

In The Matter Of:
Campaign Finance Symposium

February 8, 2019

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2 Campaign Finance Symposium
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4 Date: Friday, February 8, 2019
5 Time: 9:00 a.m.
6 Place: Notre Dame Law School
7 Eck Hall of Law
8 Patrick F. McCartan Courtroom
9 Notre Dame, Indiana 46556
10
11 PARTICIPANTS:
12 Professor Nicholas Stephanopoulos
13 Professor Justin Levitt
14 Professor Ciara Torres-Spelliscy
15 Professor Lloyd Mayer
16 Professor John Nagle
17
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1 MS. CRAIG: Good morning, everyone. Thank you very
2 much for being here today. My name is Kristine Craig,
3 and I'm the executive editor of the Journal of
4 Legislation.
5 I would like to begin with some introductions for
6 our speakers. First we have Professor Ciara
7 Torres-Spelliscy on the right. Professor
8 Torres-Spelliscy teaches at Stetson on election law,
9 corporate governance, business entities, and
10 constitutional law. Her academic work has appeared in
11 the Harvard Journal of Law and Public Policy and the Duke
12 Journal of Constitutional Law and Policy. She has also
13 written pieces for The New York Times, The Economist, and
14 Forbes Magazine. She has testified before Congress on
15 campaign finance reform and has spoken at 31 universities
16 on topics around the country.
17 Next we have Professor Nicholas Stephanopoulos.
18 Professor Stephanopoulos teaches and researches at the
19 University of Chicago on a variety of areas within
20 election law, constitutional law, and comparative law, in
21 addition to publishing in academic journals such as the
22 Harvard Law Review, Standard Law Review, University of
23 Chicago Law Review, and the Yale Law Journal. He has
24 written for publications such as The New York Times and
25 the Chicago Tribune. He's also been involved in a

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1 variety of recent litigation efforts, including his work
2 on the efficiency gap for the first successful partisan
3 gerrymandering lawsuit in more than 30 years.
4 Next we have Professor Justin Levitt. Professor
5 Levitt is a nationally recognized scholar of
6 constitutional law and the law of democracy at Loyola Law
7 School in Los Angeles. His academic work has been
8 published in the Harvard Law Review, the Georgetown Law
9 Journal, the William & Mary Law Review, and the Election
10 Law Journal. He has served several presidential
11 campaigns in a variety of capacities, has testified for
12 committees of the United States Senate, and served as a
13 deputy assistant attorney general in the Civil Rights
14 Division of the U.S. Department of Justice.
15 Next we have our own Professor Lloyd Mayer.
16 Professor Mayer has been a faculty member at Notre Dame
17 Law School for 14 years, teaching courses in
18 not-for-profit organizations, business enterprise
19 taxation, election law, and professional responsibility.
20 His academic work has been published in the Stanford Law
21 Review, the Yale Law and Policy Review, and the Boston
22 University Law Review, to name a few. Professor Mayer
23 also serves as the Journal of Legislation's advisor.
24 I would also like to introduce Professor John Nagle,
25 who will be joining us late in Symposium. Professor

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1 Nagle has been a faculty member at Notre Dame Law School
2 for 21 years, teaching courses in environmental law,
3 torts, property, and legislation. His academic work has
4 been published in the Harvard Journal of Legislation, the
5 Yale Law Journal, the Columbia Law Review, and the
6 University of Pennsylvania Law Review. Please join me in
7 giving them a round of applause.
8 I would also like to thank the Journal's executive
9 board, especially our Symposium chair, Matt Sachaj, for
10 organizing this event today.
11 Lastly, we would like to thank our co-sponsors for
12 making this Symposium possible, namely the Notre Dame Law
13 School Program on Constitutional Structure, the American
14 Constitution Society, and the ACLU.
15 With that, I will turn it over to our first speaker,
16 Professor Torres-Spelliscy.
17 PROFESSOR TORRES-SPELLISCY: Good morning.
18 So I am going to talk about lawyers, guns, and
19 money, which I know is a different title than is on the
20 program, and this is a preview of a book that I'm writing
21 right now. So this will be my second book, and its title
22 is "Political Brands," and I've been working on
23 commercial branding in politics for about five years now,
24 and so each chapter in this book is going to be an aspect
25 of American political life that is being branded.

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1 So we're going to have a chapter on branding
 2 treason, branding greed, branding corruption, and
 3 branding tragedy. And it's that last chapter, branding
 4 tragedy, that I'm going to talk about today. And I
 5 really could use the feedback and some help, because I am
 6 still noodling through how exactly to capture what
 7 tragedies, especially around gun violence, what is going
 8 on in the country right now.
 9 I was just listening to NPR, and they had a
 10 remembrance of a kid who was at Marjory Stoneman Douglas
 11 High School, and she and her mom were talking to
 12 StoryCorps. And I think that's just sort of emblematic
 13 of what is going on with our discussion of that topic.
 14 So I come to this through the lens of money and
 15 politics. And to understand why I'm talking about gun
 16 tragedies, I first have to ask a broader question, which
 17 is: Why do I want transparency of money in politics?
 18 And to answer that question I have to ask an even broader
 19 question, which is: What is going on with corporate
 20 political spending? And this is something that I have
 21 spent many a day, hour, minute, of my mental space
 22 thinking about especially ever since Citizens United.
 23 So I'm going to start in 2012. In 2012, you get
 24 corporate publicly traded companies stretching their
 25 legs, using their Citizens United rights, and this is all

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1 spending at the federal level. And so our big spender in
 2 2012 is Chevron. But it's a modest number of
 3 corporations, and the aggregate amount that they spend is
 4 around \$4 million.
 5 The story is very similar in 2014 in the midterm.
 6 We get Chevron again is one of our big political
 7 spenders. But again, it's not that many companies, and
 8 the aggregate total is around five million. Publicly
 9 traded companies in 2016, there are more of them, and
 10 they are spending more money. And -- but we're only up
 11 to 16 publicly traded company donations for around
 12 \$7 million.
 13 Now, in our last election, I think one of the things
 14 that has been somewhat underreported is that there were
 15 far more publicly traded companies spending in the 2018
 16 election for a bigger grand total. I think this story
 17 has gotten underreported in part because the big story
 18 from the midterm election was the blue wave that flipped
 19 the House. And all of this money was actually going the
 20 other direction. All of this money was actually
 21 pro-Republican. So this takes four slides to show you.
 22 So we have 30 publicly traded company donations to
 23 super PACs in the midterm, and the total is significantly
 24 higher in terms of \$18 million. And so the trend over
 25 time is that more publicly traded companies are spending

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1 more money, and they are doing it in a disclosed way.
 2 So what I like about this trendline is that more
 3 companies are spending on the record. What I don't like
 4 about this trendline is that they're spending at all.
 5 And the reason that those last bubbles were red is nearly
 6 all of the publicly traded company spending that goes to
 7 super PACs is almost entirely pro-Republican. There's
 8 this one teeny tiny little sliver of a publicly traded
 9 company giving to a Democratic super PAC, but the overall
 10 trend is that that money is going all to the right, which
 11 is sort of interesting, because if you actually look at
 12 the employees or the customer bases of these companies,
 13 they are politically heterogeneous. And so I apologize
 14 for the smallness, but these are 30 different Fortune 500
 15 companies, and what this slide is looking at is the
 16 political giving from the employees of those companies.
 17 This is not money coming from the corporate treasury.
 18 This is coming from the individuals who work there. And
 19 what you can see is Democrats in blue and Republicans in
 20 pink.
 21 You can tell that there are very few companies that
 22 are either hard left or hard right if you look at the
 23 donations from their employees. And even our good
 24 friends at Chevron, if you look at the money from the
 25 employees of Chevron in the last election, there was more

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1 money going to Democrats than to Republicans. And fun
 2 fact, the biggest beneficiary of Chevron employee money
 3 in 2018 was Beto O'Rourke.
 4 So that's all the money you can see. What's great
 5 about money you can see is you can actually see some of
 6 these trends. What I am more deeply concerned about is
 7 the money that we can't see. So this is the trendline of
 8 dark money in federal elections. We had a high mark in
 9 2012 when Obama and Romney were running against each
 10 other, and we've never hit that high water mark since.
 11 I do put a huge asterisk over the 2016 election. I
 12 think we don't know exactly how much money was spent in
 13 the 2016 election. We may know more as more indictments
 14 roll in, but we know that certain spending should have
 15 been reported during the 2016 election which simply was
 16 not. So I'm hoping that one day we will have a clearer
 17 picture of that particular slice of the pie.
 18 But even in 2018, there was around \$150 million in
 19 dark money in the federal elections alone. And one of
 20 the reasons that I care about dark money is I think it
 21 really thwarts accountability, and accountability in many
 22 different directions: Accountability for politicians;
 23 accountability of corporations to their shareholders;
 24 accountability to their customers as well.
 25 So here is a little preview of this chapter in this

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1 book that I am still grappling with, and the chapter
 2 title is "Branding Tragedy." So one of the ways to think
 3 about dark money is if you compared the dark money that
 4 was spent in 2016 compared to what I showed you in some
 5 of my previous slides, the dark money would completely
 6 eclipse the disclosed publicly traded money that we can
 7 actually see. And what I deeply suspect is that in that
 8 dark part of the circle, there's other publicly traded
 9 corporations giving, but they are not showing the courage
 10 to spend under their own name.
 11 And one of the sources of dark money in the 2016
 12 election was the NRA, who were responsible for over
 13 \$35 million of dark money in 2016. So we could ask the
 14 question: What would accountability look like for the
 15 NRA? Now, one thing that it might look like is Bob
 16 Mueller knocking on their door, and in the question and
 17 answer period we can get into why I think Bob Mueller
 18 might be at the NRA's door.
 19 But so far, in the past year, one of the ways that
 20 the NRA has been held accountable is by these teenagers.
 21 These are some of the survivors of the Parkland massacre,
 22 which happened nearly a year ago on Valentine's Day, and
 23 I'm going to talk about a couple of the tactics that they
 24 have used.
 25 And what it strikes me with the Parkland students is

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1 this is different than a normal boycott. So with a
 2 normal boycott, usually you have some sort of finite
 3 objection to a particular brand doing a particular thing,
 4 and you boycott, and you try to get that brand or that
 5 company to change that sort of small behavior. And
 6 usually it doesn't work.
 7 I feel like with the Parkland students, they are
 8 trying to break a line of causality that led to their
 9 friends' deaths and their teachers' deaths. And so I
 10 think part of that link of causality for them is the
 11 nexus between corporations, politicians, and the NRA.
 12 And this is -- it's some other level than a boycott.
 13 This is like trying to siege Carthage. This is we will
 14 burn down your houses and salt your land.
 15 So here's some of the things they have been up to.
 16 So this is my local grocery store. I too live in
 17 Florida. And as a grocery store, I like it very much.
 18 I'm there every week buying my groceries. As someone who
 19 studies money in politics, I'm not a big fan. And one of
 20 the things the Parkland students noticed was that Publix,
 21 both its corporate treasury and the founders of Publix,
 22 and some of their corporate leaders presently, were
 23 giving a goodly amount of money to a candidate for
 24 governor named Adam Putnam. And when they figured this
 25 out, they went into action.

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1 And one of the things that the Parkland students
 2 objected to is Adam Putnam's relationship with the NRA,
 3 and this is not the students putting words in his mouth.
 4 These are things he would say. He would proudly
 5 pronounce that "I am an NRA sellout." And he would brag
 6 about his A-plus rating from the NRA. And so the
 7 Parkland students went to their local Publix, which is
 8 right near their high school, and did a die-in at Publix.
 9 And, you know, they called the media, and they got a lot
 10 of press for this. And I'll tell you how that story ends
 11 in just a moment.
 12 Another tactic that they had was they organized a
 13 huge march in Washington called the March for Our Lives.
 14 And that march included lots of students from Florida,
 15 some from Parkland itself, and others from around the
 16 state. And you may have seen this while you were looking
 17 at coverage of the march but not really realized what
 18 certain things meant.
 19 So they had these price tags on their bodies, and
 20 the price tags for the students from Florida said \$1.05.
 21 And the way that they arrived at that amount is they
 22 looked at the amount of money that the NRA had spent
 23 supporting Senator Marco Rubio, and then they divided it
 24 by the number of students in the state of Florida, and
 25 that's where they get that number. They also have

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1 numbers for the other 49 states, and so the numbers were
 2 different depending on how much the NRA had spent in
 3 those states compared to how many students were in those
 4 states.
 5 So we can ask the question: Has there been
 6 accountability in terms of Publix? Publix announced
 7 immediately after this die-in at their store that they
 8 would end all corporate political donations. Whether
 9 it's causal or not, Adam Putnam lost his primary. Now,
 10 Senator Rubio is not up for election until 2022, and I
 11 think this will be very interesting to watch whether the
 12 passion that these students have now will peter out, and
 13 they may, you know, pick a different target, or it's
 14 possible that Marco Rubio will continue to be hard-headed
 15 and continue to like being supported by the NRA. We
 16 don't know how this particular story will end.
 17 Now, I think if we're honest about looking at
 18 marches on D.C., there are a lot of marches on D.C. A
 19 lot of them don't have a lot of impact, even when they
 20 are as big as the March on Our Lives. But every now and
 21 then you get movement, and you never can tell what will
 22 be persuasive to another American. And one of the things
 23 that the Parkland students did is they were trying to
 24 break up this causal chain between corporations, the NRA,
 25 and politicians. And so one of the things they went

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1 after were the corporate relationships between very
 2 famous brands and the NRA itself. And the result of that
 3 in terms of accountability for the NRA is these are all
 4 brands that stopped doing discounts for NRA members.
 5 This isn't a complete list, but this was basically all I
 6 could fit on one slide at one time. And some of this I
 7 find remarkable, like that you could get an airline to
 8 change any policy whatsoever is just amazing.
 9 And the Parkland students also caught the attention
 10 of the governor of New York. And so the governor of New
 11 York used his authority as the head of the Department of
 12 Financial Services, which regulates banks and insurance
 13 companies, because either they are based in New York or
 14 they do sufficient business in New York to be regulated.
 15 And he put out this directive that companies that are
 16 regulated by the State of New York should assess their
 17 relationship with the NRA. And one of the things I found
 18 very striking about this particular pronouncement is he
 19 actually pointed to Parkland as a reason why businesses
 20 should do this reassessment.
 21 And then a month later the governor of New York,
 22 through the Department of Financial Services, also went
 23 after an NRA product called Carry Guard, and the State of
 24 New York has taken the position that selling Carry Guard,
 25 which I am not an expert on insurance, but my

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1 understanding is the idea behind Carry Guard is it's an
 2 insurance policy that kicks in after you have killed or
 3 maimed someone with your gun. And so the State of New
 4 York has taken the position that this type of insurance
 5 is illegal in the state of New York, and so they have
 6 made Chubb and Lockton stop selling it in the state of
 7 New York, and then they put a hefty fine on these two
 8 entities part of the consent decree.
 9 As a result, the NRA is now suing Governor Cuomo,
 10 and in this lawsuit they assert that Cuomo's directive
 11 has blacklisted the NRA to the point where the NRA
 12 itself, the big nonprofit entity, cannot get insurance.
 13 The other thing that they claim is that the NRA is
 14 nearly broke, and we can tell from public facing
 15 documents that the NRA has been running a deficit for the
 16 past two years. So this is a form of accountability, but
 17 this, for me, goes back to the question of whether money
 18 in politics is transparent.
 19 If you don't know that Publix is supporting Putnam,
 20 then you can't put pressure on either Publix or Putnam.
 21 If you don't know the NRA is supporting Rubio, you can't
 22 put pressure on either the NRA or Rubio. And I would say
 23 what's good for the goose is good for the gander.
 24 I imagine some of you find what Governor Cuomo did
 25 completely reprehensible, over the top, not okay. Well,

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1 I think you can look at Cuomo's donations and see if you
 2 can put pressure on his donors to change his behavior.
 3 But if you have dark money, then all of that
 4 accountability is impossible. So for me, I go back to
 5 first principles, which is I still fight for disclosure
 6 laws, because I want a society where there is some
 7 accountability.
 8 So that's the end of that, and then we can sit and
 9 chat.
 10 PROFESSOR MAYER: Well, first I would like to open
 11 it up to our fellow panelists. Do you have any questions
 12 for Ciara? And then we'll open up to the audience.
 13 PROFESSOR STEPHANOPOULOS: One question is just, you
 14 know, if we think about the categories of post-Citizens
 15 United spending, we have, you know, disclosed corporate
 16 spending, we have dark money, and then we have, you know,
 17 super PAC contributions and other forms of spending, but
 18 not by corporations, right. And if we think about those
 19 three categories, the final one is one that you didn't
 20 talk about is by far the biggest, right?
 21 PROFESSOR TORRES-SPELLISCY: Bigger. Yeah.
 22 PROFESSOR STEPHANOPOULOS: I think like an order of
 23 magnitude, there were, let's say, \$20 million of
 24 disclosed corporate spending, \$150 or \$200 of dark money,
 25 but over a billion in total super PAC spending. And so I

