefore, First Amendment doctrine is triggered. We have a First Amendment problem on our hands.

Turns out, that that's not even a plausible way to imagine the boundaries of First Amendment rights. So, for example, the people who flew the planes into the World Trade Center were trying to communicate a message. They were successful and there is not a First Amendment issue in prosecuting them. So you might say: well, what we mean by communicating a message is, you have to do it in language or writing. And then just think about contracts, just think about product warnings, just think about doctors' advice to patients, just think, for example, about the case where there's an aeronautic chart and it puts the mountain in the wrong place and the plane runs into the mountain. And they sue, and the chart maker makes a First Amendment defense—doesn't go, no First Amendment questions raised. So, there are many, many instances in which we try to communicate, we are successful in communicating in language and otherwise, and the First Amendment isn't triggered.

So how do we, then, retain some understanding of the boundaries of what the First Amendment is? The way in which, for example, Tommy Emerson would explain this when he was trying to explain why espionage acts aren't subject to First Amendment scrutiny is to say, well, that's speech brigaded with action – a phrase that Justice Douglas picked up. But, of course, that just leaves us where we started. What do we mean by that?

And, in the end, I think there's just no way to go with that way of imagining the boundaries of the First Amendment because in the world, there's no such thing as speech versus action. These are constructs we use to interpret the world, to make sense of the world. And we use these constructs in order to do something. So, in the context of the First Amendment, we would say, to apply this insight, we protect rights under the First Amendment in order to do something, to serve some value. And we define as speech those actions, transactions that serve this value. And we protect them with First Amendment doctrine. And we do not apply First Amendment doctrine where these values that we want to use the First Amendment to protect are not at stake.

Now, if that's even plausibly true, it means that the question we were asking this morning—is money speech?—is the wrong question to ask. The right question—because it presupposes that there's such a thing as speech, you could know what it is in the world, we're dealing with real ontological things that I don't think are correct. So the right question to ask is: Looking at a particular transaction, does its regulation implicate First Amendment values or not? And that forces us to ask the real question, which is: What are First Amendment values? When you see things that way, the issue of whether, for example, money is speech is not the issue. The issue is a First Amendment value implicated in a particular kind of regulation. And just to think about this concretely, if I make a law that bans newsprint in order to save trees, newsprint is not speech, but of course there would be a First Amendment value implicated and we would look at the law under the First Amendment because it would end newspapers as we know them.

So, what are the First Amendment values? And, here, this is a matter of much debate and I don't have the time to go into it. Some people say it's a marketplace of ideas. I don't find that plausible because when you actually look at where knowledge is created in this society, say in scientific journals or by academics, it does not have the structure of First Amendment doctrine. There is such a thing as a false idea because if there is no such thing as a false idea, you can't have true ideas and knowledge. Some people will say autonomy, and I, myself, find that implausible because autonomy is always, everywhere, at stake, and so it doesn't help you much understand where First Amendment rights are triggered.

And so, we can talk about all that later, but for the sake of brevity, I'll cut to what I think is actually the most helpful way of understanding the actual boundaries of our First Amendment doctrine, which is, we protect speech in order to facilitate the process of self-government, which is to say the process of making the government accountable to the people.

So what do mean by self-government? We mean roughly that we can, in this nation, look at our government and say with some degree of plausibility to ourselves, it's ours, it reflects us in some sense. And how do we do that since we disagree with what the government is doing all the time? The typical solution to this problem, which we've seen since the beginning of the twentieth century, and its elements go back earlier, is to say: what we do is to make government accountable to public opinion, and we give all persons access to the formation of public opinion. And so we protect those forms of communication that we deem necessary to the formation of public opinion. I'm just going to call that public discourse for the purposes of this remark.

So, typical First Amendment doctrine says when you are engaged in public discourse, such as, to say, a communicative process that we as a society deem necessary for the formation of public opinion, we will protect your right to participate as an autonomous person. We'll imagine your audience as autonomous of you. We will prevent the state from viewpoint discrimination. There are lots of rules we apply to people who are engaged in public discourse formation. And we do that so that we can have a democracy, so that we can imagine our government as accountable to us. So, that's ordinary First Amendment doctrine.

If you gave me your top three First Amendment rules, all of them would be characteristic of the kinds of structures that we want to put into place in the formation of public opinion, but that's not the whole story because when we get together to deliberate in public, we do so in order to decide something. And when we decide something and want the state to act, it has to act in a way that's effective and efficient. So, if we want to create a social security administration or a health care administration, we have to actually create the governmental institutions and organizations that do that. That is a totally different social structure and social process than the process of public deliberation.

In the process of deliberation, we keep discourse open because we are perennially indecisive about what our ends are going to be but once we've decided on an end, we create a governmental organization in order to implement an end that's given.

So how do we implement the end that's given if in the court system we want to implement the end of justice, and in the school system (the end) of education, and so on? Well, we have to

arrange people and resources in order to accomplish the purpose at hand, and that means you have to regulate their speech in order to accomplish the purpose at hand. And that means there are whole domains of First Amendment doctrine that you see within organizations that are organized according to principles which are entirely different than your top three First Amendment rules. They're organized according to the principles of purposive, instrumental rationality.

So, if I ask, how can I regulate speech within a school, I ask whether the regulation of speech is required or necessary to the mission of the school, and that entails a constitutional inquiry into what's the proper mission and whether the regulation is necessary to serve that purpose. That's a very different doctrinal structure than what one sees about the regulation of speech in public discourse.

And that leads to this question: What is an election? Is an election an institution that is purposive, which has a given end, so speech can be regulated within the election in order to serve the end of the election? Or is the election part of public discourse? Is the election part of the system by which we keep our ends open? Again, I don't think this is a matter in which there is a right or wrong answer; it's a matter how we choose to characterize elections for us as a matter of constitutional law.

And it is perfectly appropriate, and I think we do, in fact, consider elections to be purposive organizations that have an end. The end is, I think, something like what Vicki Jackson was saying this morning – to create an institutional structure which serves the purpose of democratic legitimation, and we regulate speech within the elections in order to serve that purpose. We don't let people say, "I'll give you twenty dollars for your vote." And we don't let people say, "I'll shoot you unless you vote this way." And we don't let people say, "I have to see your ballot." There are lots of rules that we have that govern speech within elections that we allow without thinking too much about them in the First Amendment sense precisely because we view them as necessary for the elections to accomplish the end for which we've established elections in the first place.