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1 wonder, I guess, first, how concerned should we be about
 2 the two categories you're focusing on when they're a lot
 3 smaller than the non-corporate super PAC spending pile.
 4 And then what are your thoughts about that pile, the
 5 biggest pile of money?
 6 PROFESSOR TORRES-SPELLISCY: Yeah. So the biggest
 7 pile of money actually comes from very rich individuals
 8 like Sheldon Adelson. And I guess a few things. One,
 9 because Sheldon Adelson is a human being, you can reason
 10 with him, which I think is very different than money
 11 that's coming out of Chevron where you're trying to
 12 reason with a corporate structure which is different.
 13 And I feel like Chevron's shareholders and the
 14 shareholders of the publicly traded companies have to --
 15 well, in my ideal world, we would solve two distinct
 16 problems. One is a lack of transparency. So right now
 17 corporations do not have to tell their shareholders where
 18 they're spending in politics, and moreover, they don't
 19 have to give consent to that political spending.
 20 So this is very different than what happens in the
 21 UK. In the UK, the spending by corporations is
 22 transparent, so they actually account for all of the
 23 money that's going into politics from the corporate
 24 treasury. And moreover, it has to be approved before
 25 it's spent by shareholders. And so I would advocate for

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1 that kind of UK model in the United States. And it's not
 2 that I'm not concerned with the Sheldon Adelsons of the
 3 world, but it's a different problem. I think the
 4 corporate money comes with all of these corporate law
 5 problems attached to it, which are sort of separate and
 6 distinct from the Adelson problems.
 7 And then the other thing, I guess, to think about is
 8 Adelson is a casino mogul, so you could put pressure on
 9 his casinos if you're objecting to his political
 10 spending.
 11 PROFESSOR LEVITT: So actually I want to follow up
 12 on that. I've got, I guess, two or three short comments,
 13 and then I want to ask you what the problems coming out
 14 of corporate spending are that are different from the
 15 problems from Adelson and whether we ought to be more
 16 concerned about the Adelson problems than the corporate
 17 problems.
 18 With respect to the dark money sort of trendline,
 19 I'll add a category. So there's the direct corporate
 20 spending, there's the dark money we know about, then
 21 there's all the other dark money.
 22 PROFESSOR TORRES-SPELLISCY: Yeah.
 23 PROFESSOR LEVITT: And then there's super PAC
 24 spending. So just one thing to realize -- and I know
 25 that Professor Torres-Spelliscy knows this really well --

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1 I think the stats that are up there for the dark money
 2 that is being spent roughly tracks media spending on
 3 particular types of advertising where there's a
 4 responsibility to report that the money was spent, but
 5 not who spent it.
 6 But we've got a drunkard streetlight problem in that
 7 we're searching where the light is, which may or may not
 8 be -- this is a long-ago fable. Cop wanders across a
 9 dark street and finds a guy obviously intoxicated,
 10 scrambling around in the dark, right below a street
 11 light, on the ground. He's obviously looking for
 12 something. The cop walks over and says, "Sir, are you
 13 okay?" Guy says yeah.
 14 Can I help you?
 15 I think I dropped my keys.
 16 Oh, do you know where you were coming from? Do you
 17 know what the path you took to get here was?
 18 Oh, I wasn't anywhere near here. I was over there.
 19 But the light is much better here.
 20 I think we know what spending has been reported in
 21 various ways, because there are some disclosure laws
 22 requiring the disclosure of amounts spent on certain
 23 types of public media ads. But there's a whole bunch of
 24 political spending, including money to buy chairs for a
 25 campaign, including money to buy staff for a campaign,

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1 including money to buy the sorts of ads that aren't
 2 required to disclose the fact that they exist, that we
 3 don't know anything about. And so all of the trendline
 4 things that you've seen -- including, by the way, and
 5 this important -- prior years don't reveal what we don't
 6 know. These are in Secretary Rumsfeld's formulation.
 7 These are the known-unknowns.
 8 And so it's actually, I think, really difficult, and
 9 maybe an unanswerable question, I think it's really
 10 difficult to know whether dark money has been growing or
 11 not. We know the amount that we can see under the
 12 streetlight, but we don't know whether that represents a
 13 transfer from other spending, an increase in spending, or
 14 a total decrease, just we can see the part that's
 15 growing. So one, I don't know if that's true.
 16 The second comment is that I think what you saw in
 17 the employee mix for the corporations up there, there was
 18 a study I know that was done just after Citizens United
 19 that tracked the corporate boards of the major Fortune
 20 100 companies, and they look very similar, actually.
 21 There are very few corporate boards that are unilaterally
 22 Republican or unilaterally Democratic. There are a few
 23 that are pretty well skewed, but very few. Massey Energy
 24 I think is one of them. I mentioned it because it shows
 25 up in a lot of campaign finance cases.

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1 To Nick's question, should we be worried about
 2 corporate giving to candidates when the boards are
 3 generally mixed, or spending on candidates when the
 4 boards are generally mixed, we'll either see lots of
 5 spending on all sides, trying to bank on a winner, or
 6 we'll see little spending at all compared to this other
 7 pot of money from the Sheldon Adelsons of the world.
 8 And then the third question is: So why should we be
 9 more scared of Chevron than Sheldon?
 10 PROFESSOR TORRES-SPELLISCY: Especially when Sheldon
 11 outspends Chevron like by times 50, depending on the
 12 year. So it's not that I am not worried about Sheldon
 13 Adelson and, say, his wife's Medal of Freedom that she
 14 got recently. But I guess I've spent a lot more time
 15 thinking about mitigating the impact of Citizens United.
 16 And so I think one of the things that has happened
 17 over the past nine years is corporate shareholders have
 18 been very engaged on this particular issue. And so one
 19 of the rights that corporate shareholders have in
 20 publicly traded companies is the ability to put
 21 shareholder resolutions on the corporate proxy so that
 22 they can be voted on by their fellow shareholders.
 23 And the -- there's a lot of the shareholder
 24 resolutions on ESG topics, which is environment,
 25 governance, and social topics. And the one that has,

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1 year over year, been either number one or number two in
 2 terms of the number of shareholder proposals out there
 3 has been asking for transparency of money in politics.
 4 And those come in two different flavors. One is
 5 asking for better disclosure of where the corporation is
 6 spending its lobbying dollars, and the other is where the
 7 corporation is spending its money in electoral politics.
 8 And then there's sort of a third, tinier category
 9 which in a few corporations there have actually been
 10 shareholder proposals to stop political spending
 11 altogether. And the proposals that have got even
 12 majority support tend to be the ones asking for just
 13 transparency. The proposals about stopping corporate
 14 political spending have done very poorly. That does not
 15 seem to have support among shareholders yet. But I think
 16 even asking the question has brought a conversation
 17 between corporate boards and investors about whether it's
 18 actually appropriate for corporations to be spending the
 19 way that they are.
 20 For example -- and this will maybe go back to the
 21 gun rights discussion that I had in my presentation. So
 22 one of the things that corporations have spent a lot of
 23 money on in recent years is support for a group called
 24 ALEC, and ALEC is a conservative group that is mostly
 25 corporate funded, and then they go state to state to

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1 state, and they draft legislation. And one of the pieces
 2 of legislation that they drafted and then marketed it
 3 around the state legislature was stand-your-ground. And
 4 when Trayvon Martin was killed, also in my state in
 5 Florida, people recognized, oh, stand-your-ground was
 6 from ALEC. Who supported ALEC? And then they looked at
 7 these blue chip companies supporting ALEC, and a lot of
 8 those companies under that pressure temporarily, at
 9 least, pulled the financing from ALEC. So again, that's
 10 one of these questions of accountability. If you can't
 11 tell that the corporation is supporting ALEC, which has
 12 been marketing the stand-your-ground laws, and you object
 13 to the stand-your-ground laws, then there's no one to
 14 pressure, like you don't know where to push.
 15 And so I sort of come back to first principles that
 16 I wish that people had the courage to spend under their
 17 own names so that if they are spending in a way that is
 18 socially pernicious, someone somewhere can be held to
 19 account for that spending. So it's things like that that
 20 I hope we get more transparency, especially as
 21 shareholders push for more transparency.
 22 And there has been a tick up because of these -- the
 23 pressure that investors have put on their own companies
 24 so that you're getting more of the Fortune 500 or the S&P
 25 500 who are being transparent about where their money is

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1 going. And that is another type of accountability,
 2 because right now the Securities and Exchange Commission,
 3 they've been asked by over a million people, please
 4 promulgate a new rule that actually says we will have
 5 transparency of money in politics that come from publicly
 6 traded corporations. And the SEC during the Obama
 7 administration, they would have had the votes. They
 8 didn't do it. And then Mitch McConnell stopped this, has
 9 put in riders to our federal budget that literally say
 10 the SEC cannot promulgate a rule on dark money, and that
 11 rider is still in the budget today.
 12 PROFESSOR MAYER: I'd like to open up for questions
 13 from anyone in the audience. Yes. Go ahead.
 14 (Audience member responded which was inaudible to
 15 transcribe.)
 16 PROFESSOR TORRES-SPELLISCY: Yeah. Yes. So there
 17 are two categories of reportable expenditures in our
 18 campaign finance world in terms of independent spending.
 19 So there are independent expenditures, so those are ads
 20 that use Buckley's magic words, so they literally say,
 21 "vote Quimby." And then there are ads that qualify as an
 22 electioneering communication, so an electioneering
 23 communication is a broadcast ad that costs at least
 24 \$10,000, that reaches 50,000 viewers, and mentions a
 25 federal candidate right before a federal election.

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1 PROFESSOR LEVITT: And these are statutory
 2 definitions, not constitutional ones, right? They exist
 3 because Congress passed a law saying, report this stuff?
 4 PROFESSOR TORRES-SPELLISCY: Yes. And so there are
 5 ads say if you are 61 days out from an election, but you
 6 don't say vote Quimby, but you feature someone who's
 7 running for federal office, those are not captured by any
 8 of these systems, and that's what I think Justin is
 9 talking about. There is dark money which is reported,
 10 which means someone has paid for an electioneering
 11 communication, or someone has paid for an independent
 12 expenditure.
 13 And so what you see is a report of a million dollars
 14 is spent, and then you look for a list of donors, and
 15 there's a big hole, because the way that the FEC
 16 interpreted its own rule making authority, they allowed
 17 for this anonymous spending. So what we see is a million
 18 dollars was spent, and then zero donors are listed, and
 19 that's what I call dark money.
 20 But there is this other universe of what I sometimes
 21 call black hole money, which is being spent on politics,
 22 but it's not being captured by the regulatory system at
 23 all. And I have no idea how big that is. I mean, we can
 24 get some sense of it from there's this group called CMAG
 25 that captures, essentially, the satellite feeds of ads,

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1 and so they can pull the satellite feeds, which comes
 2 with a little bit of data, and they can tell that more
 3 money is being spent on political ads than is being
 4 reported. And so that's an even bigger universe of
 5 political spending that is not captured.
 6 And the other thing that we didn't even get into is
 7 online ads. So one of the things that you see being
 8 discussed, in part because of the Russia investigation,
 9 are ads that were bought on Facebook that would have met,
 10 actually, the statutory definition of an independent
 11 expenditure under the Buckley test that were not reported
 12 at all by anyone. And they were sort of doubly illegal,
 13 because they came from a foreign government, which is
 14 another layer of mischief.
 15 PROFESSOR MAYER: Other questions? Yes.
 16 (Audience member responded which was inaudible to
 17 transcribe.)
 18 PROFESSOR TORRES-SPELLISCY: That's an open
 19 question, I guess. One of the things that I found sort
 20 of interesting in the past two years -- and this may be a
 21 Trump era phenomenon. So for a long time, when you
 22 polled after Citizens United, and you either asked voters
 23 or you asked consumers, do you want corporations involved
 24 in politics, the answer was overwhelmingly no.
 25 There has been a weird change in the past two years.

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1 So pollsters who are looking at consumers, they've
 2 started asking these questions, like if you found out
 3 that a corporation disagreed with your politics, would
 4 you boycott them? And different questions like if you
 5 found out that a corporation had this stance on gay
 6 marriage, would you change your buying patterns? And I
 7 think corporations are going to get caught in this very
 8 weird vortex, which looks like this. When you poll
 9 especially Millennials and Generation Z's, they actually
 10 want corporations to take political stances. They just
 11 want them to take their political stances, which is
 12 somewhat different than if you interview older cohorts
 13 who are much more likely to still say no, I want
 14 corporations to stay out of politics.
 15 And it might really matter about what your target
 16 demo is for your product. If your product is aimed at
 17 like 18- to 24-year-olds, you may have to really think
 18 about do I make a stance on one of these bathroom bills,
 19 like the transgender bathroom, you have to be your
 20 assigned birth gender to go to this bathroom.
 21 So if I'm targeting that young demographic, do I, as
 22 Coke, Pepsi, running shoes, should I actually take a
 23 stance on that issue because that is likely to align with
 24 the target demo that I'm trying to sell to? Or is it
 25 better to stay neutral? Will I get hit for being neutral

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1 on it, or do I actually take a stand that is
 2 anti-transgender because I think my market is very
 3 religiously conservative? And I think depending on the
 4 corporation will determine which path they go on. But
 5 they are likely to get slammed no matter what choice they
 6 make.
 7 PROFESSOR MAYER: Yes.
 8 PROFESSOR LEVITT: That's not hypothetical. In
 9 North Carolina in 2016, actually the biggest movers on
 10 the issue were private entities like the NBA, and not
 11 corporate entities, but things like the NCAA suggesting
 12 that they would cancel their sporting events in North
 13 Carolina, and in North Carolina that was big news. None
 14 of that captured by "political spending."
 15 PROFESSOR TORRES-SPELLISCY: Yes.
 16 PROFESSOR LEVITT: But zero of the influence there
 17 was captured by any political dollar spending, as these
 18 private entities were taking a political stand. And so,
 19 yeah, the scenario that Professor Torres-Spelliscy lays
 20 out is not hypothetical. It actually happened.
 21 PROFESSOR MAYER: We need to move on with our
 22 program, but I want -- please join me in thanking
 23 Professor Torres-Spelliscy. And now Professor Nick
 24 Stephanopoulos.
 25 PROFESSOR STEPHANOPOULOS: I may need help to switch

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1 Power Points. All right. Great. Thanks very much to
 2 Notre Dame and to the Journal of Legislation for setting
 3 up this Symposium.
 4 So I'll be talking today about non-campaign finance
 5 law, the law that governs money in non-electoral
 6 politics. And I should note that this is a very, very
 7 early stage project that I'll be discussing. It has its
 8 origins in a conversation I had with a colleague two or
 9 three months ago, and since that conversation, my
 10 thoughts have not advanced at all until last night after
 11 the Symposium dinner back in my hotel room where I sort
 12 of forced myself to try to impose a little bit of
 13 structure on just various hazy ideas that have been
 14 floating around in my head. So I wouldn't even call this
 15 a half-baked idea right now. I don't think it's even
 16 entered the oven.
 17 Okay. So what do I mean by non-campaign finance?
 18 Well, I mean things that are not classic campaign
 19 finance, things that are not classic money in politics.
 20 So I'm not talking about contributions to candidates for
 21 office or contributions to political parties or
 22 contributions to tax political action committees. I'm
 23 not discussing some of the forms of communication that
 24 Ciara just talked about, electioneering communication,
 25 express advocacy. All of that is the core of campaign

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1 finance, but I want to talk about non-campaign finance.
 2 I'm also not talking about lobbying. So lobbying is
 3 distinct from campaign finance. Lobbying is money that's
 4 spent, communications with elected officials in an effort
 5 to influence the decisions of elected officials, that
 6 lobbying is itself a distinct category from campaign
 7 finance. But it has already been written about, so it's
 8 not my focus either.
 9 What is my focus are efforts to influence the
 10 political views of the public outside the context of an
 11 election. So that's what I mean by non-campaign finance.
 12 And also four aspects of this definition are important in
 13 my view. So I care about efforts to influence. I'm not
 14 thinking about polls or efforts to register voters or get
 15 them to the polls. You know, those aren't attempts to
 16 change the views of voters.
 17 I'm interested in efforts to influence the political
 18 views of voters. You know, that's why I think this is
 19 relevant to this Symposium. So I'm not discussing
 20 marketing, for example. You know, there are lots of
 21 nonpolitical entities that really try to influence the
 22 views of the public on nonpolitical matters, and that's
 23 also beyond the domain of this project.
 24 Third, I'm interested in efforts to influence the
 25 views of the public. There are a lot of different

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1 audiences for persuasion efforts. Elected officials,
 2 elites, bureaucrats, etc. I'm interested here in mass
 3 persuasion, you know, efforts to change the views of the
 4 voting public, the electorate.
 5 And then fourth and finally, what distinguishes this
 6 from classic campaign finance is that it's political but
 7 non-electoral. And so, you know, normal campaign finance
 8 meets aspects one to three of this definition. It just
 9 doesn't satisfy the fourth criteria, which is that the
 10 efforts to persuade the public involve non-electoral
 11 political issues.
 12 So non-campaign finance clearly is linked in
 13 interesting ways to both campaign finance, classic
 14 campaign finance, and lobbying. So most obviously, both
 15 campaign finance and non-campaign finance are trying to
 16 influence voters' views. The difference, again, is that
 17 campaign finance is trying to influence voters' electoral
 18 choices, whereas non-campaign finance is trying to
 19 influence their general political or ideological or
 20 policy views.
 21 There's also a relationship, but not as close of a
 22 connection, between lobbying and non-campaign finance.
 23 So lobbying is an effort to directly change the views of
 24 elected officials. Non-campaign finance doesn't directly
 25 target elected officials, but one of the ultimate

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1 rationales for engaging in non-campaign finance might be
 2 the hope that once you successfully change the views of
 3 voters, those changed views of voters in turn will have
 4 some impact on the positions taken by elected officials.
 5 So I do think there is a connection between lobbying
 6 and non-campaign finance in that at some level they're
 7 both concerned about influence on elected officials, and
 8 therefore, the end of the process on enacted policy.
 9 And a key point to note is that these different
 10 forms of political action are either substitutes or
 11 compliments for sophisticated actors. You know,
 12 well-funded, savvy political players commonly engage in
 13 all three of these tools. You know, it's common to give
 14 money to candidates, spend money on electoral ads, lobby
 15 elected officials, and do non-campaign finance, you know,
 16 and do non-electoral efforts at voter persuasion.
 17 Sort of some examples of non-campaign finance, a
 18 number of them are linked to the Koch Brothers. You
 19 know, the origins of this project have to do with just a
 20 conversation I was having about all the sort of
 21 unconventional, non-electoral techniques that the Koch
 22 brothers are using to move American society in a
 23 libertarian, small government, anti-regulatory direction.
 24 So Americans for Prosperity is one of the flagship
 25 Koch brothers organizations. It doesn't do electoral

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1 politics, or it doesn't do much electoral politics. The
 2 vast majority of what Americans for Prosperity does is
 3 hold rallies, talk to voters, organize other kinds of
 4 events, have people going door-to-door, circulate their
 5 literature. You know, that's how Americans for
 6 Prosperity is trying to influence American politics, not
 7 through electoral activities.
 8 There are quite a few other Koch-related groups that
 9 I would also categorize as non-campaign finance. One
 10 more nice example is the LIBRE Initiative. Its goal is
 11 similar to Americans for Prosperity in that it's trying
 12 to promote the Koch message of small government
 13 libertarianism. The LIBRE is focused on Hispanics, so it
 14 has I don't know how many staff. Hundreds of staff
 15 members who go door-to-door in Hispanic neighborhoods,
 16 who attend neighborhood events, and just talk to people
 17 about the Koch brothers philosophy, and who also organize
 18 lots of events, pushing this anti-regulatory message.
 19 On the left there's nothing quite as systemic or
 20 large scale as the various Koch-funded initiatives. But
 21 Tom Steyer, one his vehicles is NextGen America. NextGen
 22 does a mix of electoral and non-electoral activity. But
 23 a substantial part of it is non-electoral, so it's,
 24 again, talking to voters, producing literature,
 25 organizing events. And in particular with NextGen

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1 America, there's a focus on climate change, avoiding
 2 environmental disaster, and also on youth mobilization.
 3 So even if the best-known examples are on the right, it's
 4 clear that there are people in groups on the left who are
 5 also involved in non-campaign finance.
 6 Unions are another classic example, you know, who do
 7 large scale non-electoral political education,
 8 mobilization, persuasion, etc.
 9 Okay. So I'm still grappling a bit with what counts
 10 and what doesn't count as non-campaign finance. There's
 11 a risk with this concept that it will just include the
 12 entire world of public discourse. You know, everything
 13 covered by the First Amendment that's not elections.
 14 Maybe that's the right way to think about it. I don't
 15 know.
 16 But, you know, here are some entities that I'm
 17 currently unsure about their status. Think tanks. You
 18 know, there are Koch-funded think tanks and
 19 non-Koch-funded think tanks. There are lots of think
 20 tanks. Do they count as non-campaign finance? I don't
 21 think so currently, because I consider them more focused
 22 on idea generation and influencing the views of
 23 particular elites as opposed to being groups that are
 24 involved in mass persuasion. You know, voter contact,
 25 voter influence. But I'm not sure if that's the right

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1 way to think about this.
 2 What about media organs? You take Fox News, you
 3 take MSNBC, clearly they are involved in efforts to
 4 influence the political views of the mass electorate. I
 5 also don't think that I'm talking about media organs.
 6 One reason is that they're typically for profit, so
 7 they're engaged in their efforts partly for the sake of
 8 persuasion, but also, very importantly, for the sake of
 9 money. And so I think that profit motivation is a major
 10 distinction between Fox News and Americans for
 11 Prosperity, let's say.
 12 And then what about philanthropy? There are, you
 13 know, lots of major foundations funded by all sorts of
 14 folks that do lots of things that might have an influence
 15 on public opinion. As an example, you know, George Soros
 16 founds the Open -- founded and funds the Open Society
 17 Foundations. You know, does that count as non-campaign
 18 finance? Again, I don't think so, because I wouldn't
 19 consider the fundamental purpose of philanthropy to be
 20 mass persuasion or mass political persuasion. You know,
 21 clearly, philanthropy can have an effect on public
 22 opinion, but it seems to me there's still a real
 23 distinction between any foundation and Americans for
 24 Prosperity or NextGen America.
 25 But I'm still working through these conceptual meets

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1 and bounds of what I'm talking about, and so I'm open to
 2 people's views about what I should be discussing, what I
 3 shouldn't be discussing in this project.
 4 Okay. So how much non-campaign finance is there? I
 5 really have no idea how much money is being spent in this
 6 way. Part of why I have no idea was alluded to in the
 7 last discussion, which is that we don't have requirements
 8 that this sort of spending be disclosed.
 9 It's not entirely true. You know, the IRS does
 10 require that nonprofits disclose their total revenue and
 11 their total spending so we have some idea of how much
 12 money particular groups are raising and utilizing. To my
 13 knowledge, nobody has amassed this data and analyzed it.
 14 That's one thing I'd like to do as part of this project.
 15 But I do think the amount of money we're talking
 16 about is very significant. You know, quite bit larger
 17 than the dollar sums we were talking about in the last
 18 discussion.
 19 As an example, Americans for Prosperity spends
 20 roughly \$100 million every single year. You know, even
 21 Sheldon Adelson, he only does it every other year.
 22 Americans for Prosperity does it every year.
 23 NextGen America, it's not quite on the scale of
 24 Americans for Prosperity, but in 2018, also in 2016, it
 25 spent on the order of \$30 million or \$40 million on

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1 non-electoral activities. It also spent a lot of money
 2 on electoral activities. NextGen also operates a super
 3 PAC that is firmly in the world of traditional campaign
 4 finance. But its non-electoral activities are still very
 5 significant.
 6 Then if we start counting philanthropical
 7 organizations, they have enormous budgets. Just the one
 8 that I mentioned before, the Soros-funded Open Society
 9 Foundations, they spend \$100 million per year in the U.S.
 10 They spend a little more than a billion dollars worldwide
 11 every single year. So there is a lot of money in this
 12 non-campaign finance bucket.
 13 Another issue is, you know, does non-campaign
 14 finance have any effect, you know, if the purpose of this
 15 activity is to influence voters, persuade voters to, you
 16 know, mold the ideological or the policy views of voters,
 17 does it work? I don't know. I have no idea if it works.
 18 To my knowledge, nobody has ever done any kind of study
 19 to find out whether there is any return on investment for
 20 the Koch brothers, for Tom Steyer, for others involved in
 21 these sorts of efforts.
 22 I could imagine studying this question empirically.
 23 We sometimes have information about when and where and
 24 how much money groups are spending and on what. So I can
 25 imagine if we knew that Americans for Prosperity was

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1 active in some states and in some years but not in
 2 others, and was focusing on certain issues but not other
 3 issues, I could imagine linking that data about, you
 4 know, Americans for Prosperity's activities with public
 5 opinion data and having a pretty good empirical setup to
 6 see if a group's activities actually have any measurable
 7 impact on public opinion. It would be a fascinating
 8 empirical project, although one that I have done nothing
 9 toward other than write down this phrase here.

10 Certainly the people involved in non-campaign
 11 finance think that it matters. Here's a quote from
 12 Charles Koch. He says that if you want to bring about
 13 social change, you need an integrated strategy. You need
 14 -- this would span methods from idea creation to policy
 15 development to education to grass roots organizations to
 16 lobbying to litigation to political action.

17 So the first few items on this list are all things
 18 that I would consider non-campaign finance, while the
 19 last couple items -- especially lobbying and political
 20 action -- are the existing modes of political activity
 21 that scholars have thought a lot more about.

22 So I think this shows us that, you know, one very
 23 sophisticated funder of non-campaign finance thinks of it
 24 as a compliment and a substitute to other modes of
 25 political action. It also thinks you need to do this.

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1 If your goal is to eventually win on policy, you can't
 2 only spend money on elections. You can't only spend
 3 money on lobbying. You also have to try to influence
 4 voters' underlying political views. You know, is Koch
 5 succeeding in doing this? I don't know. But he thinks
 6 that it's important.

7 Okay. Is it a problem? You know, do we care about
 8 non-campaign finance? Is there anything bad about it?
 9 Let me say, you know, it cannot give rise to the
 10 canonical problem that regular campaign finance gives
 11 rise to. You know, if you're spending money to influence
 12 voters, you are absolutely not engaging in any kind of
 13 quid pro quo transaction. You know, your money is not
 14 going anywhere near an elected official, and so it can't
 15 be part of a classic corrupt deal with a politician.

16 Probably non-campaign finance is unrelated as well
 17 even to broader notions of corruption. So, you know,
 18 liberals on the Supreme Court have tried to conceptualize
 19 corruption more broadly as encompassing things like
 20 improper access to politicians, excessive influence over
 21 politicians, and there too, I don't really think that
 22 non-campaign finance can generate that kind of
 23 corruption, because again, politicians aren't the
 24 audience. Politicians aren't who the non-campaign
 25 finance is targeting. You know, the money is targeting

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1 people, not elected officials.

2 You know, that being said, I can certainly imagine
 3 that if you're spending a lot of money to influence
 4 people's political views, politicians may well be aware
 5 of that. They may well be wary of your political
 6 influence, and you may, as a sort of ancillary benefit of
 7 your non-campaign finance activity, get more access to or
 8 more influence over politicians. So I think that there
 9 could be some causal chain connecting non-campaign
 10 finance to broader notions of corruption, but it's not a
 11 very direct link.

12 So if it doesn't corrupt, why might non-campaign
 13 finance be a bad thing? Well, if it has an impact, one
 14 reason to worry about it is that it might distort the
 15 views of the public. It might change the views of the
 16 public relative to a benchmark where either there was no
 17 non-campaign finance activity going on or where this
 18 activity was more balanced.

19 You know, we could imagine getting a different
 20 distribution of public opinion than we otherwise would
 21 have gotten in a better or different domain of public
 22 discourse. And if you think that representatives and
 23 ultimately laws are responsive to public opinion, you
 24 might worry that distorting public opinion, ultimately
 25 non-campaign finance will distort or will skew public

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1 policy.

2 In particular, the current danger that I think is
 3 greatest is that it would skew public opinion, skew
 4 public policy in the direction of the wealthy, you know,
 5 the powerful. Who's paying for non-campaign finance?
 6 Maybe unions, you know, who are not, you know, a classic
 7 or wealthy source, but primarily it's the Koch brothers,
 8 it's Tom Steyer, it's Michael Bloomberg. It's rich
 9 individuals. So I think there's a danger that
 10 non-campaign finance is yet another tool that the
 11 wealthy, the corporations can use to skew all of American
 12 politics in their direction.

13 Okay. So if we thought that non-campaign finance
 14 was a problem in at least some of its manifestations,
 15 what can we do about it? We almost certainly couldn't
 16 take direct action against it. It's, I think, virtually
 17 certain that outright prohibitions on non-campaign
 18 finance or ceilings on non-campaign finance would be
 19 unconstitutional. They plainly implicate poor political
 20 speech. You know, trying to persuade voters about
 21 political matters. And there, any such restrictions
 22 would be missing the crucial link to preventing
 23 corruption, which is the one existing justification for
 24 campaign finance regulation. And so, you know, if you
 25 take the anti-corruption interest off the table, it's

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1 very hard to see how restrictions that are permitted in
 2 the campaign finance contracts would have a prayer of
 3 surviving traditional scrutiny in the non-campaign
 4 finance context.
 5 I think the very good analogies for non-campaign
 6 finance are to independent electoral expenditures and to
 7 lobbying, and both of those forms of political activity
 8 can't be constitutionally banned or capped.
 9 A couple other regulatory avenues are disclosure,
 10 and I'll talk about public financing last. So
 11 disclosure, there's currently not enough disclosure of
 12 non-campaign finance. We know some of the top level
 13 spending and revenue of these actors, but that's about
 14 all we know. So we could require non-campaign finance
 15 involved groups to release more information about their
 16 donors. There might be some constitutional problems with
 17 doing this, but I think it would likely be okay for most
 18 groups.
 19 We could also, I think, entirely constitutionally
 20 require groups engaged in non-campaign finance to tell us
 21 a lot more about what they're doing. You know, the FEC
 22 requires groups that engage in electoral expenditures to
 23 tell us the purpose and the payee for all disbursements
 24 above a certain level. I think we can do something
 25 similar with non-campaign finance expenditures.

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1 Last, maybe wackiest idea, you know, if we can't
 2 limit non-campaign finance, maybe we could subsidize it
 3 and give opportunities to groups that aren't wealthy,
 4 that don't have connections or corporate power, to also
 5 engage in non-campaign finance.
 6 One could imagine the government offering grants
 7 with certain criteria, and if you win one of these
 8 grants, you could then go around engaging in voter
 9 persuasion, voter mobilization relating to various
 10 political issues. You could imagine grants to political
 11 parties. If we think that this is all just, you know, a
 12 cousin of electoral activity, then you could, you know,
 13 authorize the parties to be the ones who are involved in
 14 more non-campaign finance activity courtesy of public
 15 funds.
 16 The idea that I like best is a voucher system.
 17 There have been voucher ideas proposed for campaign
 18 finance over the years. I think non-campaign finance
 19 vouchers would also be a very intriguing possibility.
 20 Let's say every American gets \$25 that the voter can then
 21 or the citizen can then assign as the citizen wishes to
 22 the group of the citizen's choice that's engaged in
 23 non-campaign finance activities. It would be a huge pool
 24 of money. It would be, you know, an effective
 25 counterweight to Koch money or Soros money or Steyer

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1 money. And it means you have non-campaign finance
 2 activities involving a far wider range of political
 3 issues than we see today.
 4 So I think I'm well over my time, so I'll stop
 5 there, and I invite your questions and your comments.
 6 Thanks a lot.
 7 PROFESSOR MAYER: First I'll open it up to the other
 8 members of the panel. Want first shot at it?
 9 PROFESSOR TORRES-PELLISCY: Sure. So what are you
 10 not writing about may be the question.
 11 So several thoughts come to mind. One, in terms of
 12 if you are going after the Koch brothers, one of the
 13 things that I noticed a couple of years ago is that in
 14 certain poor communities, some offshoot of the Kochtopus
 15 was paying poor people's electric bills. And I think
 16 this was literally a way of trying to curry favor with
 17 those individuals. But, you know, our campaign finance
 18 system doesn't have anything to capture something like
 19 that.
 20 Other things that I was thinking of are maybe if you
 21 limited this by a topic, so you could talk about this
 22 non-campaign finance in the context of climate change,
 23 and if you were doing climate change, then I would point
 24 you to the Heartland Institute. If you were doing
 25 tobacco you could look at that effort to make it look

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1 like there was a debate about whether tobacco is causing
 2 cancer. There's a similar effort around sugar to try to
 3 make sugar not look like it was linked to heart disease,
 4 which goes to trying to frame an entire debate for the
 5 public.
 6 The other thing that I think of is during World War
 7 II, one of the things that American corporations did,
 8 because there were rations, and there were all of these
 9 limits on what you could sell, so they ended up with all
 10 of these extra advertising dollars in their budgets, and
 11 so what they advertised was, quote, the American way.
 12 And it was just broadly pro-capitalism. But that was one
 13 of those efforts that is not really electoral in the
 14 traditional sense, but is trying to shape the way
 15 everyone thinks about what it means to be a true
 16 American, which, in their mind, was to be a consumer.
 17 And then the last point is there's this great report
 18 from RAND out from last year called "Truth Decay," and
 19 they point out other periods in American history where
 20 truth has literally decayed in American discourse. And
 21 part of what they talk about is when opinion takes over
 22 facts, and so that might be an interesting jumping-off
 23 point.
 24 So I'm not even sure that I have a question other
 25 than: How are you going to cabin this? Because I think