So, if we think about campaign finance within that context – and here I'm just basically standing in for Rick Pildes – I call this the managerial regulation of speech which occurs within institutions. And an institution is a social structure in which we have agreed upon an end. If that's true, then we can rationalize campaign finance in the same way. We can say the question of the election is its ability to serve democratic legitimation.

And if we can to our satisfaction resolve the empirical questions that we were talking about this morning, and we can say certain forms of speech are inconsistent with the serving of that function – we do say that about lots of little forms of speech, but campaign finance raises this in the wholesale way about money and the relationship of certain forms or types of contributors to the function of democratic legitimation – then I think it's perfectly within this understanding of the First Amendment that the speech to be regulated for that end.

So, I'll just stop there, but that's what we mean when we talk about a domain in the context of First Amendment reasoning.

Monica Youn:

Thank you very much for your remarks. And it's interesting to hear you talk about standing in for Rick Pildes when Rick Pildes is sitting next to you and will be our next speaker. So, Rick Pildes from NYU Law School.

Richard Pildes:

So, I always like speaking after Robert because I usually agree with him as you already can tell from his reference to my views, but I always feel like I can re-explain what Robert has just said.

Let me come at the same issues from a slightly different framework, but I think it's very much in the same spirit as what Robert was just saying. A number of years ago, Fred Schauer, who is a leading First Amendment theorist, and I wrote an article called, "Electoral Exceptionalism and the First Amendment," which the Brennan Center took its title for the session from. And what we meant by that, or what our target was in developing that concept, was an alternative understanding of the First Amendment, which I think is a very widespread understanding, that suggests that there's some sort of unitary, general conception of the First Amendment. We call it sort of the off-the-rack or the normal conception of the First Amendment that applies relatively similarly across lots of different contexts, lots of different institutions, different media, different social-cultural settings.

And that general conception of the First Amendment is associated with a lot of the standard rules-of-thumb or doctrine that we know about from the First Amendment area. There can't be viewpoint discrimination, there can't be content-based discrimination, there can't be distinctions based on the identity of the speaker. I think of it as the Hyde Park soap box model kind of ruling the world. So, the image is all First Amendment issues are essentially about the speaker getting up on the soap box in Hyde Park and speaking. And can government regulate that in any way? And basically in the American libertarian First Amendment tradition, we tend to say no. And I suspect that Floyd Abrams may have kind of represented this more general, unitary vision of the First Amendment.

The idea of electoral exceptionalism was motivated by the thought that this is not actually how the American First Amendment works in practice, nor is it the way it ought to work in theory. That, in fact, there is no general right of free speech, there is no one broad sense of interests the First Amendment serves, there's no undifferentiated set of rules about speech in the American First Amendment context. That in fact, if you look at our practice under the First Amendment, what you realize is that there are many, many variations in how the First Amendment is applied and understood that turn on things like the institutional setting in which the speech occurs, the context, the particular social structures within which the speech is operating. So, for example, to be more concrete, does the speech arise in a public school setting, in a public service bureaucracy, in the military, at the ballot box.

And even in the context of pure political speech, where you might think this Hyde Park, soap box, general vision of the First Amendment rules, it's not true. We have a highly sort of contingent, differentiated set of understandings of what the First Amendment means, even when

it comes to pure political speech. So is the speech on government property, is the political speech on the broadcast media as opposed to other media, is it by government employees, is it in a public school setting even if it's political speech? First Amendment doctrine in practice is highly sensitive to differences between the institutional environments within which speech occurs.

And the argument about electoral exceptionalism is that when we start asking whether the domain of elections should be regulated, can be regulated according to certain sorts of norms, and values, and purposes – particularly some understanding of what the purpose of democratic elections or the purposes might be – what we're asking is whether, despite the power of this sort of general free speech idea, whether the highly institutionally oriented doctrine we in fact have should recognize elections as a specific kind of institutional setting in which the right way to understand the application of First Amendment principles admits some space for campaign finance regulation, for example, of one sort or another.

Now, there are a number of people who were developing this set of ideas, the late Ed Baker, who I want to mention here is probably the most elegant, I think, exponent of this view. What I would say now with a little bit more development of the doctrine in the years since we first developed this idea or first articulated these terms is that there is sort of an ongoing tension, it seems to me, in American First Amendment doctrine between this sort of general, universal conception of the First Amendment that is fairly indifferent to the particular institutional settings or contexts in which speech occurs, and a recognition within the doctrine as well that the application of the First Amendment does properly vary depending on the particular institutional domain in which the speech is occurring.

That is, we have both things present in our First Amendment doctrine. And over the last decade, the U.S. Supreme Court has pushed, I think, this tension very much in the direction of the more general, Hyde Park, soap box model, which has kind of occupied more and more space and overrode potential institutional differentiation in how free speech is understood.

Let me just tick off two or three examples. When it comes to judicial elections, the Supreme Court has now held that there's nothing unique about the judicial election setting that can be recognized when it comes to questions like whether states can prohibit judicial candidates from announcing their political views on various sorts of disputed issues. Judicial elections cannot be treated as a distinct domain for understanding how the First Amendment ought to apply. The judicial elections are like any other elections.

Number two, the Court has dealt with regulation of political parties by assimilating that issue also to this general free speech kind of understanding. So that, for example, states had regulated political primary elections to permit non-party members to vote in those primaries. The idea was that this will increase participation, and it will make candidates more responsive to the average voter. The Supreme Court held that was unconstitutional, and it got there on the basis of the view that ideas about free association that we have in sort of general civil society—ideas that prohibit the state from telling organizations they have to accept certain kinds of members or don't have to accept certain kinds of members—the parade cases and the like—that those same kinds of principles should apply to the state regulation of political parties. So there's nothing

distinct about elections and political parties. The fact that there are only two of them as opposed to an infinite number of groups in civil society—none of that made any difference. The court said the general First Amendment understanding is about free association and prohibits the state from telling the political parties you have to let independents or non-party members vote.

One last quick example of the expansion of this general vision of the First Amendment – in the direct democracy context, states had prohibited signature gatherers from being paid. The Supreme Court said, no, that violates the First Amendment. There's nothing distinct about direct democracy that allows the state to limit it to those who are willing to use their labor to go out and try to persuade people to sign petitions and to participate.