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1 there's risk that it's either you're talking about, as
 2 you said, all political discourse, or maybe at the very
 3 least, all discourse that's coming out of the nonprofit
 4 sector.
 5 PROFESSOR STEPHANOPOULOS: Yeah. I don't know yet
 6 how I'm going to cabin this. You know, part of what I'm
 7 wrestling with is why I don't think I'm talking about,
 8 you know, Fox News or foundations or think tanks. I
 9 think what I'm trying to focus on is the category of
 10 non-campaign finance that is closest conceptually to
 11 regular campaign finance.
 12 So, you know, if you imagine just moving one step
 13 over from classic campaign finance, where the motivation
 14 is clearly to influence the political views of the mass
 15 public, you know, I mean, really what I think I'm talking
 16 about is pure issue advocacy, right. Like we often think
 17 about a fake issue advocacy where it nominally counts as
 18 issue advocacy, but the motivation clearly is electoral.
 19 So I think I'm really just talking about real issue
 20 advocacy, and, you know, which is currently unregulable,
 21 and I think it's probably going to continue to be the
 22 case. But it's still, I think, really interesting to
 23 grapple with the contours of real issue advocacy and to
 24 think about what, if anything, the government should do
 25 about it if it can't actually, you know, restrict issue

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1 advocacy.
 2 PROFESSOR LEVITT: So this is fascinating. I kind
 3 of suspected -- and let me back up. So in most of my
 4 policy priors, I'm fairly progressive. And I kind of
 5 expected in the campaign finance world to be the mild
 6 libertarian of the bunch, and I find that I have suddenly
 7 taken on the mantle of the raging libertarian.
 8 So to go back to an earlier point of Ciara's
 9 presentation, I am deeply disturbed by the government
 10 deciding to suggest that companies supporting a nonprofit
 11 reassess their contributions to the nonprofit lest they
 12 be financially regulated. I think that's an enormous
 13 amount of government power, and so that degree of
 14 regulation, of quote/unquote "regulation -- that's a
 15 really nice nonprofit you got there, be an awful shame if
 16 something happened to it" -- strikes me as deeply
 17 alarming.
 18 And I think I'm even more alarmed by what Nick just
 19 presented. So I think what you're talking about is
 20 social activism. "It is pure issue speech" is right, but
 21 on everything, and you describe this spending as
 22 unconventional. But I think it's what social activism
 23 has been for hundreds of years, not just in the American
 24 system.
 25 So the entities that engage in non-campaign finance,

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1 it strikes me, are not just unions and not just the sorts
 2 of organizations that you've got up there, but the Center
 3 for American Progress, and the NRA, and the Parkland
 4 students, and the ACLU, and the American Constitution
 5 Society, and the other organizations that are hosting
 6 today, and the League of Women Voters, and the NAACP, and
 7 Planned Parenthood, and the National Right to Life
 8 Foundation.
 9 I think it's all of civil society. And if you're
 10 cabining off the organizations that also have any profit
 11 motives, which may also engage in social activism, if
 12 you're cabining off those, you still leave all of the
 13 rest of organizing for social change, including the
 14 suffragettes and the civil rights movement, right. Those
 15 were the original non-campaign finance leading all of the
 16 spending on efforts to persuade the public.
 17 You're talking about the anti-smoking campaign that
 18 changed the way Hollywood portrayed people smoking
 19 cigarettes and the seatbelt campaign that portrayed the
 20 way Hollywood portrayed people riding around in cars.
 21 And I don't know how you know when that's distorting
 22 or when that's just us. So I don't know how you
 23 establish a benchmark for when there hasn't been social
 24 activism, or what it would look like if there were no
 25 social activism, that is, if people spent no money trying

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1 to persuade other people about stuff. I don't know how
 2 you set a baseline for what the non-skewed version of
 3 that is. I don't know how you ask for disclosure of it,
 4 and I'm actually -- I'd be frightened of that amount of
 5 regulation.
 6 And as to the voucher idea, I think we've got it
 7 already. I think it's the tax deduction for (c)(3)'s. I
 8 think that in order not to pay a certain -- you get to
 9 deduct from the taxes that you pay a certain amount of
 10 money that the government -- whether you call it gives or
 11 lets you retain, it is an amount of money that the
 12 government otherwise claims from you that you get to keep
 13 to use on social advocacy as you see fit.
 14 And so I deeply appreciate the intellectual project
 15 of trying to get your arms around what this is, but I
 16 guess I have real questions about even if we can define
 17 what the world we live in looks like absent it, to know
 18 whether it's a problem or not.
 19 PROFESSOR STEPHANOPOULOS: Yeah. So a couple of
 20 thoughts. One is that I'm not sure what I think
 21 normatively we ought to do, if anything, about this. It
 22 might be that the right answer is to, you know, let it
 23 be. And one major aspect of this project is just
 24 descriptive. How much money is being spent on this?
 25 What do we think about the effectiveness of this money?

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1 What do we know about the ideological, you know, pursuits
 2 or ambitions of this money? Like there's a lot I just
 3 want to learn about non-campaign finance. And it may be
 4 that, you know, we don't do anything, we just appreciate
 5 having learned something about this, you know, quite vast
 6 amount of money.
 7 In terms of, you know, if we think there is a
 8 problem, I think we're all on the same page that tools
 9 that are available to the government in the campaign
 10 finance context are just entirely unavailable here. I'm
 11 not sure if disclosure would be a huge imposition. You
 12 know, there is disclosure for nonprofit groups currently.
 13 It just doesn't go as far as I would like, because it
 14 tells us, you know, this is the total amount that
 15 Americans for Prosperity took in as revenue and spent in
 16 a given year. We don't know in more detail what are the
 17 uses of that money. Where is that money being spent, you
 18 know, on what?
 19 I don't think there's a serious constitutional
 20 problem with just, you know, having a more detailed tax
 21 form for Americans for Prosperity. I don't think that,
 22 you know, disclosing uses of money raises the First
 23 Amendment associational questions that, you know, being
 24 forced to release your donors might raise, for example.
 25 And then I agree that the existing tax code is

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1 absolutely already a subsidy, you know, an implicit
 2 subsidy for non-campaign finance activities, but it's one
 3 that benefits, you know, the wealthy much more. You
 4 know, it's an inegalitarian subsidy, so I would be
 5 interested in exploring the possibility of an egalitarian
 6 subsidy for non -- I think it's great that the tax code,
 7 you know, foments this kind of activity. It would be
 8 even better if it fomented it in a way that represented,
 9 you know, all Americans instead of disproportionately
 10 allowing the -- you know, the wealthy to contribute and
 11 to drive the non-campaign finance activity.
 12 But yes, I think ultimately this project will be,
 13 you know, 75 percent descriptive and 25 percent, you
 14 know, throwing out some potential regulatory ideas, but
 15 I'm certainly not taking the position that we need to,
 16 you know, export the campaign finance system to
 17 non-campaign finance.
 18 PROFESSOR MAYER: Open it up to questions from the
 19 audience. Yes.
 20 (Audience member responded which was inaudible to
 21 transcribe.)
 22 PROFESSOR STEPHANOPOULOS: The utility of the
 23 voucher idea is just that if you're the median American,
 24 you're not itemizing your deductions, and you're not
 25 claiming any kind of deduction for charitable

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1 contributions, and so you are simply not benefiting from
 2 the tax code's implicit subsidy for non-campaign finance
 3 activity.
 4 But if we said that every American gets 25 bucks to
 5 allocate to the nonprofit group of their choice, then all
 6 of a sudden you would actually have, you know, a small
 7 say, but, you know, but some ability to directly, you
 8 know, promote non-campaign finance activity. And \$25
 9 times, you know, 300 million Americans all of a sudden
 10 becomes a huge amount of money that can be, you know, a
 11 real counterweight to wealthy and corporate interests
 12 representing, you know, typical Americans.
 13 And so, you know, I do have this worry about distort
 14 -- even if I can't define the distortion very precisely,
 15 I do have a worry about it. And so I think that, you
 16 know, having a huge amount of noncorporate, non-wealthy
 17 non-campaign finance would result in a healthier public
 18 discourse and a less distorted distribution of use. I
 19 can't probably prove any of that, but that's my strong
 20 intuition.
 21 PROFESSOR MAYER: Yes.
 22 (Audience member responded which was inaudible to
 23 transcribe.)
 24 PROFESSOR STEPHANOPOULOS: *My thinking through this*
 25 issue amounted to a bullet point last night. I think it

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1 ought to be in addition to, not instead of. You know,
 2 for most Americans, this would be their only route to
 3 getting, you know, public support for engaging in
 4 non-campaign finance. For the wealthier, yeah, fine,
 5 give them 25 bucks also and let them, in addition, deduct
 6 their \$5 million contribution to Americans for
 7 Prosperity. I'm not too concerned about the extra \$25
 8 going to, you know, the top one percent or the top
 9 .1 percent. But yeah, I haven't at all thought about
 10 eliminating the charitable deduction as a proposal. This
 11 is purely a supplement to existing law.
 12 PROFESSOR MAYER: We have time for one more. Yes.
 13 (Audience member responded which was inaudible to
 14 transcribe.)
 15 PROFESSOR STEPHANOPOULOS: *So it is a point that*
 16 there could be more public interest in non-campaign
 17 finance in nonelection years?
 18 (Audience member responded which was inaudible to
 19 transcribe.)
 20 PROFESSOR STEPHANOPOULOS: *More willing to accept*
 21 what is true? The distortion of public opinion or...
 22 (Audience member responded which was inaudible to
 23 transcribe.)
 24 PROFESSOR STEPHANOPOULOS: *Or, interesting. You*
 25 know, is the public more or less persuadable at certain

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1 times than at others? I don't know. Yeah. I'm really
 2 not sure, you know, how the public's openness to opinion
 3 change might vary from one time to another. I have no
 4 idea. That's really interesting.
 5 PROFESSOR MAYER: We need to move on to our final
 6 panelist, so please join me in thanking professor
 7 Stephanopoulos. And now Professor Justin Levitt.
 8 PROFESSOR LEVITT: So hi, and thank you very much
 9 for the invitation to be here. I am going to manage to
 10 fly without Power Point, which is deeply distracting for
 11 law students, I know, and equally distracting for law
 12 professors.
 13 I also want to thank Notre Dame Law and all of the
 14 various sponsors and the Journal for putting this
 15 together. I think it's fantastic. I thank you for
 16 inviting me here. I will say that 11 degrees -- I'm
 17 coming from Los Angeles, and that is what we use as the
 18 threat when kids don't eat their vegetables, they'll be
 19 sent to a place where it's 11 degrees, like that's the
 20 downside repercussion. It is very warm and welcoming in
 21 here, so thank you very much for that.
 22 I have -- actually, this entire setup is really one
 23 big question for my co-panelists and for you all. So I
 24 want to talk about a -- in a way, this is small ball
 25 compared to what both Professor Stephanopoulos and

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1 Professor Torres-Spelliscy have talked about so far. It
 2 is a doctrinal constitutional distinction that might make
 3 absolutely no difference going forward. But it's
 4 something that's been bothering me, and I want to find
 5 out whether it's something that should be bothering me or
 6 not.
 7 So you've heard it mentioned a couple times today
 8 already. The origin story of modern campaign finance is
 9 a case called Buckley versus Valeo, 1976. And among the
 10 very, very, very many things that Buckley did is it set
 11 up a fundamental divide between the way that
 12 constitutional law treats expenditures and the way that
 13 constitutional law treats contributions. Expenditures:
 14 "I am spending money on" -- and you can think of it as
 15 the paradigm case, although there are ways in which they
 16 bleed into each other in some circumstances. "I'm
 17 spending money on a political ad" is the paradigm
 18 expenditure. Contribution: "I'm giving money to a
 19 political campaign." That's the paradigm contribution.
 20 And the Supreme Court in Buckley took an overall
 21 regulatory regime, a campaign finance regime, and
 22 essentially cut it in half. It said that expenditures
 23 under the First Amendment effectively can't be regulated
 24 beyond disclosure, effectively they can't be limited,
 25 they can't be capped, they can't be -- later on they got

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1 to a point where they can't even be slowed or compensated
 2 for. But spending money is essentially core First
 3 Amendment activity, extremely close scrutiny, strict
 4 scrutiny, and it's turned out to be fatal in pretty much
 5 every circumstance.
 6 Contributions, on the other hand, they said were
 7 subject to a lesser degree of scrutiny, an intermediate
 8 type of scrutiny-ish. They weren't very clear about it
 9 then. They haven't gotten all that much clearer about it
 10 since.
 11 I'm maybe the only academic left who thinks that
 12 makes sense. And I don't mean makes sense as a matter of
 13 a campaign finance system that makes political sense.
 14 There's a whole lot to criticize about the incentives
 15 that that structure sets up.
 16 But in particular for a court, I think a court's job
 17 is not to build a campaign finance system that makes
 18 sense. While it may be fine to acknowledge that it
 19 should be thinking about a campaign finance system that
 20 makes sense, its primary job is to apply constitutional
 21 law, and that may be different in many ways from building
 22 a sensible campaign finance system.
 23 And in particular, in Buckley and in the cases that
 24 follow, I think that as a matter of the court deciding
 25 what the government may do, rather than building a system

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1 that it should create, I think the distinction in Buckley
 2 makes an enormous amount of sense as a matter of
 3 constitutional law, and I'm starting to worry that I
 4 might be the only one. So the big question I want to
 5 pose is: Why am I wrong about this?
 6 If you ask the professorial commentariat, they will
 7 tell you that contribution limits, or that the scrutiny
 8 of contribution limits, are going exactly the way that
 9 scrutiny of expenditure limits went -- right -- that
 10 there is a deregulatory trend, that the courts will, as
 11 soon as they can, as soon as they get their hands on a
 12 contribution limit, they'll decide that it's subject to
 13 the same strict scrutiny, they'll strike it down. You
 14 see this in the courts as well, sort of, so a ratcheting
 15 up of the skepticism of contribution limits in cases
 16 like, most notably, McCutcheon versus FEC was about
 17 aggregate limits to a bunch of candidates at the same
 18 time.
 19 And there, although just as Thomas was the only one
 20 who said, "you know what, I've never liked this
 21 distinction, we ought to scrap it" -- the plurality
 22 inched its way closer to treating contribution limits
 23 like expenditure limits. And I think various legal
 24 commentators have said they see that being the future of
 25 the courts' campaign finance jurisprudence.

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1 Jim Bopp keeps serving up cases. One of them will
 2 get to the court eventually. I'm surprised one hasn't
 3 gotten there before now. And rather than ask what the
 4 court will do when it gets the next case about
 5 contribution limits, I want to ask what it should do.
 6 So if you look at expenditures, if you look at the
 7 Buckley court and the courts since, and their
 8 jurisprudence on expenditures, it actually makes sense to
 9 me that as a matter of constitutional law, that courts
 10 would look very skeptically at limits on how much you can
 11 spend to speak your mind in a political context.
 12 Expenditure limits really do, in my mind -- and I
 13 know some of my other panelists may disagree with me
 14 here -- they do impact core speech, the stuff that we
 15 think of as the stuff the First Amendment fundamentally
 16 protected. Once you hit a limit, the only way you can
 17 speak is literally by standing outside and yelling or by
 18 walking up to somebody and having a conversation. But
 19 just about everything else costs money, including the
 20 money that you pay for your wireless subscription in
 21 order to access what are now otherwise free methods of
 22 speaking using a computer. Once you hit an expenditure
 23 limit, if you really, really believe that no more money
 24 can be spent on speaking, then the money that you pay for
 25 your Internet access gets cut off as soon as you use it

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1 for political speech.
 2 And there's no other constitutional right that we
 3 treat like that. We don't put a cap on your ability to
 4 travel interstate. We don't put a cap on your ability to
 5 seek reproductive freedom or educating your kids. We
 6 don't put a cap on your ability to hire a lawyer or a
 7 legal team to support your defense in a criminal
 8 prosecution. And I think when you start thinking of caps
 9 in those other areas, you can see why -- at least I can
 10 see why -- the court was really resistant to putting a
 11 cap on the amount of money you can spend to further
 12 putting a message out to the world. Even buying poster
 13 board and magic markers costs money, and once you hit a
 14 limit, it starts to curtail that activity.
 15 I think it's especially understandable in the
 16 context of Buckley itself. So Buckley involved a \$1,000
 17 cap on political expenditures, and I often wonder
 18 actually if we'd have the same constitutional law today
 19 if the cap were \$10 million. But at \$1,000, even in
 20 1976, that struck the court as a rather low limit to
 21 spend, right.
 22 Let me make this personal. You can only hire a
 23 lawyer for criminal defense if you pay them 50 bucks an
 24 hour, and once you hit \$5,000, you're done. And as law
 25 students, all of you think, "okay, I don't like that rule