So, over the last decade, there's been a general movement, I think, and this tension that continues to exist in the First Amendment toward this more general conception that First Amendment principles are more similar across arguably different institutional settings than they are different. And that's reflected in the *Citizens United* case, ultimately, which holds that the First Amendment prohibits government regulation of corporate and union independent electioneering.

Now despite all that, I think Robert Post is right that the Supreme Court does at the same time continue to recognize a variety of restrictions that would otherwise violate the First Amendment that occur in the context of regulating the domain of elections. So, the very ban on corporate contributions to candidates, or the fact that individuals are capped in how much they can contribute to candidates, is a content-based ban on what the Supreme Court has said is a form of political speech—giving money to candidates—and yet that's widely accepted within the Supreme Court, that we can ban corporate contributions and we can cap individual contributions. Why? Because there's something distinct about elections. Or disclosure requirements in the election context, which are widely accepted but not applied in other contexts to speech and which might be unconstitutional in other contexts. Or things like bans on foreign companies spending money on elections, taking out election ads. Something that would obviously violate the First Amendment in the broader public discourse but doesn't in the context of elections, or at least right now doesn't.

So, we have this deep tension within First Amendment doctrine about how institutionally specific First Amendment doctrine ought to be. We have the court moving away from recognizing something distinct about the political or the electoral sphere, but at the same time, we also have a variety of doctrines that do recognize there's something distinct about the electoral sphere.

I think this issue is not going to go away—this is the last thing I'll say—despite the *Citizens United* case because many of the reform efforts in the wake of *Citizens United* continue to depend on some notion that there is a distinct sphere called elections that's separate from general public debate, or general public discourse that ought to be regulated in one way or another, if it can be done consistent with *Citizens United* and it would not violate the First Amendment to regulate.

So for example, the two or three things on the table right now: the legislation that's being talked about in Congress—the Schumer-Van Hollen Bill—is continuing to tie its restrictions to the

electoral process, to support of candidates or proposed constitutional amendments. Larry Lessig has a proposal out that would change the constitution to permit regulation of corporate spending in the election context, but limit it to sixty days before an election, as opposed to general public debate about health care or financial regulation.

I have thought for many years that the success of campaign finance regulation as a legal matter—what had been in place before the *Citizens United* case—will depend on persuading courts that there is some distinction between the electoral domain and the general domain of public debate and public discourse, and that unless that distinction can be made persuasively, very little regulation of what goes on with the financing of elections will be constitutional. The general First Amendment idea is very powerful in the domain of Hyde Park and the soap box, the general domain of public discourse and public debate. So, unless we can distinguish that from something specific about candidates and elections, there won't be any successful effort to address campaign financing in the wake of *Citizens United*. Thanks.

Monica Youn:

Now I'm very pleased to leave it to Burt Neuborne who was really instrumental in sitting with us and hashing out this conference and what would be appropriate ways of framing the incredibly problematic question of money in politics.

Burt Neuborne:

Let me start by saying this as a litigator, as a trench warfare person. It's worth worrying about this not just as an abstract question and not just whether we can build some sort of theory for a constitutional amendment or for some major long-term reform process. There are short-term reasons for caring about this. The decision in *Citizens United*, as you all know, was 5-4. As far as I'm concerned, it sits on a bubble. It does not have powerful *stare decisis* legs. And the reason it doesn't have *stare decisis* legs is that the decision itself was a huge reach. The Court didn't have to go this far. It is very easy to characterize much of what Kennedy said as dictum, unnecessary for the holding and the resolution of the case. So that for the case, as far as I'm concerned, the issue is still in the air.

Now, of course, that means the Court has to change. We're not going to persuade Kennedy to change his mind, but it is not outside the realm of possibility that we will see a shift in the Court, especially if it is a two-term president. And that we'll be talking about the need to give the new Court a theory on which it can reverse *Citizens United* and reverse it within appropriate doctrinal limits. And the theory is, I think, the theory that both Bob and Rick have presented—I've called it a theory of bounded speech.

But before I say a few words about that, I'm going to subject you to a Joe Biden moment. And anybody who doesn't want to be subjected to the Joe Biden moment should leave the room. The *Citizens United* case strikes me as much an issue of sociology as an issue of law. The extraordinary psychological and sociological changes that have taken place in American life that make us think about corporations as though they are free-standing entities having some sort of

life of their own apart from the fact that they are pure abstractions created by the state—this is to me an extraordinary phenomenon.

A hundred years ago, when we had the same debate about whether corporations should have Fifth Amendment rights, it wasn't even close. They weren't free-standing entities. They didn't get Fifth Amendment rights, and the Supreme Court had no trouble saying that they had no Fifth Amendment rights. My sense is if things keep going like this, within reasonable period of time, we will be able to marry a corporation. Until then, we simply have to be willing to be fucked by them. And that's where my legal theory comes from. That was a long Joe Biden, but I needed to work up my courage.

So, is there a problem? I think that frankly Bob and Rick have taken us analytically to the point where I could rehearse the notion that there is no such thing as a single First Amendment, that we have First Amendments, and what the Court has done is create what I call speech submarkets, and regulated speech within the speech submarkets to make sure each speech submarket performed at an optimum level.

The *Velasquez* case, for example – where they treated a court room as a special kind of free market of ideas and said the government couldn't interfere with the flow of information in that market – is an example of something they've done everywhere. The legislative process, the adjudicative process, the workplace, the classroom, the military, the commercial market. I mean, over and over again, you'll see what we have are submarkets in which the free speech rules are designed to make the market work optimally, and regulations that are designed to prevent the failure of a market have a much better chance of being upheld, and I think that is consensus thinking.

Now, somebody who was going take up the cudgels at this point would say: Fine, so what does that say about *Citizens United*. All you've done so far is argue that an election can indeed be treated as one of these submarkets, and that elections should be, as they have been by the Court.

I mean, the fact that we don't allow electioneering near the polls is an example of noting that there is something about an election as a bounded sphere where special regulations can take place where they couldn't take place otherwise. Otherwise, we wouldn't have an Australian ballot, or a secret ballot, or bans on cross endorsement, or bans on writings. It's a process that gets regulated in order to optimize its performance.

Now, the answer is, so what? What is there about corporate speech that is likely to create a suboptimal performance in the electoral sphere? Kennedy's position is: "What are you talking about? All of this is going to be more information. More information is going to be pumped out there. It's going to be pumped out there about politics. It's going to be pumped out there in the context of an election." And that kind of information is exactly the raw material for the best operation of a democratic process. The worst operation of the democratic process is to let the government get its hands on the flow of information just before the election. That's got to be the most dangerous point, and that's the point we should be most worried about.

And that leads me to ask a couple of questions. Because in order to know whether I want to regulate within this bounded sphere, in order to know whether there is a problem within the bounded sphere that would justify regulation, it seems to me we have to ask a couple of questions.

One, what are corporations likely to do with this new power? Are they likely to run rampant with it? Are they likely to all of a sudden rise up and pour billions of dollars into an electoral process two or three days before an election, in ways that completely distort the operation of democracy?

I think not. I think there's a possibility we're going to see a significant upgrade in corporate spending, but I would wonder whether we really are on the verge of the kind of apocalyptic shift in our democracy that critics—and I am a critic of the opinion, I think the opinion is wrong because I don't think you want to take this chance, and I would have allowed regulation prophylactically to prevent the possibility that this might occur.

But now that the opinion's on the table, it seems to me we have to start measuring what the real effects of the opinion are. Not only what the effects of the opinion are on spending in an election, but the backroom effects on whether or not it enhances the capacity of lobbyists to bluff legislators away from votes based on a threat that the spending will take place. And if the bluff is good enough, the spending never has to take place, so we have to worry about the integrated nature of the lobbying and spending process and start taking a look at that.

Second thing we have to look at: We have to look to see what the effect of the spending is. If I thought corporate spending was a kind of randomly distributed phenomenon where corporations would have huge power, but they would be, in effect, speaking for lots of poor people who don't have the same power they do, but acting as their speech proxies, their very powerful speech proxies, and if I thought that that proxy process was simply creating a greater intensity of information that roughly reflected the population of the country, I would applaud the opinion. I would think that Kennedy was right.

Now, where rich people are concerned, although they aren't the same, by and large we do have that kind of random distribution. For every Bloomberg there is a Gates. And there is a kind of rough proxying going on. So wealthy people spending bothers me much less than corporations because by definition, a corporation's speech is public choice speech.

The speech of a corporation must be designed, if the managers are doing their job, to maximize the corporation's short-term profit interest. That's the purpose of the speech. That kind of driven speech – driven in one direction all the time, almost always driven toward non-regulation, almost always toward prevention of governmental efforts to deal with perceived social problems – if in fact what we do is get a steady diet of that on the local, state and federal level, in ways that distort and tilt the democracy, away from dealing effectively with social problems, then I think we have a problem that can be dealt with within Rick and Bob's model.

But the doctrinal question is, how sure do we have to be to know that that problem exists? Is it an intuition that we should go on? What kind of empirical data do we need? If we came back to the

Supreme Court and we made an empirical showing of what kind of effect this was having on the democratic process, I think we'd win. And I think we don't have that now, mostly because the corporations haven't been spending, and because it has been inhibited for so many years—we have a situation in which it's a new world now. The nature of *Citizens United* validates this corporate behavior in ways that allow the corporate executive to say, "Hey, it's the American way for me to spend my money. I have a First Amendment right to do it and the Supreme Court has said I can do it, and therefore, I'm going to do it."

So we're going to see an upsurge in corporate spending. The question is: Is that upsurge going to have the deleterious effects that we think it's going to have? Or is it going to be partially cancelled by an upsurge in union spending and partially cancelled due to the fact that within the corporate world, there are divisions. The cable company is going to fight with Verizon, and they're not necessarily going to have the same electoral position. So while I'm very nervous about *Citizens United*, I think it was decided wrongly, I think it has put our democracy at risk. The question of whether that risk will actually come to fruition I think is one of the issues that people like the Brennan Center and people who care about this issue deeply have got to focus their attention on. And I'll leave it at that.

Monica Youn:

I have to confess that despite Burt's concerns professed at the beginning of his presentation, I was never seriously worried that he would not have something to say. Similarly, Sam Issacharoff is our next panelist and I'm sure he'll have something very valuable and interesting to add to the conversation.

Sam Issacharoff:
So let me turn to two ways of thinking about the world post-*Citizens United* that take a different approach to what's the issue and what's the problem. Let me start with something that has survived both *McConnell* and *Citizens United*. And that's what I thought to be the most interesting insertion in Title II of BCRA, which is the introduction to American law something called the election period. This is a concept which is well-known to European democracies, it's well known to parliamentary systems, where a government collapses or ends or calls an election and then there's a fixed period between the announced end of that government and the election that is to be set. So there's not a four-year cycle, there's just a maximum amount of time within which an election has to be called.

Now the Europeans have certain advantages over us in terms of campaign finance, or party funding as they call it, because parliamentary elections, particularly where you have proportional representation, means that you run through the party, you don't run as individual candidates. So there's not the pressure of fundraising on the individuals. Nonetheless there are very tight controls on this election period, which is seen as distinct from the general endorsement of liberties and freedom of speech, different in every country, different at the European community level, but nonetheless, some version of it exists in every one of the European democracies.

So let me give you the example of Britain to think of what an election period might look like. In England, you have a very tight election period, the government has not yet called an election, it has not set the date, but it probably will, so it will be something on the order of six weeks in which the issue for the English people will be: Who do you want to rule? Tories or Labour, effectively, or Liberal Democrats if you want to vote for them. And that's the only issue before them. This is not seen as an arena for debate, it is not seen as an arena for participation, it is not seen as an arena in which groups can set the agenda.

How is this accomplished? Well, to begin with, every candidate for a parliamentary seat is allowed to spend about £10,000, roughly under $20,000 total. Which means that all the spending, everything takes place at the national level between the political parties. The parties are funded in various ways and they have problems with that, but nevertheless, the parties are funded and the candidates are not. No one is allowed to buy television time, no one is allowed to advertise through television in any fashion. There are state-sponsored debates, those are formal debates between the leaders or the spokespersons for the parties, and that's it. No one else gets to do anything except within that $20,000 boundary within their constituency.

Now in order to make that work, you have to have limitations. Because if you had congressional elections limited to $20,000, it means the people in this room could get together and overwhelm any candidate. Because obviously, only $20,000, if it's something we cared enough about, we could overcome. So the British rule is that individuals could spend nothing to propagandize their views during the election period. In fact, it wasn't quite nothing, it was £5, or $7.50 roughly. If you've been to London, it wasn't enough money to go across London and come back by tube to go to a meeting.