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1 at all." And I think the very low limit on expenditures
 2 that Buckley set up struck the court as quite
 3 constraining in a way that it might not have had the same
 4 reaction had there been a much higher cap.
 5 It also struck the court, I think, as inherently
 6 incumbent protective. So when you've got the name
 7 recognition of an incumbent, you can do a lot more with a
 8 small amount of money than you can as a challenger, and I
 9 think the court was sensitive to this. It thought that
 10 part of the regulatory regime was actually favoring those
 11 who were already in office.
 12 The counterargument to all of this is that
 13 expenditure limits help foster equality, particularly
 14 equality of political participation. And I'm a little
 15 skeptical, or at least I'm a little skeptical that they
 16 do enough of the job to justify the restriction. So
 17 especially in the Internet era, I am skeptical that you
 18 can actually drown out speech with paid speech. It has
 19 never been easier to put speech out into the world. I'm
 20 a little bit skeptical that money will actually buy your
 21 belief in a particular idea or in a particular policy
 22 matter.
 23 The last time that you made decisions about
 24 something probably involved a lot more of your talking to
 25 friends or family or teachers or other influencers than

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1 it did paying attention to an ad, whether you knew it was
 2 a paid ad or not.
 3 I'm not at all skeptical of the idea that
 4 expenditures can buy political influence. There was a
 5 case called Caperton written by Justice Kennedy in which
 6 he either intentionally or unintentionally elided the
 7 difference between expenditures and contributions -- this
 8 is a judicial spending case, and millions of dollars for
 9 spending in a judicial race, and Justice Kennedy said, I
 10 understand how this outside independent spending could
 11 actually buy favors from a judge.
 12 In a way, that was shocking, because I can't
 13 remember -- I think it was the year after -- he said
 14 outside independent expenditures can't possibly buy you
 15 favors from a legislator. So I don't believe that
 16 outside independent spending can't possibly buy you
 17 favors from a legislator at all. I think that if you put
 18 Citizens United and this Caperton decision together, what
 19 you actually realize is he's resisting the notion that
 20 the fact that expenditures may buy you influence means we
 21 should cap expenditures.
 22 And actually, one of your faculty members showing up
 23 later today, Professor Nagle, has proposed a system of
 24 legislative recusal, like judicial recusal, that I'm
 25 quite fond of as a means of dealing with the potential

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1 improper access that expenditures might buy.
 2 But all of that means that capping expenditures
 3 seems to me to be correctly prompting really strict
 4 government scrutiny.
 5 I'll also say one more point toward the
 6 under-inclusiveness of capping expenditures. If you had
 7 expenditure limits across the board, if no individual
 8 could spend more than "insert your dollar amount" on
 9 campaign spending or political spending, Warren Buffett
 10 still gets his call returned faster than I do, and Bill
 11 Gates still gets his call returned faster than I do, and
 12 I have absolutely no question about that. Whether he
 13 gives or spends "political money" or not, we have a
 14 wealth bias in this country, as Nick and others have
 15 amply documented. And although political spending may
 16 contribute to that, I'm not sure it's more than a drop in
 17 the bucket in the total amount of wealth bias we have.
 18 That is, I think that legislatures are structurally more
 19 likely to respond to the interests of wealthy people
 20 whether they are spending in the political arena or not.
 21 And so I don't know that expenditure limits -- A,
 22 they impact core speech, and B, I'm not sure that they
 23 produce measurable or meaningful amounts of
 24 egalitarianism in the way that we might hope. So there
 25 is both more to resist them and less to speak in favor of

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1 them, and so it makes sense to me that the court would be
 2 skeptical. And again, here I'm playing the part of
 3 raging libertarian, at least in most progressive campaign
 4 finance discussions.
 5 Similarly, it makes sense to me that the court would
 6 actually be much more lax, allow much more regulatory
 7 "freedom" in the area of contributions. Again, not in
 8 furthering a building of a campaign finance regime that
 9 makes any sense, but in deciding the freedom with which
 10 the government has to regulate, it makes sense that
 11 contributions would provoke less government -- less court
 12 ire, less close scrutiny.
 13 So for example, contributions are not what we think
 14 of as typically core speech. My giving money to somebody
 15 else might well further speech I agree with, or it might
 16 not. It might be used to buy chairs. It might be used
 17 to give to somebody else that I don't agree with. It
 18 might be used to promote one of many messages that I
 19 don't agree with even if I like, generally, what a
 20 particular candidate happens to be saying. It's a very
 21 indirect way of furthering speech to give money to
 22 somebody else to use as they see fit in a political
 23 campaign.
 24 It's not particularly indicative of a degree of
 25 support, right. My ability to give money depends more on

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1 my wealth than how much I like somebody, and sure, if I
 2 give somebody \$10 million, it means I support them a
 3 whole lot more than if I give them \$500. But if Charles
 4 Koch gives somebody \$10 million, it might not mean that
 5 there's a higher degree of support than if I give
 6 somebody \$500 just from the very different starting
 7 points that we begin with.
 8 It is vital in the aggregate. So we could not
 9 actually have a political system -- unless it were
 10 entirely government funded -- that did not rely on some
 11 form of private contributions, and so it is truly vital
 12 toward getting speech out into the marketplace in the
 13 aggregate. But for any individual, and the court -- you
 14 can say whether this make sense or not -- the court has
 15 always viewed campaign finance in an individualized lens.
 16 It's not particularly vital for me to contribute to
 17 somebody else in order to further expression, in order to
 18 put ideas out to the marketplace, at least nowhere near
 19 as much as expenditures. So there's less of a core First
 20 Amendment value. And on the other side, regulating
 21 contributions actually does have a pretty strong effect
 22 in preventing the sorts of corruption that we think are
 23 not only bad, but still well within the regulatory zone
 24 in making sure the representatives respond to us.
 25 Giving someone a suitcase full of cash can indeed

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1 affect their willingness to pass policy for the suitcase
 2 cash giver, and comparatively involves a whole lot less
 3 sand in the gears than somebody spending money truly
 4 independently -- big caveat, we don't have true
 5 independence -- but somebody spending money truly
 6 independently without knowing whether it will benefit a
 7 politician exactly or not, knowing whether it will be on
 8 message, knowing whether it targets the right voters,
 9 that's a little more removed.
 10 My giving a suitcase of cash to somebody, well,
 11 that's as valuable as it possibly gets to an incumbent
 12 politician, and so could well be used to trigger corrupt
 13 activity, activity that is designed for individualized
 14 interests that are not in the public interest. It may
 15 not be that \$2,800 is the right threshold for that
 16 contribution, but having some contribution limits and
 17 allowing the government to place those contribution
 18 limits, that makes sense to me as a -- not just a
 19 prophylactic measure, but as a measure to directly combat
 20 the most serious and perhaps most pernicious forms of
 21 legislative inattention to the rest of us.
 22 So there's less First Amendment activity in the
 23 contribution zone, it seems to me, and there's more risk.
 24 And to the extent that the court is concerned about
 25 legislative entrenchment, in the same way that I

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1 mentioned a \$1,000 expenditure cap really benefits the
 2 incumbents, it's probably not true with respect to
 3 contributions. That is, if you raise contribution
 4 limits, incumbents have a very natural fundraising
 5 advantage, because they have the entire regulated
 6 community that would love to get in well with any
 7 legislator that is in charge of policy. And so it
 8 strikes me that contribution limits actually limit
 9 incumbents in a way that is not true in the expenditure
 10 limit zone. That is, if you're worried about
 11 entrenchment, contribution limits give you less to worry
 12 about than expenditure limits might.

13 There are, no question, tricky issues at the margins
 14 of these activities. So a contribution to a super PAC,
 15 giving money to a super PAC, the more single-issue that
 16 super PAC is and the more control I have over what the
 17 super PAC does, the more giving that money feels like an
 18 expenditure, right, the more it is actually related to my
 19 personal speech.

20 The sharpest version of this, if I have a super PAC
 21 that just responds to me, my giving money to it is pretty
 22 much the same as an expenditure. Conversely, the more
 23 independent the super PAC is, and the more multi-issue it
 24 may be, the less that looks like an expenditure, the more
 25 it reflects values that we associate with contributions.

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1 So the simple fact that I'm giving money to somebody
 2 else isn't always definitionally going to tell me whether
 3 it feels more like the constitutional values of a
 4 contribution or feels more like the constitutional values
 5 of an expenditure.

6 But I don't think the notion that there are tricky
 7 in-between cases should stop us from recognizing the
 8 sensibility that there are different constitutional
 9 balances between spending money of my own on speech
 10 activity and giving money to somebody else that inspire
 11 different levels of court scrutiny. That's not the
 12 direction recent cases seem to be headed, but I don't
 13 know why, other than general skepticism of the campaign
 14 finance regime. That is, I find the skepticism in the
 15 recent cases to be not particularly grounded in
 16 constitutional law values.

17 And so where I'll end is really with a question.
 18 Have I got it totally wrong? Is there a logic in
 19 treating contributions and expenditures similarly? Is
 20 the court or the direction of the court or the
 21 predictions of legal commentators, do they see something
 22 in the similarity that I don't? Or is it really the case
 23 that this distinction makes sense as a matter of
 24 constitutional regulation even if the regulatory system
 25 that Congress has built, that the FEC has built, doesn't

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1 make any sense from the perspective of funding campaigns?
 2 That is, if we're not talking about political philosophy,
 3 and we're not talking about campaign practice, but we're
 4 talking about the First Amendment and what it allows
 5 government to regulate, am I wrong that this distinction
 6 is not actually the original sin of Buckley, but
 7 something that given what a court is good at, actually,
 8 the original value of Buckley?
 9 And so that's really a question that I have. I'll
 10 leave it there. I'm sure that's going to provoke a lot
 11 of reactions from the other folks on the panel, so thank
 12 you.

13 PROFESSOR MAYER: And now four of the reactions.
 14 PROFESSOR TORRES-PELLISCY: Go for it.
 15 PROFESSOR STEPHANOPOULOS: So I guess like -- I
 16 think that I'm wearing the cap in this Symposium of the
 17 statist or the socialist, and so I guess I'll continue
 18 wearing that hat. So I think I want to just -- I, you
 19 know, defend the position that we ought to think about
 20 contribution limits and expenditure limits similarly, and
 21 we ought to just, you know, permit both of them. This is
 22 the exact -- this is the Stevens position. This is the
 23 exact opposite of the Thomas position, which is that,
 24 yeah, we ought to think about contribution limits and
 25 expenditure limits the same way, and we ought to get rid

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1 of both of them.

2 So first off, the vast majority of supposedly
 3 independent expenditures look and feel exactly like
 4 contributions. You know, instead of cutting the check to
 5 Chuck Schumer, you're cutting a much bigger check to
 6 Chuck Schumer's super PAC, right. Like you're not
 7 standing on a soap box, writing op-eds, appearing in
 8 front of a camera. You know, Tom Steyer might do that,
 9 but like the typical billionaire is just writing a check
 10 either way, whether it's a contribution or whether it's a
 11 so-called independent expenditure. And that's for the
 12 95 percent or something of supposed independent
 13 expenditures.

14 Second point is I don't think the right way to think
 15 about expenditure limits is as just, you know, pure caps
 16 on a protected activity. Like the whole point is we all
 17 recognize that there is a core constitutional value
 18 implicated. The whole point would be that the burden on
 19 that true core constitutional right is valid is
 20 permissible, because the end that the restriction is
 21 serving is sufficiently important. And if you think
 22 inequality, inequality, distortion of American
 23 democracy by the wealthy is the most pressing problem in
 24 American politics -- which I do -- you know, that a
 25 policy that tries to combat that really is serving, you

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1 know, a vital, vital end.
 2 Three, like I think it's relevant that a whole bunch
 3 of other countries, you know, real Western democracies
 4 have equivalents of the First Amendment and have upheld
 5 various regimes of expenditure limits. You know, Canada
 6 is probably the Western society most like ours, and
 7 they've upheld something very similar to what the Supreme
 8 Court -- to what our Supreme Court struck down in
 9 Buckley. They have a First Amendment. They have a real
 10 free speech doctrine. They just put a lot more stock
 11 than our court does on, you know, preventing the undue
 12 influence of the wealthy and of corporations over the
 13 system.
 14 Four, I don't think that the Internet era is a great
 15 argument. Anybody can blog. Anybody can tweet. Anybody
 16 can post things on Facebook, and nobody reads it, right,
 17 like you have no influence when you tweet or when you
 18 post on Facebook or when you blog. You know, how do you
 19 get influence over the Internet? With money, right.
 20 Like it takes a lot of money to reach millions of people
 21 over the Internet. And still, even in today's Internet
 22 era, much more -- most especially older people still
 23 spend a lot more of their time with TV than with blogs or
 24 social media. So, you know, maybe this won't be true in
 25 50 years, but for now I still think that traditional TV

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1 media are more significant and more influential than the
 2 Internet.
 3 Last point is I don't know why we would think that
 4 expenditure limits aren't a major tool of, you know,
 5 plutocracy. You were suggesting that Warren Buffett
 6 would have just as much influence if we had a real regime
 7 of expenditure limits. I don't know why. Sure, he would
 8 have more influence than I do, but I think the gap would
 9 go down a lot if, you know, Tom Steyer or Michael
 10 Bloomberg or whoever was limited to, you know, \$1,000 or
 11 \$10,000 of electoral influence, not \$100 million of
 12 electoral influence.
 13 You know, yeah, there's still all the non-campaign
 14 finance I was talking about. There's all the lobbying.
 15 You know, there's other roots of influence. But you've
 16 got to think this is a big one. If you just terminate
 17 this root of influence, I've got to think that will have,
 18 you know, significant positive effects even if it
 19 doesn't, you know, solve the problem of economic
 20 inequality.
 21 PROFESSOR TORRES-SPELLISCY: Oh, where to begin? So
 22 I preface this with I've spent the last two years looking
 23 at what happened in the 2016 election, and I am very
 24 concerned that the entire model that the Supreme Court
 25 has adopted in terms of it assumes that our marketplace

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1 of ideas actually works. So they assume that bad ideas
 2 will be displaced by good ideas, that the remedy for bad
 3 speech is more speech. And one of the things that
 4 happened in the 2016 election is American voters were
 5 exposed to more fake news than real news, and so I don't
 6 actually agree with you that it doesn't matter what's
 7 going on online. I think that has turned into the game.
 8 And even the dinky Trump campaign compared to other
 9 presidential campaigns, they were able to put out on a
 10 daily basis, you know, 40,000 iterations of a particular
 11 ad where each little target demographic got a different
 12 version of it because they thought that they had
 13 psychological profiles on every American voter.
 14 And so I don't know if that means that we need to
 15 re-argue some of the way we structure campaign finance
 16 given that the Supreme Court, A, is on this deregulatory
 17 track, and B, is only ratcheting up scrutiny of all
 18 campaign finance regulations. But whatever regime we
 19 have I think is not being protective of voters or their
 20 interests. And I spend my days horror of what comes next
 21 after this.
 22 The Senate Intelligence Committee commissioned two
 23 reports. One was from a group called New Knowledge, and
 24 another was from Oxford University. And what those two
 25 entities did is they looked at the Facebook ads and

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1 Twitter bots and all of the social media campaigns that
 2 the Russian Internet research agency put into the
 3 American election in 2016, and it was horrifying in its
 4 effectiveness. And part of what they did is they played
 5 on divisions in American society. So they had ads that
 6 were targeted towards black people. They had ads that
 7 were targeted towards people who were in the right wing.
 8 They had ads targeted to people on the left wing.
 9 And what they did was super insidious. They would
 10 basically create personas, and the personas would get
 11 themselves into conversations with real Americans and try
 12 to build trust with that American audience. They did
 13 that for years before the 2016 election, and then once
 14 they had established trust with those audiences, then
 15 they pushed in, you know, fake, you know, for lack of a
 16 better word, bullshit. And people fell for it. And they
 17 fell for it because it came through a network of trust.
 18 And if a bunch of Russian intelligence officers can do
 19 that, I would imagine that what we're going to see in the
 20 next set of campaigns is American campaigns trying to do
 21 that too.
 22 And so is that pure First Amendment speech? Yeah, I
 23 guess so, but the -- I feel like we have to almost change
 24 what voter education looks like, because I think before
 25 it was just like, can you get up on the issues. Now I

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1 think it's can you spot a deep fake video and process the
 2 information in a meaningful way so that you don't fall
 3 for nonsense?
 4 PROFESSOR MAYER: You want to respond?
 5 PROFESSOR LEVITT: Yeah, 30 seconds, because then I
 6 really actually want to hear questions as well. So I
 7 couldn't agree more with all of that, and I don't think
 8 any of that was driven by money. So the fake news that
 9 was out there didn't require vast amounts of spending.
 10 In fact, it required very little spending. The advocacy
 11 by the Internet Research Agency didn't require vast
 12 amounts of spending. In fact, if anything, what was
 13 remarkable was how unbelievably efficient it was. Very
 14 small dollars with an awful lot of impact. The
 15 transmission of fake news doesn't require a lot of cash.
 16 It turns out that we are virally susceptible, and
 17 once you plant the virus, it spreads, but I don't think
 18 money is driving that. I think that our susceptibility
 19 is driving that, and I don't know how to regulate it. I
 20 agree that it's a problem.
 21 The capacity to regulate also brings with it the
 22 capacity to misregulate, and I don't like the government
 23 branding what truth is, even though I'm not claiming that
 24 we cannot tell the difference between truth and not
 25 truth. I just don't like the government telling us which