So, a Mrs. Bowman decides at some point that she, as the head of an anti-abortion group is outraged by the fact that nobody knows the views of their member of Parliament or their opponent on the abortion question. The parties consider this a matter of personal privilege and don't broadcast it. And so individuals have no accountability before the public on their views on abortion. Now to me as an American, not having every national election turn on abortion sounds like a great idea, but Mrs. Bowman didn't agree with that. She wanted to put out a flyer that just said, "These are the candidates in every constituency, these are their views on abortion to the extent they're known." That's all she wanted to do. Criminal charges. Because she was going to spend more than £5 to do that. You can't do anything for over £5.

She goes to the European Court of Human Rights and they start down the *Buckley v. Valeo* path. And they say, "No, there's an important liberty interest in expression here. And the liberty interest is violated by this restriction on the spending." This was a huge blow because every European country has this system in some fashion. Goes back to Britain, and the British say, "Ah, well, we have to in the first obey. £5 is too low. We'll make it £500." This is not the last word. But this gives you an idea of what it means in a mature, advanced democracy to have a highly regulated election period that operates distinctly from the general presumptions in favor of freedom of expression.

Now, you think about that in the United States and you think about the amount of silencing of groups that normally participate in the political process that would have to be reached in order to

have a coherent election period in which we can reduce the amount of money, make it more candidate and party specific, and not worry about them being overwhelmed by tertiary actors who set the agenda for them. That's the first point. Let me make the second point very quickly.

I am not sure that corporations want to enter the electoral sphere. In about half the states in the United States, corporations are able to participate in political life, they're able to contribute to candidates, they're able to have independent expenditures. The best data I've seen is from California, where when you look at the top ten spenders over half the decade of the 2000s, it turns out that there wasn't a single corporate interest there. There were unions, public employee unions, a couple of Indian tribes, a couple of rich people, but corporations weren't there.

No individual corporation filed an amicus brief in *Citizens United*, it's not clear to me that corporations want this power that's being assigned to them. The electoral arena is messy, it's noisy, people get pissed off for the wrong reasons or the right reasons, and it's generally not the way to get things from government for corporations. They use lobbying. And the amounts spent on lobbying compared to the electoral arena are orders of magnitude different. Burt claims that they can be related, and perhaps. Perhaps. But nonetheless, one has to be struck by the difference.

So what's my concern about corporations and corporate money? My concern is not so much that they want to give, but that they don't want to give and will be forced to. And they will be forced to in a kind of push/pull system. When they want to give, and there will be occasions when they do, it will be because they have concentrated, particular interests in public choice that Burt raised. But most often, if they have contracts with the government, if they are regulated by government actors who are elected, they are subject to extortion. Give us money, or don't come talk to us if we get into office.

And there is another group that historically we have thought to be both too powerful because they're insiders with this kind of narrow public choice agenda, and to vulnerable at the same time because of extortion. And that group is public employees. And so we have, and we have upheld on two occasions, some variant of the Hatch Act, either at the federal level or the state level. The Connecticut one is being litigated by the Brennan Center at this time. But the idea there is that public employees, if they contribute, it's too unifocal. It's a reinforcement of a special concern.

This is an argument that was begun at Yale Law School about four years ago by Harry Wellington and Ralph Winter who addressed this issue in the context of why it is problematic to have public employees with the right to strike. And their argument was that public employees with the right to strike have the rights of citizens and this secondary right, and so they have two bites at the public policy.

So the argument now is not so much about the distortion or the corruption or the wrongfulness of the electoral outcomes, but it's about the potential distortion in our governmental policy. It's not the inputs of who goes into government, but it's the concern that the outputs will now be distorted because of the shakedown effect. Because the people in power will now look to

promulgate policies that will give them the maximum leverage over the place where it's easiest to get money, which will be corporations or unions.

And so the Hatch Act analogy would be to start looking at approaches which say: If you are contracting with the government (which is the Connecticut approach at the moment) or if you are subject to regulation by the government, you can not contribute to the candidacies of those who are either letting the contracts to you or your regulators in any fashion. And what you do is you prohibit the double-dipping at democracy—that is, the two avenues for influence on the one hand—and you're also preventing the extortion on the other. And on two occasions, the Supreme Court has upheld that logic with regard to public employees.

And I think that that may be a more significant concern than this notion that they're going to come in with billions and billions of dollars on the day before the election to make sure that somebody as opposed to somebody else gets elected to office. American corporations have figured pretty well that they can get what they want from our elected officials regardless who they are through all sorts of ways. They are unlikely to risk this in the electoral arena, or at least in the states where it's permitted, we haven't seen corporations come in in this fashion.

Monica Youn:

Thank you so much. And lastly, I would like to introduce Professor Geoffrey Stone, who I am delighted is here, given that he made it here and apparently his luggage did not. Welcome Professor Stone.

Geoffrey Stone:

Thanks, Monica. I like Sam's idea that we just rename the BCRA and reenact it PCA – the Protect Corporations Act, this is all just "be nice to corporation" week and if five justices are in the majority, we can just assume they will flip. So protect them from extortion. I want to return to the points that Robert and Rick were making about electoral exceptionalism, and that Burt was talking when he wasn't swearing at us.

So assume for the sake of argument that campaign finance regulation of the sort we've been discussing would be unconstitutional under general First Amendment principles. Assume there are such principles, such as Robert stated, and that they do apply very broadly, and unless we find a way to think of elections as a separate and distinct type of First Amendment problem, these regulations are invalid. So the question then, is whether or not speech takes place in the context of an election, is itself a valid reason for departing from the general First Amendment principles that would otherwise make such regulations unconstitutional.

Now it's clearly true as both Robert and Rick noted that there are many different environments in which the Court has recognized that First Amendment general principles do not govern. Now, that's true in schools, classrooms, all the way up to the university level, in trials and appeals, legislative sessions and town hall meetings, candidate debates, presidential press conferences, polling places and ballots, these are all contexts in which we do not apply the general, basic principles of the First Amendment. In all of those situations, we make rules that limit ordinary

free speech principles in order to facilitate other goals, such as order, efficiency, and fairness. The question, then, is whether elections are more analogous to those particular situations or are they more analogous to general public discourse, which is largely unregulated and left to the marketplace of ideas.

So what we're basically talking about here is having to choose between competing analogies. And assuming you've got two analogies from which to choose – public discourse in the ordinary sense and these specific situations in which we hold that those general principles are not necessarily applicable. An analogy to general free speech principles, in public discourse, is pretty obvious. In most senses, speech during a course of an election looks an awful lot like speech in ordinary public debate.

So the question then is: How would one make the argument to say that elections are different? It seems to me that there are three difficulties that one encounters in making the argument that we should treat elections the way we treat trials and legislative sessions and press conferences.

First, is that the boundary between free speech in public discourse and speech in elections is very elusive. As demonstrated by the challenge of drafting McCain-Feingold and the *McConnell and Wisconsin Right to Life* decisions, the line between election speech and issue speech is not an easy one to draw. And unlike the situations in classrooms and appeals and legislative sessions and the like, it's not so easy to demarcate where one slips over from speech about the war to speech about who the president should be. It's not impossible to do that, but it's much more difficult to do it in this context than it is in all of the others in which we have recognized the special applications.

The second problem I think is that in all of these other situations, those contexts exist independently of the issue of regulating speech—that is, first we create things like classrooms or press conferences or town hall meetings and then later we figure out how we apply the principles of speech to those sort of preexisting concepts or ideas. But in the election context we've dealt with elections for a very long time and have not had intrusive rules of the sort we're talking about here, and so, tradition, in this context cuts in the other direction. We don't have a sort of natural tradition of regulating elections in intrusive ways the way we do regulate in trials or press conferences or public debates. Instead, what we want to do is create the concept of elections as a First Amendment matter in order to regulate speech, rather than because we've already independently defined it as a separate and distinct situation. So that's sort of backwards, and backwards in a way that should make us suspicious, because now we're really trying to transform something that has historically been subject to general free speech principles into something that's not. And that's really not the situation with respect to most of the other contexts that have been recognized under the First Amendment.

And the third obstacle here is that, in all of the other situations, the regulations are thought to be necessary, either in order to maintain order and or because there's limited time, or limited other resources. So that there's a need, a real need for the regulation in order to parcel out limited time or to maintain a certain order that's necessary.

But in the election situation, we want to restrict speech even though there is no external need to do so, in terms of considerations like limited time or limited resources or the need to preserve order. Rather, we want to regulate speech here entirely because we want to regulate speech, and because in this context we don't trust the marketplace of ideas to operate, even though we trust it to operate in other circumstances. And so the reason for regulating it in this situation, unlike the others, is really not legitimately justified by these other constraints of time and resources and so on. It's really just about saying, we don't think we like the way this market operates here, so for its own sake we want to change it to make it better. In principle that's a much tougher sell.

Now, my suggestion for how to approach this, is to forget about campaign finance regulation, for the moment, because I think that distorts the discussion. There's so much energy and enthusiasm and passion focused on the question of campaign finance regulation that this becomes a kind of cart-and-horse argument – that is: How can we manipulate things to get the right policy result that we want to achieve.

I think the better way to proceed is to go back a step and to see if one can make the case, as a matter of general principle, that there are aspects of elections that are sufficiently analogous to the situations that exist in classrooms and in town hall meetings and in trials that it actually makes sense as a matter of principle to treat elections in a way that is similar to the way that we treat these other circumstances, and to examine what are the arguments that would be pro and con to such an approach. If an argument can be made that favorable, is it really feasible to regulate elections in a way that's analogous to these other circumstances?

Then if we're persuaded that elections really are distinct, that they're really not just a part of general public discourse, but there's something about them that justifies regulation and attention different from public discourse and makes them analogous to these other circumstances, then I think the thing to do is not to start with campaign finance regulation but to start with other regulations that one would then consider, once one made the intellectual leap to say that elections are like trials.

And that would mean, for example: Should we support a law that makes it a crime for anyone to make a knowingly false statement in the context of an election campaign, that would be like perjury in a trial? Would we accept that in an election context? How about no hearsay statements? No one – we have to define who the no one is, is it any citizen during the campaign, or is only a formal candidate or spokesperson for a candidate – but no one may make statement that relies upon hearsay evidence. That would make it a better process. If we don't like it in trials, then we certainly shouldn't like it in the context of public discourse. Or how about no unduly prejudicial statements? In the same way that we exclude certain evidence in trial because we don't trust the trier of fact to deal rationally with the information. Once we start thinking of elections as special bounded spheres that should require government intervention to produce the right kind of process, then presumably we should prevent individuals from disclosing unduly prejudicial information. But that might be, of course, obviously very contentious, just as I suppose it is in the trial context. So should that be something that we think about regulating?

Certainly, the idea of equal time by the media and by candidates themselves might make sense, once we start thinking of elections in this way. We might also think, like someone this morning

mentioned *Mills v. Alabama*, a case the Court held unconstitutional by a vote of 9-0, and which involved speech the day before an election. Well, nowadays, if we're going to think about elections this way, we might prohibit any speech by anyone within a week of an election because we want to make sure there's adequate time to respond.

Of course the same objections would be raised that were raised properly in my view in *Mills*, but it becomes much more plausible once we think of elections in this different way. We have one person, one vote, so should we have one person, one speech? So each of us is given one quantity of speech, defined somehow, and that it, once you've used your quantity of speech you're done. You can't go out and vote a second time. Criminals can't vote in many states, so maybe that means criminals can't speak during the course of elections, because they've forfeited their right.

So my point about this is simply to say, the right way to think about this analytically and to build a strong argument is to separate it to some extent from the issue of campaign finance regulation and see whether we think a credible argument can be made for the claim that elections should be treated the same way we treat trials and classrooms and so on. And then to ask what regulations follow from that, which are good, which are not good, and then to finally get to the question of campaign finance regulation.

Monica Youn:

Thank you very much. I think that this has been a very interesting panel, and we still have over half an hour left of discussion time on this topic. So what I was thinking about doing was opening it up first of all to the panelists to see if any of them have short additions to their prepared remarks that they would like to offer, and then open it up to the audience. Is there anyone who would like to add on to what they had said previously or to ask a question of their fellow panelists?

Questions and Answers

Monica Youn:

I'm going to now open it up to the floor, but the panelists should also feel free to chime in if they want to respond to a floor comment.