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1 things are true and which things are not true.
 2 And I agree with you entirely that voter education
 3 is probably the solution, but I don't know that the money
 4 train is the hammer there. And so I can say yes. I can
 5 also say one of the policy matters that would address
 6 that are different types of disclosure. I think both
 7 more and less, actually. The fact that you contribute
 8 \$200 to a campaign that's spending billions isn't really
 9 meaningful disclosure in any way. I think knowing the
 10 top five people behind any particular set of marketing
 11 campaigns might be meaningful disclosure, and there's an
 12 awful lot that we don't need to know. The current
 13 disclosure regime is not calibrated to give us
 14 information that is useful.
 15 But I'll go back to where I started, which is:
 16 that's building, not regulating whether we can regulate.
 17 That is, that's not a matter of constitutional law.
 18 That's a matter of building a sensible campaign finance
 19 policy, and so I agree with you.
 20 The same, I'll agree with at least one of the things
 21 that Nick said as well, which is that independent
 22 spending isn't independent, that that dividing line is,
 23 at this point, pretext. It's a joke. But that too is
 24 more a function of the regulation that we have and not a
 25 function of constitutional law. So the court was fairly

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1 clear that when it is talking about expenditures, it's
 2 talking about this in a very abstract way, I mean, this
 3 very formalist way, as truly independent. And it would
 4 seem to follow from that that the political system could
 5 establish more lines to keep people in a zone of
 6 independence so that you're not just giving to Chuck
 7 Schumer's super PAC. You just haven't. And there too,
 8 that's a failure of building the regime rather than
 9 regulating it with the Constitution, that is, regulating
 10 what the regulators can do. So I agree with the need to
 11 recalibrate disclosure regulations.
 12 I would also like to recalibrate coordination, and
 13 we'll have a chance to talk about some of that this
 14 afternoon, or in the second panel, and independence
 15 rules. But I don't know that those are constitutional
 16 lines. I think that's a failure of regulators rather
 17 than a failure of the courts. That's the only thing I
 18 would say about that.
 19 PROFESSOR MAYER: Let me open up for questions.
 20 Yes.
 21 (Audience member responded which was inaudible to
 22 transcribe.)
 23 PROFESSOR LEVITT: So a great question, and I'll try
 24 to get to it quickly. The short version is that I think
 25 Citizens United got it wrong, but not on the issue that

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1 most people think Citizens United got it wrong about. I
 2 emphatically think that the group Citizens United should
 3 have been allowed to produce the documentary, advertise
 4 the documentary that it was producing.
 5 PROFESSOR TORRES-SPELLISCY: And I can say I knew
 6 Justin at the time, and he made this argument at the
 7 time.
 8 PROFESSOR LEVITT: That's true.
 9 PROFESSOR TORRES-SPELLISCY: Yes.
 10 PROFESSOR LEVITT: We used to work at the same
 11 organization, and I told them explicitly when I was hired
 12 there, "Ciara is not going to want me anywhere near her
 13 stuff." And that turned out to be right.
 14 So I think the group Citizens United is a
 15 traditional -- is a group that traditionally organizes to
 16 promote expression, to promote political ideas. I think
 17 it is far less different from the ACLU and the ACS and
 18 other organizations that traditionally get together in
 19 order to promote ideas than many other people think. It
 20 happened to take corporate money, but so does the ACS,
 21 and so does the ACLU. And I don't think that changes the
 22 speech that they produce.
 23 Historically, corporations that have -- not groups
 24 that have not banded for First Amendment purposes have
 25 not been provided the same amount of protection under the

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1 First Amendment. So that's the reason why municipal
 2 entities can regulate gangs in a way that they may not be
 3 able to regulate associations of citizens banding
 4 together for First Amendment purposes is because there
 5 are protections on groups that get together in order to
 6 promote expression that don't exist for groups that get
 7 together for other purposes, or at least that
 8 historically has been the case.
 9 Citizens United was addressing a nonprofit group
 10 that engaged in advocacy and made a rule -- in part
 11 because Justice Kennedy loves super expansive language --
 12 that appeared to apply to everything under the sun.
 13 The media corporations are actually a proof point
 14 for me and tell me that I'm more right than wrong, I
 15 think. I don't know why -- it's not in keeping with our
 16 historical traditions that we would cap the ability of
 17 The New York Times to endorse candidates. The New York
 18 Times is a for-profit company. It exists for First
 19 Amendment purposes. It makes its profit in First
 20 Amendment activity, but it's a for-profit company. Vice
 21 is an Oscar nominated film that has a decided political
 22 perspective, and I would hate to say that you couldn't
 23 spend more than X amount of dollars making the movie
 24 Vice.
 25 That strikes me as different from -- and the reason

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1 why I think the court is right to be skeptical of
 2 expenditure limits in that context. That strikes me as
 3 different from the regulation of other corporate
 4 expenditures when the corporation itself doesn't have a
 5 First Amendment purpose. And I am more concerned about
 6 that expenditure, to be sure. I don't know whether we
 7 will ever be able to put the genie back in that bottle.
 8 So that was a long answer.
 9 PROFESSOR MAYER: Other questions? Yes.
 10 (Audience member responded which was inaudible to
 11 transcribe.)
 12 PROFESSOR STEPHANOPOULOS: Yeah. I think it was
 13 Jeb.
 14 PROFESSOR TORRES-PELLISCY: Yeah. Oh, man. It was
 15 a lot.
 16 (Audience member responded which was inaudible to
 17 transcribe.)
 18 PROFESSOR LEVITT: Yeah. And to the extent that
 19 legislators that get overaggressive, that may be driving
 20 some of the doctrine. So unfortunately, like I said, I
 21 think Buckley might have come out differently if the
 22 expenditure limit were ten million than if it were a
 23 thousand dollars. I think that some of the court
 24 skepticism of -- or some of the justices' skepticism of
 25 disclosure registration laws -- and to be clear, the

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1 court is -- has said over and over and over again
 2 disclosure laws and registration laws are generally
 3 constitutional, but some of the dissenting justices on
 4 that have expressed these sorts of concerns about smaller
 5 entities. I think if those laws were better calibrated
 6 that you wouldn't see so much hesitation even in the
 7 dissents.
 8 So I think part of it has to do with the "nature of
 9 design" rather than "the fact of" that drives the court
 10 to categorical rulings. So all expenditure limits fell
 11 because they were evaluating ones that were \$1,000. They
 12 drive the court to categorical rulings, but that's in
 13 part an unfortunate aspect of the way that constitutional
 14 regulation works, and the logic of constitutional law.
 15 That needn't necessarily be the case. So you could
 16 have assessments of the burdens of particular regulation
 17 based on the amounts regulated, based on the
 18 sophistication of the entities, right.
 19 PROFESSOR MAYER: Well, we're out of time, so I want
 20 to let the students that may have other commitments go,
 21 but please thank me in joining -- join me in
 22 thanking Professor Levitt and all of the panelists.
 23 We'll take a break. We'll take about a ten-minute break
 24 until 11:30, and then we'll have a second session which
 25 Professor Nagle will moderate. See you in a few minutes.

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1 (Recess taken.)
 2 PROFESSOR NAGLE: All right. Why don't we resume
 3 here. I'm John Nagle. I'm delighted to be here in many
 4 ways. I am, in some respects, an odd choice for
 5 moderating the second panel since I was not here for the
 6 first panel. And for that, I beg your forgiveness. I
 7 thought I had a really good excuse, which was that I gave
 8 a talk in Oregon yesterday and didn't roll into town
 9 until 4:00 a.m. this morning. But then I found out that
 10 Justin didn't roll in until 3:00, and he got up here for
 11 the first panel, so, so much for my excuse. He's just a
 12 better man than I.
 13 In any event, we have a kind of neat opportunity,
 14 which is something you don't always see in events like
 15 this, where we don't have particular presentations
 16 scheduled. Rather, we're able to kind of continue the
 17 discussions which we've had so far this morning as well
 18 as kind of expand them into some other related areas
 19 which we haven't had the opportunity to address.
 20 So I have a handful of questions myself. The
 21 panelists have suggested some. Certainly we want to get
 22 everyone else involved. Again, there's no kind of
 23 out-of-bounds kind of place we would go with this here.
 24 And I hope that this, you know, kind of format gives us a
 25 chance to really kind of develop a lot of the ideas that

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1 you were able to explore this morning.
 2 So with that, Justin actually, you know, took the
 3 lead and set up some questions, so why don't we kind of
 4 begin with those, and then I have some others in mind as
 5 well. And, well, should I read your question or -- we'll
 6 stage this well. I'll ask him the question that he
 7 asked. So hold on. Let me find it here.
 8 PROFESSOR LEVITT: I'll pretend to be totally
 9 surprised.
 10 PROFESSOR NAGLE: Exactly. Who would have ever
 11 thought to ask that? Well, generally, I guess the first
 12 issue we would like to talk about now here is -- that's
 13 an issue. I thought I had a question. It's basically on
 14 foreign campaign spending, which I know is something was
 15 touched on a little bit, is something which has been
 16 litigated, Bluman versus FEC, but I think that there's
 17 still a sense that there's more to be said about it.
 18 The idea here of course is, you know, to what
 19 extent, you know, does campaign finance law allow for
 20 under the First Amendment and under the applicable
 21 statutes kind of differential regulation when we're
 22 talking about foreign individuals, foreign entities
 23 getting involved in the United States, not that that
 24 could ever happen in an American election. But that's
 25 the issue we have here. So let me kind of -- we'll tee

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1 it up like that, and Justin, what do you think about
 2 this?
 3 PROFESSOR LEVITT: So we did mention a little bit in
 4 the first panel, Ciara mentioned that we had this report
 5 out of the Senate Intelligence Committee, and there's
 6 more coming, and we've had indictments, and there's more
 7 coming, and we saw some foreign spending, some of which
 8 may be illegal, most of which is probably not illegal,
 9 question mark-ish. And that's in part because the law in
 10 this area is in a weird point of stasis in that we have a
 11 decision, and there may not be a way to revisit it, and
 12 we're not sure what the decision means.
 13 So the governing law in this area is law that was
 14 made by a three-judge court in a case called Bluman
 15 versus FEC. It came right after Citizens United. And
 16 after Citizens United, I said: Given what the court has
 17 just said, you should expect non-Citizens United
 18 tomorrow, because given what the court said in Citizens
 19 United, it's very hard to believe that the blanket
 20 prohibition on foreign engagement in American elections
 21 is constitutional. There's a statute that says
 22 essentially no giving, no spending, no stuff.
 23 PROFESSOR TORRES-SPELLISCY: And no solicitations.
 24 PROFESSOR LEVITT: And no solicitations. So zero
 25 activity intended to influence American elections by

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1 noncitizens is essentially -- I think I'm not
 2 exaggerating.
 3 PROFESSOR TORRES-SPELLISCY: Yeah.
 4 PROFESSOR LEVITT: It is as blanket as you can get.
 5 Congress said "no, flat-out." Citizens United seemed to
 6 give free speech rights to entities that were not
 7 traditionally part of the American political community,
 8 right. American business corporations don't vote. They
 9 don't run for office. They are not traditionally what we
 10 thought of as the American political community. But it
 11 seemed to say nevertheless, there are individuals that
 12 comprise these business entities, and collectively, they
 13 can spend money, not only because they collectively are
 14 individuals with rights themselves, but because we want
 15 to hear their speech, because the speech itself is too
 16 valuable. There are listeners' rights as well. And
 17 corporations have a viewpoint, and we would be deprived
 18 of them if you read -- again, massively broad -- Justice
 19 Kennedy's opinion. We would be deprived of the
 20 particular unique perspectives that corporations have to
 21 offer, and that would be detrimental to us.
 22 Well, the same is true of noncitizens, right. It
 23 might be interesting to me in voting on American
 24 elections as an American citizen what people in France
 25 think, or what people in Russia think, or what people in

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1 China think, as long as we knew where they were coming
 2 from. Disclosure question. It might well influence how
 3 I thought about a candidate to hear what people in other
 4 countries thought about the candidate, particularly when
 5 a lot of what we do is foreign engagement, right. It
 6 might actually influence how I thought about a candidate
 7 if I heard from folks in Syria, or I heard from folks in
 8 Iran, or I heard from folks in the UK on either side of
 9 Brexit about what the political candidates thought about
 10 trade or other stuff.
 11 So after Citizens United, I would have thought most
 12 of those restrictions on, at least speaking were coming
 13 down and probably should have come down. The D.C. --
 14 this three-judge court, which again is a weird entity, it
 15 has a direct appeal to the Supreme Court. It's one of
 16 the few remaining zones that has this procedure. Said
 17 no, this statute can stand despite Citizens United
 18 because noncitizens aren't part of the American
 19 political community, period. The logic was deeply
 20 unsatisfying to me.
 21 And then it did something else which is equally
 22 dissatisfying in a totally opposite direction. It said,
 23 but we're going to construe this statute, which touches
 24 everything under the sun, to only involve express
 25 advocacy and giving money directly to a campaign. We're

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1 going to construe the statute to not touch noncitizens
 2 talking about issues or otherwise trying to influence
 3 American elections. That's what the statute prohibits if
 4 they don't use magic words.
 5 That is almost certainly dicta. That is, the case
 6 itself didn't involve any expressed wish of a noncitizen
 7 to engage in issue advocacy. It only involved desire to
 8 engage in magic words -- "vote for," "vote against" -- or
 9 to give money to campaigns. But it exists. The court
 10 said it. Didn't really explain why.
 11 There had been a distinction in campaign finance law
 12 between express advocacy and other stuff on the basis of
 13 vagueness concerns, right. We want American citizens
 14 with American speech rights to understand when they might
 15 be running afoul of the law and when not, and we can't
 16 just hold people subject to a \$1,000 cap on expenditures
 17 when you're not sure when you might be getting into the
 18 expenditure zone. That was the rationale for confining
 19 speech acts to certain magic words.
 20 If you are mentioning a candidate, are you going to
 21 be on the hook for capping your expenditures even when
 22 you're not actually intended to get them reelected? When
 23 you talk about the McCain-Feingold law, are you going to
 24 be on the hook because you're mentioning McCain and
 25 Feingold -- both of them were at the time candidates --

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1 even if you're not trying to get them reelected. So the
 2 Supreme Court said there are vagueness concerns here,
 3 we're going to narrow what the domestic statutes
 4 incorporate, but it's actually not clear to me the First
 5 Amendment vagueness rules apply extraterritorially. They
 6 might. They might not.
 7 PROFESSOR NAGLE: It's hard to say. Right.
 8 PROFESSOR LEVITT: And if you are a noncitizen, at
 9 least one thing is clear. You know when you're a
 10 noncitizen. So being in the category of people whom this
 11 regulation affects is clear. It's not clear that the
 12 Constitution is as protective of the rights of
 13 noncitizens, at least who aren't present in the country.
 14 So there are certain rules that certainly apply to
 15 people with a connection to the U.S., but somebody
 16 sitting in Russia, spending money in Russia, it's not
 17 clear that vagueness concerns apply to them, and so it's
 18 not at all clear that this decision is right on the other
 19 side.
 20 So on the one hand, it said we're going to uphold
 21 these prohibitions on noncitizens coming in and spending
 22 money on the campaign, because they're not part of the
 23 community. On the other hand, we're only going to keep
 24 them -- we're going to construe the statute. We're only
 25 going to keep them from spending money on some stuff, and

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1 it's not at all clear that the logic there holds either.
 2 So I guess the broader question that I have is:
 3 Does any of this make any sense? And even whether it's
 4 likely to come up again or not, do we think that as a
 5 matter of constitutional law, it is correct? What it has
 6 done is it's made some of the stuff that we found out in
 7 the indictments that foreign countries engaged in -- if
 8 you believe that this decision isn't dicta, it's made it
 9 legal.
 10 So the fact that Russia came in and expressed
 11 opinions about Donald Trump and Hillary Clinton without
 12 saying "vote for" or "vote against" in all of their --
 13 some said "vote for" or "vote against," but some of them
 14 didn't. And to the extent they didn't, if this opinion
 15 is binding, that means that what Russia did was not
 16 unlawful. And that confusion, whether it's dicta,
 17 whether it's binding, whether it means anything, whether
 18 it makes any sense, may well be why the indictments
 19 actually did not process this activity as campaign
 20 finance violations. The indictments that we've seen so
 21 far have focused entirely on hacking and on wire fraud
 22 and on pretending to be somebody else, but not at all on
 23 breaking the campaign finance rules. So that's just the
 24 setup. It's a long setup.
 25 PROFESSOR NAGLE: No, that's great.