Deborah Hellman:

So this I take it is a sort of friendly amendment to Roberts' way of thinking of things and responds also a little bit to Geoff. Which is, instead of thinking of elections as serving a particular purpose—what's the purpose of elections you said, and the other institutions, classrooms, courtrooms all have a purpose. That strikes me as misguided in the sense that I don't think of elections or democracy of having a purpose but instead instantiating a value. That is, why the instrumental conception? Because if we think of it that way, I think we get very different

rules, or very different conceptions of the rules, the speech rules that might apply if we think that democracy instantiated the value that everybody's interests matter equally, or something along those lines, then we're going to get a particular conception, and that's going to make it very different from a courtroom.

All the examples you have of a courtroom, I mean, yes we don't want to do all those things, but that's because a courtroom aims at arriving at truth or something like that. And I don't think of elections as doing that but instead instantiating the value that everybody matters equally. And if there is any institution that mirrors that, it's going to be harder to find because most institutions actually are aimed at achieving a particular purpose. They are more instrumental, I think, than democracy is. The only thing that possibly comes close in my mind is something like kindergarten which, maybe yes, it has a purpose—to socialize children—but, in part, it instantiates the value that everybody matters equally, and that we do see something like equal time, everybody gets one speech and we're going to go around the classroom. I mean it does kind of look like that.

Floyd Abrams:

Two questions for Burt.

First, with respect to the knowing falsehood issue. We decide that everyday. It is possible to prove knowing falsehood. Certainly Justice Brennan thought so, in *New York Times v Sullivan*. And libel lawyers do it all the time. My own reaction is that there is a serious First Amendment argument that we shouldn't trust the government. There are the courts to make a decision about knowing falsehood with respect to a candidate for public office, and that is a First Amendment argument. I'm interested in your reaction.

The second, Burt, I'm sort of surprised what it is you say you want to look at over the next few years or whatever in terms of what you're going to do with that information if you got it. You said, first, you want to know what our corporations are likely to do, and, second, you want to know the effects of spending under the new law. Suppose we were to find out that Sam is right, his suppositions or conclusions that corporations don't do a whole lot. Maybe they spend a little more money. Maybe it's more on one side then another. That doesn't seem to affect the balance a whole lot. And suppose we find out that the effect of the new rule is you find out that it doesn't have much of an impact in dealing with social problems, which as Sam said, seems to raise some big time First Amendment issues. But if you were satisfied that not a whole lot of new money was being spent, and it hasn't seemed to have an awful lot of impact on dealing with social problems, would you conclude from that therefore you don't much care, or that the result is not that important after all?

Burt Neuborne:

Let me answer the second question first. Because it's the easiest one. Yes. If, in fact, *Citizens United* is much ado about nothing, and that this will not have a significantly deleterious effect on the functioning of American democracy, either because corporations do not choose to use the right that they are given, or when they do use the right they are given it does not distort. When I

said distort, I don't mean that they are putting in false views, I mean that what you have is an enormous overbalancing of one set of views over another, so you don't get a real chance as a voter to be able to make a reasoned judgment.

If that doesn't happen, then I think it's no harm, no foul. I don't care if they want to spend their money this way if it doesn't adversely affect American democracy. I think that the major unanswered question is something that can't be answered now because the game has been changed. Up until now, corporations were inhibited from doing this, first because it was illegal in many places. Second, because there was a major social sense that it was inappropriate to do. And now that that's been lifted because there is the validating influence of a First Amendment decision saying: it's the American way to spend your money this way. And, secondly, because they are now going to see that they can gain advantage. We don't know what's going to happen in the future.

I think we have to watch. I have no reason to say this other then my respect for Kennedy, but my sense is that if you made a showing to Kennedy that this was eroding significant aspects of American democracy, he would think his vote was wrong. His bet is Sam's bet: They're not going to spend all that much, and if they do it's not going to have all that much influence. And if that's right, then I don't know that we have to get too excited.

Floyd Abrams:

I'm not going to make this a colloquy, but why wouldn't you give Kennedy the credit for believing what he said, which is that he doesn't know. He didn't make a prediction. His view is that political speech, which is generally protected under the First Amendment, particularly during an election season, and that the fact that it's a corporation didn't matter. That's what he said.

Burt Neuborne:

I think a little parenthesis at the end of his opinion: In the absence of a showing that it does matter. I think his adjudication is classic First Amendment adjudication, you don't regulate unless there's an overwhelming showing of need. He would stand here and say, where's the overwhelming showing of need? There are all of these predictions and fears that something might take place in the future. Let's see if it takes place in the future. If it takes place in the future, I think he rethinks.

Your first one about falsehood. The application of libel since *Times v. Sullivan*, it seems to me to prove that we can't distinguish truth from falsity. It is a morass, it is a swamp. It costs vast amounts of money, those cases are sometimes decided one way, sometimes decided another way. The fact that they are settled all the time indicates that the litigants themselves know that it's a crapshoot and that it's impossible to do this. I would be much more radical, I think, than you. I would have eliminated the cause of action in civil law, because you can't adjudicate it well. But I'm not ready to import it across into politics. Given the history of how badly it has fared in ordinary civil libel, it's just something that we don't know how to do well.

Geoffrey Stone:

I want to make one additional comment about the libel point, the false statement point. Which is that the reason I threw that out is because its designed to test the concept of exceptionality because, clearly, in general public discourse, the government is not allowed to punish false statements of fact that are not libelous.

But in a trial you are liable for perjury, and the question is: What do we mean by exceptionalism? There are courts, of course, who upheld the laws that make it a crime to make false statement of facts in political campaigns even though nobody is libeled. And the question, then, is: does that now take on greater force given the fact that we're saying that elections are separate and special and maybe more like trials than public discourse.

Robert Post:

I think the answer to the question you raise is: We mean by exceptionalism that the regulations of speech are decided by reference to what we regard as the purpose or, in Deborah's terms, the value of the particular institution.

And so you wouldn't ordinarily analogize it to a trial, you would analogize it to what it is, and that in turns would provoke a debate about what the purpose is of elections. And so forth and so on.

Geoffrey Stone:

The problem is, there are two purposes for elections that we've been very comfortable with. And they point in different directions. One purpose is to aggregate the preferences of the voters, and that's a mechanical task on Election Day. And those countries that have gone over to this notion of an election period, recognize that this aggregation of the preferences—the snapshot—is what elections are for, and they regulate accordingly and that would yield one set of principles.