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1 PROFESSOR STEPHANOPOULOS: We just had two points.
 2 I think I agree with virtually everything Justin said, so
 3 none of what I'm saying is a direct response to Justin.
 4 One point is -- I think unlike everyone else on this
 5 panel -- I'm skeptical that the foreign activities in
 6 2016 had huge effects on the election. I think the
 7 motives were deeply insidious, you know, clever, and, you
 8 know, diabolical too. But, you know, my reading of the
 9 available social science literature on the impact of fake
 10 news, fake Twitter accounts, fake Facebook accounts, is
 11 that first of all, they were a drop in the bucket, you
 12 know, dwarfed by genuine American social media activity,
 13 and also dwarfed by the activities of the presidential
 14 candidates and other American political actors.
 15 What I think is the best study of the influence of
 16 foreign entities in 2016 is Yochai Benkler's book Network
 17 Propaganda. And his conclusion is that as far as we can
 18 tell, the Twitter bot, the fake Facebook profiles, the
 19 Macedonians coming up with fake pro-Trump stories, none
 20 of that was very influential. You know, the impact was
 21 probably trivial of those things.
 22 Some of the other Russian activities, you know, the
 23 hacking of the emails and the disclosing of emails, you
 24 know, that could have been much more impact, but that's
 25 real news, and that's also more clearly a crime as well.

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1 But, you know, our conversation about social media, fake
 2 news, like that doesn't seem to be very influential.
 3 That's my understanding of the current literature.
 4 The other point is that, you know, I loved Bluman
 5 because my biggest frustration with campaign finance
 6 doctrine is that for 40 years plus, we've been stuck with
 7 the same governmental interest, you know, the government
 8 interest in preventing corruption. And, you know, it is
 9 hackneyed. It is frustrating to always be talking about
 10 corruption. So to have another interest, you know, the
 11 preservation of a political community, you know, the
 12 regulating of the boundaries of a political community,
 13 that is deeply exciting.
 14 You know, it's not the single interest that I'm most
 15 concerned about. You know, I think promoting equality,
 16 preventing the distortion of the political system, those
 17 are values I care more about. But I'll take what I can
 18 get. And so having a non-corruption interest, you know,
 19 asserted by conservative -- by Judge Kavanaugh, and then
 20 being upheld summarily by the Supreme Court, that's
 21 really exciting, and I can think of lots of applications
 22 of this interest that don't involve foreign actors at
 23 all.
 24 PROFESSOR NAGLE: Let's think about that for a
 25 second, how excited you are. Yeah.

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1 PROFESSOR STEPHANOPOULOS: *Some state wants to*
 2 regulate its state level campaign finance, and it says
 3 that we consider the state of Indiana to be the relevant
 4 political community, we are banning contributions to
 5 Indiana, you know, gubernatorial or state legislative
 6 candidates from non-Indiana entities. Why? Because we
 7 think of it, you know, we want the people of Indiana to
 8 govern Indiana. And if you're not an Indianian, you
 9 know, stay out of our election. Like I think that
 10 there's a colorable case that one could, you know, invoke
 11 Bluman for that sort of a law.
 12 PROFESSOR NAGLE: You think it would work just as
 13 effectively for state offices as it would for federal
 14 offices?
 15 PROFESSOR STEPHANOPOULOS: *I mean, I use the state*
 16 example because I think it's a lot trickier if you save
 17 it -- you know, we think that the relevant community is
 18 the 23rd Congressional District. But it's like, well,
 19 wait a second, whoever wins the 23rd Congressional
 20 District is then going to be voting on matters of federal
 21 policy in Washington, and also is going to belong to a
 22 party that is national in scope. So I'm not at all sure
 23 that this argument works for federal elections.
 24 It's also very unclear if a nonfederal government
 25 could pass these sort of regulations about federal

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1 elections. It might all be preempted or might be able
 2 to. I don't know. But I think the case -- the Bluman
 3 argument is much stronger if you have a state or if you
 4 have a municipality, a county, you know, some nonfederal
 5 governing body.
 6 PROFESSOR NAGLE: What about initiative campaigns?
 7 PROFESSOR TORRES-SPELLISCY: I'll get to the
 8 initiatives.
 9 PROFESSOR NAGLE: I knew it was a perfect segue.
 10 PROFESSOR TORRES-SPELLISCY: *So in terms of Bluman,*
 11 Bluman could well be the reason why Donald Trump, Jr.
 12 could be in a lot of legal trouble. So the argument here
 13 is -- so we know from public facing documents, including
 14 Don, Jr. put out his own emails, thus authenticating
 15 them, and in those emails we have an offer from the
 16 Russians to provide, quote, dirt on Hillary Clinton, and
 17 so that could be considered under campaign finance law to
 18 be a thing of value from a foreign entity.
 19 And so the meeting at Trump Tower in June of 2016
 20 where they get into a room, and it's Paul Manafort, who
 21 was the campaign manager at the time, Jared Kushner, and
 22 Don, Jr., and then a bunch of Russians. And depending on
 23 how that negotiation went, if a thing of value was
 24 provided to the Trump campaign from those foreign
 25 nationals, the way I read Bluman, that could be a

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1 violation of this section of federal campaign finance
 2 law.
 3 But one of the things that makes me incredibly
 4 nervous about this is at least so far in terms of the
 5 campaign finance charges that have been leveled in the
 6 Trump orbit, so we have Michael Cohen pleading to
 7 violations of the Tillman Act and of FECA. And what is
 8 sort of interesting about that from my perspective is
 9 that he pled guilty to those charges.
 10 And so I am very worried that if they charge Don,
 11 Jr. with a campaign finance violation of the prohibition
 12 on foreign contributions, that he will raise a First
 13 Amendment objection to the foreign ban, and it's possible
 14 that he could win.
 15 And to the point of initiatives, so one of the
 16 demonstrated cases of a foreign national spending in a
 17 U.S. election post-Citizens United happened in 2012 in
 18 Los Angeles. Los Angeles had an initiative that was
 19 trying to have safe sex in pornography. It was basically
 20 a requirement that the actors in pornography wear condoms
 21 during the act, and they actually put those to a vote in
 22 Los Angeles. And --
 23 PROFESSOR LEVITT: Not just warm out there.
 24 PROFESSOR TORRES-SPELLISCY: *Yes. And a foreign*
 25 pornographer actually spent in that election against the

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1 initiative, because he did not want his actors to have to
 2 wear condoms during the act. And this generated two
 3 different complaints. One was to the FEC, because the
 4 law that we've been talking about, it doesn't just apply
 5 to federal elections. It applies to state and local
 6 elections as well.

7 So there was a complaint into the FEC. There was a
 8 complaint into the California regulators, because it was
 9 also illegal under a parallel California statute. The
 10 FEC deadlocked and would not enforce the law against the
 11 foreign pornographer, but the State of California did
 12 enforce it, and so there was a big fine that was put on
 13 the foreign pornographer for that spending in the
 14 initiative.

15 PROFESSOR NAGLE: And I guess my question there is
 16 -- well, I'll pass that one. Is Congress doing anything
 17 with this right now? Is anyone trying to strike this or
 18 expand this in light of, you know, all of the issues
 19 arising from the last election?

20 PROFESSOR LEVITT: All of the stuff in H.R. 1, it's
 21 571 pages, and I don't think that this is anywhere in the
 22 campaign finance portion, which is another like -- which
 23 is 300 of the 571 pages. I don't think that foreign
 24 spending is --

25 PROFESSOR NAGLE: Any idea why that -- you know, you

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1 would think this would be a logical area given what we've
 2 seen for, you know, those who are particularly concerned
 3 about what happened with the 2016 election, to try to
 4 tighten this up, especially given the apparent, if
 5 ambiguous, you know, approval in Bluman. No one is
 6 pushing this?

7 PROFESSOR STEPHANOPOULOS: I mean, so I agree with
 8 Justin. I don't think there's anything about the
 9 particular provision that applies to foreign, you know,
 10 campaign activities in the U.S., which is a little odd,
 11 because H.R. 1 is a liberal wish list. And so if you're,
 12 you know, sticking in there a million other provisions
 13 that are never going to become law, you know, why not
 14 also say that the ban on foreign activity extends to
 15 issue advocacy, it's not limited to express advocacy.

16 You know, there is in H.R. 1 a ton of new regulation
 17 of social media, you know, treating social media
 18 advertisements as the equivalent of traditional media
 19 advertisements and requiring the disclosure of every
 20 single Facebook or Twitter ad, and the creation of a
 21 public database where you could go through and look at
 22 all the ads that were ever shown on Facebook, as well as
 23 disclosure about who paid for the ad and who the ad was
 24 targeted to be shown to.

25 So I think a lot of those aspects of H.R. 1 are a

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1 response to the 2016 election and the concerns about
 2 foreign influence. They're just focused on social media
 3 regulation as opposed to the sort of the higher level
 4 regulation of foreign activity, period.

5 PROFESSOR LEVITT: And one of the reasons might be
 6 this statute prohibiting foreign spending elections
 7 exist, right?

8 PROFESSOR TORRES-SPELLISCY: Yeah.

9 PROFESSOR LEVITT: The existing statute covers
 10 virtually everything. To the extent the court construed
 11 it, it was not as a matter -- well, it's only a paragraph
 12 in Bluman. So we're not really sure the reason, but it
 13 seemed to be not a matter of statutory construction, but
 14 a matter of what the court thought to be a constitutional
 15 mandate to avoid vagueness concerns. And so it's not
 16 clear that Congress -- to the extent this isn't dicta,
 17 it's not clear that Congress could fix the problem.

18 We do see Congress occasionally saying -- responding
 19 to courts' quasi-constitutional holdings in saying, are
 20 you sure, because we'd really like the blanket ban if the
 21 blanket ban is constitutional. Go back and check your
 22 work. But that doesn't -- that's a pretty aggressive
 23 response. It doesn't happen a lot. And so part of the
 24 problem -- this is why I say I'm not sure it comes up
 25 again. Part of the problem is it's not clear whether

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1 Congress will respond forcefully, because the statute
 2 they have is pretty forceful.

3 PROFESSOR STEPHANOPOULOS: What Congress could do is
 4 the BICRA response, right. So, you know, Buckley --
 5 Bluman echoes Buckley in coming up with this nonstatutory
 6 distinction between express advocacy and issue advocacy.
 7 And in the McCain-Feingold law, Congress responded by
 8 saying not that, hey, we really meant to cover issue
 9 advocacy, but by coming up with a new category of
 10 electioneering communication, which is broader than
 11 express advocacy.

12 All you have to do to be electioneering
 13 communication is mention a candidate running for office
 14 within a certain window of time, you know, in a
 15 communication that goes out to enough people. And so
 16 suppose, you know, the less aggressive response is still
 17 a response is to say that like, okay, fine, we're not
 18 going to cover foreign pure issue advocacy, but we do
 19 want to cover foreign electioneering communication. And
 20 that would have covered all those Russian ads that were
 21 like, you know, Hillary Clinton is the devil and Donald
 22 Trump is God, and they're fighting for the soul of
 23 America, you know, (inaudible) who to vote for.

24 PROFESSOR LEVITT: That was a real ad, by the way.

25 PROFESSOR TORRES-SPELLISCY: Yes. Yes.

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1 PROFESSOR STEPHANOPOULOS: It would have covered,
 2 you know, that ad, whereas Kavanaugh's construal of the
 3 existing statute would not cover the Obama is Satan ad.
 4 PROFESSOR TORRES-SPELLISCY: Can I add one thing?
 5 And there were ads from the Russian IRA that would fall
 6 under the Buckley test. So one of the things that they
 7 did is they targeted African Americans, and they had two
 8 basic messages. One was vote for a third party
 9 candidate, or don't vote at all. And so they pretended
 10 that they were African Americans themselves, so they had
 11 handles like Woke Blacks, or Blacktivist, but it's just a
 12 Russian intelligence officer behind that profile.
 13 And then they put out ads that said Jill Stein is
 14 the better candidate, vote Stein. And that vote Stein
 15 falls under Buckley's magic words test, and so that was
 16 actually a regulable ad. So it wasn't all just pure
 17 issue advocacy. And I agree under our current laws, most
 18 of what the Russian IRA did would fall outside of where
 19 we regulate now, because we don't regulate electioneering
 20 communications online. It has to be broadcast, which
 21 means radio, TV, satellite.
 22 PROFESSOR NAGLE: Before we move on to the next
 23 section, let me see. Is there any questions on the whole
 24 kind of foreign involvement on spending from our student
 25 body?

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1 PROFESSOR LEVITT: Or just stuff that we were
 2 talking about that didn't make any sense. We're using a
 3 lot of jargon.
 4 (Audience member responded which was inaudible to
 5 transcribe.)
 6 PROFESSOR LEVITT: Say another sentence, if you
 7 would, for me, at least, on the distinction you're trying
 8 to make there.
 9 (Audience member responded which was inaudible to
 10 transcribe.)
 11 PROFESSOR STEPHANOPOULOS: I think most radical
 12 reformers would be pretty satisfied with equity under
 13 your formulation, right. Like if we had a law that said
 14 everyone gets a \$100 voucher to allocate to the
 15 candidates of their choice, and that is the only money in
 16 the electoral system, I still think of that as equity,
 17 not equality, because no one is going to force you to use
 18 your \$100, so it's equality of opportunity. Everyone has
 19 the same opportunity to, you know, participate in the
 20 electoral system, to, you know, give their voucher to a
 21 candidate. But if you want to sit at home and not use
 22 your voucher, that is totally fine.
 23 A good example of this is, you know, I don't know if
 24 folks know that Seattle recently adopted the first
 25 publicly financed voucher system in American history.

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1 It's very large. It is \$100 per capita per election,
 2 which is an unbelievably huge amount of money for a
 3 municipal election. If you did \$100 per capita for an
 4 American federal election, that would be \$30 billion.
 5 The actual total amount of spending in 2016 was
 6 \$6 billion.
 7 PROFESSOR LEVITT: That we know of.
 8 PROFESSOR STEPHANOPOULOS: Yeah. Yeah. Right. But
 9 so, you know, a \$100 voucher system federally would be on
 10 the ballpark of five times more money than we currently
 11 have in the system.
 12 But in any event, so in Seattle, you suddenly have
 13 this gift from the government of \$100 to every voter.
 14 Something like -- I forget the numbers now -- tiny
 15 proportions of Seattle citizens actually used their
 16 vouchers. I forget if it was like five percent or
 17 three percent or two percent or something. But like
 18 that's the order of magnitude we're talking about.
 19 I'm disappointed by that low level of use, quite
 20 disappointed by the low level of usage, but as a
 21 reformer, I'm satisfied. I mean, it's good enough for me
 22 if we have the system where everyone has the potential to
 23 give \$100 in publicly financed money. If you choose to
 24 squander the opportunity, that's fine. And so the end
 25 result in Seattle, you know, is not equality of outcome,

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1 but it is equality of opportunity, which I think is, you
 2 know, so much better than the status quo, even if it's
 3 not actually equality of outcome.
 4 PROFESSOR LEVITT: And I'll make the same point or a
 5 similar point tying back to the presentation I gave
 6 before. And maybe this helps to explain why I can
 7 understand the concern about expenditure limits more than
 8 I can understand the concern about contribution limits.
 9 Contribution limits, I think, do foster equity.
 10 It's about equality of input. Expenditure limits,
 11 particularly expenditure limits on campaigns, on
 12 political candidates, that's more a measure of equality
 13 of outcome. And I am more skeptical of them, and I can
 14 understand why the court is more skeptical of them.
 15 So contribution limits, if you're only allowed -- if
 16 every person is allowed to give \$1,000 to a particular
 17 candidate, if everybody decides that one candidate is the
 18 preferred candidate, that candidate may well end up with
 19 vastly more money than an alternative candidate.
 20 Expenditure limits on campaigns essentially say
 21 whatever the level of support, you can each only spend
 22 the following amounts of money. And that may help to
 23 explain my skepticism, because whatever the level of
 24 support, you can only spend this much money seems to be a
 25 differential system -- seems to be a system that -- well,

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1 as I explained it before, that puts a cap on a value that
 2 I think a lot of Americans hold dear.
 3 PROFESSOR TORRES-PELLISCY: I'll take another lens
 4 on this, which is: Should Indiana elections be funded by
 5 Indiana citizens? Before Citizens United, there were a
 6 few cases in the lower courts that asked that question,
 7 and the result was actually very split. In some cases, a
 8 judge would find that it was actually appropriate to have
 9 this geographic limit, and then in other cases, courts
 10 would find that, no, we allow the freedom of movement of
 11 capital, and we shouldn't draw these geographic limits on
 12 who can spend in which election.
 13 There are two contradictory ways to think about
 14 this. On the one hand, if you look at certain
 15 congressional races, the winner would not have the money
 16 that they had if they only raised money from their
 17 congressional district. There's just not enough like
 18 wealth to support a sustainable campaign. And the
 19 average winning congressional candidate spends over
 20 \$1 million, and they have to raise that in hard money
 21 amounts, which takes an enormous amount of time.
 22 And so one way to think about it is allowing for
 23 funds to cross state lines and other political boundaries
 24 facilitates certain people being able to run for Congress
 25 at all, because they can draw on the donor locations,