The other is that it is the most focused heightened moment of public engagement with the values of our democracy. It is citizen self-government in its purest form because it's the only time that you can address people and get their attention on the issues of the day, except in truly exceptional moments, like healthcare or that sort of thing. But other than that, this is it. And they yield different conclusions because the purposes are different. One if about self-governance, and the other is about figuring out who is going to be the secretary of whatever after election day.

Robert Post:

What about a third purpose, which is to say: You imagine elections as a recurring institution that connects the electorate to the government to have certain legitimating effects. So it's neither the be-all or the end-all of democracy, which is public formation generally, nor is it merely preference aggregation, but it's a repeat player game in which you establish a relationship, and if the rules of the game are such that it's failing at that purpose, then you have a problem.

Monica Youn:

I am staging an intervention on behalf of Marty Redish, who has been very patient with his question.

Martin Redish:

I do want to make a comment and then ask a question. The comment is that this concept of electoral exceptionalism creates an interesting sort of personal irony for me, because many, many years ago when I first started arguing that commercial speech deserved First Amendment protection, I was met with a barrage of responses: that's not what the First Amendment is about; the First Amendment is about making us more informed voters. That's the essence of the First Amendment. Harry Calvin, Alexander Meiklejohn… and now I'm hearing that the period of the election is so exceptional that it's even shot past the First Amendment, that it's no longer controlled by it, though, as for the cases Rick cited, there are pretty much an equal number of cases going the other way.

My question is this: even if we accept for purposes of argument the notion of this electoral exceptionalism, I'm concerned that it doesn't come in a neat, separable unit, that there's going to be an enormous spillover into general debate. Sam's account of what goes on in England, he didn't seem to find as frightening as I did. I'd like to ask Sam and Robert and Rick whether they think that the British system that Sam described is an acceptable, logical outgrowth of the concept of electoral exceptionalism, or at some point does the First Amendment play any limiting role?

Sam Issacharoff:

I have the New Yorker view, which is: there will always be an England, it will be there, it's been relatively stable, they had to execute a few kings and stuff, but basically, they worked it out. And one of the reasons this works there is that they have a parliamentary system, they have a prime minister, not a president, they have nobody elected to the national office independent of the party slates, it has a logic to it. I find it extraordinarily difficult to import that logic to the U.S., where you have candidate-centered elections, where you have a strong First Amendment tradition. England didn't have a Bill of Rights until only very recently.

My view, Marty, is not that this is horrifying because I go to London and I'm not scared. You have to look the right way at intersections. This is just a different political structure, and my only point was if we want to start pushing the idea of an election period, understand that it's going to run up against a lot of our First Amendment values, which viewed this election process from these two guises of aggregation and also as heightened speech arena. And I'm not sure that our First Amendment could tolerate that.

Michael Waldman:

I wanted to ask the panelists what they saw potentially as the rights or interests of the voters in an electoral exceptionalism model. It seems to me, for example, even using some of the factors

Geoff Stone talked about, that there is a time period; and it's the time period by which voters must make up their minds. And there is a zero-sum game if the communication with voters—as it has been until perhaps recently—is through 30-second ads on broadcast television, which again is a limited good. And a number of other ways in which the interests of voters may be best enhanced by thinking in electoral exeptionalism terms. We've been talking very much, again, about the speakers – either the independent speakers or the candidates – but do the voters have a distinct First Amendment value, and how does that play into this idea?

Burt Neuborne:

I think the definition would be making sure the voter has tolerably adequate raw material to make an autonomous choice about who to vote for, which is why I worry about huge amounts of corporate spending. I know that it's subject to a viewpoint criticism, but, interestingly enough, it's designed to try to allow the voter to make a viewpoint choice as between viewpoints without being subjected to one viewpoint massively just before the election under a setting in which the rules are always going to be skewed to that one viewpoint getting a maximum exposure just before the election without the voter having a chance to hear something else.

I don't want to exaggerate that model. We don't live in a world in which people are let out of their houses and hear only one thing. And it may well be that my fears are going to be unfounded because this is not likely to occur. But I think it will occur undoubtedly in certain local and state elections. We will see zoning, environmental protection where a local company has a vast economic stake in the outcome of a particular setting. It's inevitable that they're going to spend a lot of money and lay it in the election to try to sway it one way or the other.

How to get the balance, I don't know—maybe public financing. Public financing would be better if you wound up with both sides being able to have a tolerable shot at getting their message across. But if we don't have public financing, and only one side has a tolerable shot at getting the message across, then I don't see how democracy has any integrity left anymore. It's not the result of an autonomous voter voice. It's the result of an ideological barrage. And I don't know how democracy survives in that kind of setting without people just giving up and not bothering to vote.

Monica Youn:

I'm going to let Rick have the last word.

Richard Pildes:

I'm sorry to take the last word. But two points I wanted to make. One very small one in response to Marty's concern. Many First Amendment theorists rush to the slippery-slope kind of concern: Where will this all go? I will just point out that we have had regulation of corporate and union participation on both contributions and spending for 100 years, and there's been no effort to extend that into the general sphere of public debate in the U.S. It's not even proposed anywhere legislatively as far as I know. So the American cultural and legal traditions are very very deep here, and I'm not particularly worried about the spillover concern.

But I think the deeper point I want to make is in response to Sam. Sam said that elections have two different purposes, and that makes the problem of thinking about a distinct electoral debate complex. First of all, I would say that there are probably at least three of these purposes and maybe more for elections. It's not just the aggregation or deliberation kinds of purposes, but, fundamentally, elections are designed to empower the government that people are able to accept and believe in. And that entails in part, I think, believing that the people you're putting into office are there making their best good-faith judgments about what policy ought to be, not that they're bribed or, having their judgment distorted.

Also, on top of that, any interesting social institution is complex and has multiple purposes. I mean we talk about schools, are schools socialization institutions? Are they creating autonomous critical thinkers? What's the balance between those purposes? So the fact that there may be multiple purposes for complex social institutions like elections doesn't seem to me to begin to be a reason to not have public debate about what those purposes ought to be, which ones ought to be given priority.

I would think if anything the answer to the complexities of these purposes is that we have a political debate and resolve this in one way, say through legislation in Congress. It ought to take a very powerful, dominating single purpose of the institution to be strong enough for the courts to step in and say that, because that purpose has been violated, there's a constitutional violation. It seems to me the very complexity of the purposes of elections means that this is what we debate as part of our self-understanding of what the point of elections is, and that courts ought to play less of a role, not more of a role.

Monica Youn:

I want to thank everybody for just a fascinating debate.