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1 which tend to be New York State and California.
 2 The flip side to that story is what happened with
 3 Prop 8 in California. So Prop 8 was an amendment to the
 4 California Constitution to define marriage as between one
 5 man and one woman. But when people pulled the campaign
 6 finance data of who was supporting Prop 8, there were a
 7 number of people from Utah who supported having Prop 8 on
 8 the California ballot. And you can ask yourself, do you
 9 think it was appropriate for all of those people from
 10 Utah to put this question before the California
 11 electorate? Is there something sort of untoward or
 12 inappropriate about that type of out-of-state funding?
 13 And so I can see both sides of that equation.
 14 PROFESSOR NAGLE: Anything else on this line? Yeah.
 15 AUDIENCE MEMBER: Talking about vouchers, is there
 16 any literature on the correlation between some of the
 17 actual voting outcome of what they give the money to?
 18 Because I would assume that people who give their money
 19 to a candidate will also vote for them. And if that's
 20 the case, isn't that just a massive waste of money?
 21 Because the voting system without these vouchers,
 22 taxpayer money is going to sort it out anyway.
 23 PROFESSOR STEPHANOPOULOS: Yeah. A big part of the
 24 case for vouchers is that they're supplanting other funds
 25 in the system, right. So it is true that at some level,

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1 your voucher contribution is going to be virtually
 2 perfectly correlated with your votes, so what's the point
 3 of the voucher contribution?
 4 The point is that from the candidate's perspective,
 5 if they can easily raise enough money to run a viable
 6 campaign through vouchers, they don't have to resort to
 7 private financing, you know, to private contributions.
 8 So all of the fears that flow from private financing no
 9 longer exist when the private financing is replaced by
 10 public financing. Quid pro quo corruption, you know, out
 11 the window when there is no privately financed quid to
 12 begin with. Broader notions of corruption out the
 13 window.
 14 You know, interest the current Supreme Court doesn't
 15 recognize as valid, you know, fostering of inequality,
 16 lack of egalitarianism, all those concerns too no longer
 17 applicable if the source of the money is public and
 18 universal instead of coming from, you know, wealthy
 19 donors or from corporations.
 20 So in my view, that's the real selling point for
 21 vouchers, that they allow us to have a vibrant electoral
 22 system. You know, \$100 per capita, much more vibrant
 23 than the status quo. But they do it without any of the
 24 corruption, any of the distortion, any of the
 25 inequalitarianism that I think are, you know, so deeply

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1 disturbing about the system that we currently have.
 2 PROFESSOR LEVITT: And two add-on points to that.
 3 So you're right, if everybody actually chose to use their
 4 voucher, it would amount to a vote before a vote, and so
 5 what's the point? It serves a purpose when you have a
 6 limited percentage of people who ever exercise the
 7 voucher at all, because then people would be contributing
 8 funding toward persuading the rest of the electorate. So
 9 it only works -- if you get 100 percent participation on
 10 vouchers, it's a vote before a vote, and it doesn't
 11 matter. It only works or it only has a practical purpose
 12 when you have a smaller percentage of people using these
 13 vouchers, which provides financing or persuasion.
 14 Just on the notion of other interests that the
 15 courts don't recognize, I think one of the more -- one of
 16 the shoddier campaign finance precedents in this zone is
 17 a case out of Vermont that was dealing with the interest
 18 in regulating the time that legislators spent, and
 19 particularly the time that legislators spend on cash
 20 calls. It takes away from legislation, takes away from
 21 getting along with each other, it takes away from all of
 22 the things that we want legislators to do if call time is
 23 taking up what, in some cases, amounts to 70 percent of
 24 their day, or at least 70 percent of some days. And I
 25 think the average is 30 percent across the board of all

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1 of the time that a legislator spends working is call
 2 time, which is a little weird.
 3 Vermont tried to regulate its campaign finance
 4 structure in order to further this interest. And the
 5 Supreme Court essentially said the outcome we got to in
 6 Buckley is an outcome we want to preserve here, so I'm
 7 not going to pay attention to your other interest. We
 8 already have stasis. Let's preserve the stasis. That is
 9 a weird mode of constitutional analysis.
 10 One of the things that vouchers might do, if you
 11 believe that they supplant other funding, is they might
 12 allow -- they might free up time for legislators to
 13 engage in legislative stuff rather than call time.
 14 There's a big if. I mean, that empirical premise that
 15 they might supplant other fundraising is a big if. There
 16 aren't many businesspeople I know who say "I've already
 17 got enough money, I'm not interested in making more," and
 18 the same might be said of legislators. So it's not clear
 19 that it would actually supplant fundraising time, but
 20 that's another interest that the courts haven't
 21 addressed.
 22 PROFESSOR TORRES-SPELLISCY: Yes. Go ahead.
 23 PROFESSOR STEPHANOPOULOS: (Inaudible) saying if you
 24 want to receive any vouchers, you agree not to receive
 25 any private contributions, right. It's up to you. You

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1 can choose to run privately financed campaigns, but if
 2 you want access to \$100 per capita, then you simply
 3 cannot accept private contributions. Like that's a way
 4 to insist on the public funds, you know, supplanting the
 5 private funds.
 6 PROFESSOR TORRES-SPELLISCY: And if you're
 7 interested in the phenomenon of call time, so call time
 8 is the time that your member of Congress or a state
 9 legislator spends on the phone dialing for dollars to
 10 raise money for their next campaign.
 11 I wrote an entire law review article on this called
 12 "Time Suck," and I meant it. Basically what we can see
 13 from leaked documents is the Republican Party and the
 14 Democratic Party tell their freshmen members of Congress
 15 to spend 30 hours a week on fundraising. And what
 16 happens in Congress then is that the legislating has to
 17 bow around the fundraising, and that means that your
 18 junior members of Congress don't have a chance to be at a
 19 hearing, or draft a bill, or meet with constituents.
 20 They are literally doing more telemarketing than a
 21 telemarketer.
 22 And I think one of the interesting models that has
 23 just sort of popped up more recently is sometimes
 24 referred to as Netflix for democracy. So the idea there
 25 is if there's a candidate that you like, a member of

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1 Congress that you like, set up a like \$5 a month donation
 2 to them and let them know, I'm giving to you every month,
 3 so that they can actually budget. And the more people
 4 who do that, the more it frees members from being stuck
 5 in that cubicle on call time.
 6 And so one of the ways that we have to get creative
 7 with the current system that we're somewhat stuck in is
 8 thinking about how do we use all of this brilliant
 9 technology that we have to actually free our members of
 10 Congress to have the literal time to do their jobs.
 11 (Audience member responded which was inaudible to
 12 transcribe.)
 13 PROFESSOR LEVITT: So it's an interesting sort of
 14 international relations theory. I think the foreign
 15 campaign ban, it's certainly been around for decades. I
 16 don't know whether it was part of -- or part as
 17 extensively -- original OG 1910s, 1920s campaign finance
 18 structure.
 19 PROFESSOR TORRES-SPELLISCY: It really kicked in in
 20 '66.
 21 PROFESSOR STEPHANOPOULOS: It was tightened much
 22 more recently.
 23 PROFESSOR TORRES-SPELLISCY: Yes.
 24 PROFESSOR STEPHANOPOULOS: Bluman in 2007 tightened
 25 of the law though. I'm not sure.

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1 PROFESSOR LEVITT: Loosening of the law.
 2 PROFESSOR STEPHANOPOULOS: No, tightening.
 3 Tightening.
 4 PROFESSOR LEVITT: How so?
 5 PROFESSOR STEPHANOPOULOS: I mean, I think the
 6 current language of the law that was considered in Bluman
 7 I think didn't take its final form until quite recently,
 8 and I think the -- you know, it's as radical as it can be
 9 right now, but I think that -- like it became that
 10 sweeping I think only quite recently. Maybe I'm --
 11 (inaudible) accounting scandals in the 2000s, there might
 12 have been an amendment to that provision.
 13 PROFESSOR LEVITT: So you're right -- you're
 14 absolutely right in response to some of the White House
 15 scandals of the 2000s, Congress tightened it up, but I
 16 think the scandals were scandals because there was
 17 already a prohibition in place for decades, and the
 18 empirical question is -- so I don't think other countries
 19 responded to that. And Nick's absolutely right that it
 20 only took its final, most sweeping form relatively
 21 recently.
 22 But I don't think -- I'm not an international
 23 comparative expert. I certainly don't get the sense that
 24 other countries reacted to the 1960s, 1970s regulation by
 25 strengthening their own campaign finance regimes in

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1 response. And that regulation existed, I mean, whether
 2 Bluman sort of siphoned some of it off or not, whether it
 3 took some of the existing regulation out of the sphere of
 4 congressional power, that happened quite recently. That
 5 was after Citizens United. So those who are more expert
 6 in international campaign finance regulation than I am
 7 can talk to whether other countries responded in kind. I
 8 don't get the sense that that was a tit-for-tat or quid
 9 pro quo.

10 PROFESSOR TORRES-SPELLISCY: And we do have some
 11 extraterritorial campaign finance law for, lack of a
 12 better term, with the Foreign Corrupt Practices Act. So
 13 the Foreign Corrupt Practices Act bars American
 14 businesses from bribing foreign governments to keep or
 15 get business abroad, and that prohibition is actually
 16 enforced by the Securities and Exchange Commission and
 17 the DOJ. But it is outward looking. So if you're
 18 bribing, say, the Russians with a penthouse, that's
 19 potentially a violation of the Foreign Corrupt Practices
 20 Act, because you have a foreign government. You're
 21 ostensibly trying to get the business of building Trump
 22 Tower Moscow, and depending on how far those negotiations
 23 got, you might not just see campaign finance violations
 24 being charged. You might see a Foreign Corrupt Practices
 25 Act being charged.

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1 PROFESSOR STEPHANOPOULOS: Also in Bluman, Kavanaugh
 2 notes that the plaintiffs in the case were Israeli, and I
 3 think also Canadian citizens. And so Kavanaugh just
 4 notes that both Canada and Israel have equivalent bans
 5 already on foreign electoral activity in Israeli or
 6 Canadian elections. So it might be that there's already
 7 a norm, you know, internationally of only allowing
 8 citizens from that country to participate in electoral
 9 activity within the country.

10 And so that case, Bluman would just be confirmation
 11 of an existing international norm, you know, rather than
 12 an impetus for future tit-for-tat retaliation. Also tell
 13 you like I think the norm is fine. Like even if the norm
 14 didn't exist and Bluman pushed us toward that norm, I
 15 think the norm of, you know, countries electing their own
 16 officials free from foreign interference is a pretty good
 17 norm. Like I like the idea of having the particular, you
 18 know, nationally circumscribed political community decide
 19 what to do within boundaries of that community. So if
 20 that's where Bluman pushes us toward, I think that's a
 21 good normative direction.

22 PROFESSOR LEVITT: It's also true that the
 23 prosecutorial -- the ability of U.S. regulators to reach
 24 foreign conduct, both practically and legally, does not
 25 extend to the full scope of the regulation that the

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1 congressional statute would suggest, right.
 2 Congressional statute says no foreign spending or
 3 contributions in American elections at all, period. And
 4 you're not going to see an American prosecutor seeking
 5 criminal charges even against somebody who happens to
 6 land on American soil because they tweeted or because
 7 they sent an email or because they put a poster up in a
 8 foreign country about an American election. Both legally
 9 and practically, there would be limits on the extent to
 10 which that regulation could influence truly international
 11 speech.

12 PROFESSOR NAGLE: Anything else on this? Okay.
 13 Then we have -- thanks to Justin -- another question
 14 which actually is an interesting one. Is derives --
 15 well, the issues is kind of permissible regulation of
 16 coordinated speech. The coordination between campaigns
 17 and candidates and others is famously complicated under
 18 the court's campaign finance jurisprudence. It happens
 19 though that the case which you highlighted, which I think
 20 especially this one, Wisconsin versus Peterson, is not
 21 actually a federal court case. It's Wisconsin Supreme
 22 Court. You want to tell us a little about the case and
 23 then kind of the issues that you're kind of intrigued by?

24 PROFESSOR LEVITT: Sure. So I can set this one up
 25 more quickly, I think, and should anyway, because you're

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1 tired of listening to me. It's a very similar issue in
 2 some ways to the Bluman issue, or at least one of the
 3 Bluman issues. And it's an issue that comes out of
 4 vagueness concerns, or at least as I understand it, it
 5 comes out of vagueness concerns.

6 So as Nick mentioned before, most campaign spending
 7 that purports to be independent isn't. But legally the
 8 Constitution treats independent speech differently from
 9 speech that is coordinated with a candidate. So truly
 10 independent speech, again, paradigm case, you go out and
 11 produce an ad, and you don't talk to a candidate about
 12 it. And the paradigm version of coordinated speech is
 13 you like a candidate, and so you ask the candidate, hey,
 14 what would help you most? I would like an ad to these
 15 people about this issue in this area. And then you go
 16 out and produce that ad.

17 The courts treat that and federal law treats that
 18 and most state laws treat that as coordinated speech and
 19 therefore a contribution. So if you go in, and before
 20 you speak, you check in with the candidate about what
 21 would be most helpful, and then you do that thing, that's
 22 treated the same as a gift to the candidate, because
 23 effectively, money is fungible. If I spend \$5 million on
 24 whatever the candidate would like to spend, the candidate
 25 doesn't have to. And to the extent there's true

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1 coordination about that, that is no different from my
 2 giving \$5 million to the candidate, because that just
 3 saves them the bother of having to produce this very ad.
 4 The question has arisen whether there are
 5 constitutional limits on the sort of campaign spending
 6 that can be coordinated. Federal law, generally
 7 speaking, has regulatory limits on what it will consider
 8 to be coordinated speech. So the FEC has a bunch of
 9 regulations that say before we're going to call something
 10 coordinated, it has to meet this test and this test and
 11 this test and this test. There are both content
 12 restrictions and conduct restrictions that come out of
 13 federal regulation.
 14 State laws, including Wisconsin state laws, were
 15 significantly broader. Well, state laws are different.
 16 State laws are different all over the map. Wisconsin
 17 state law in particular was significantly broader. It
 18 didn't have the same sort of restrictions on what you
 19 could consider to be coordinated speech as a matter of
 20 building regulation. Wisconsin state law essentially
 21 said if you're engaging in electoral spending and you ask
 22 a candidate or coordinate with a candidate about the
 23 sorts of things that would be helpful, that amounts to a
 24 gift without confining the sorts of stuff that you would
 25 spend money on.

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1 There was a scandal that developed in Wisconsin, and
 2 I'll say some people thought that the coordinated
 3 spending was scandalous, and some people thought the
 4 investigation into the coordinated spending was
 5 scandalous. Wisconsin has a John Doe law that allows a
 6 prosecutor to investigate stuff in a way that is not
 7 particularly transparent, and there was a quite vigorous
 8 investigation of Scott Walker's campaign and some
 9 independently financed speech, and whether that financed
 10 speech was coordinated in a way that amounted to a gift
 11 to Scott Walker's campaign.
 12 Out of competing scandals, out of a quite aggressive
 13 prosecutorial investigation arose this state case from
 14 the Wisconsin Supreme Court, and the court construed its
 15 coordination rules quite narrowly. It essentially
 16 adopted the same magic words test that you see in Buckley
 17 that I mentioned before, that we've been talking about
 18 here, and said the only sort of coordinated expenditure
 19 that a government is allowed to regulate is expenditure
 20 that says "vote for" or "vote against" a candidate.
 21 The Wisconsin Supreme Court said effectively -- and
 22 I'm paraphrasing a lot, I think the opinion is about 150
 23 pages -- if there is coordinated speech about issues or
 24 that mentions candidates or you're just talking about
 25 things that are helpful and you get together with the

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1 candidate, that a state may not regulate that even if it
 2 effectively provides the candidate a benefit and that
 3 allows the candidate to use its money fungibly, right,
 4 even if the candidate would love to put out an ad that
 5 doesn't mention "vote for me," that just talks about the
 6 great things that I'm doing in the arena of [insert X]
 7 and we get together, and then you spend money on that ad
 8 rather than me spending money on that ad.
 9 The Wisconsin Supreme Court essentially said that's
 10 off limits, and the analysis it did relied on vagueness
 11 concerns, essentially that regulated entities, that
 12 people would have to know when they were running afoul of
 13 the law, and if they were engaging in coordinated issue
 14 speech, they might not know that they were running afoul
 15 of the law.
 16 I've got questions about that, because I think the
 17 act of coordinating itself might put you on notice that
 18 you were in fact potentially entering into a regulated
 19 zone. And it seems to me that the Wisconsin Supreme
 20 Court's analysis was more concerned with the scope of a
 21 potential prosecutorial investigation than it was with
 22 putting a regulated entity on notice that it might be
 23 running into a regulatory arena. That is, the court
 24 expressed its concern about vagueness and said we can't
 25 have these coordination laws that are so expansive

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1 because you might not know when you're getting in
 2 trouble, but I don't think that was actually its concern.
 3 I think it was just concerned with a prosecutorial
 4 investigation that it felt was going too far. And so
 5 we're left with this Constitutional holding that doesn't
 6 actually seem to be based on the theory that it espoused.
 7 I actually think that there aren't many vagueness
 8 concerns as long as the degree to which conduct is
 9 coordinated is clear. I don't think there are vagueness
 10 concerns with the content of the speech, that is, I think
 11 it is entirely sensible to say that we can address any
 12 concerns about when you might be coordinating by having
 13 clear rules about what conduct is viewed as coordinated
 14 rather than the content of the speech that is
 15 coordinated. But the Wisconsin Supreme Court disagreed
 16 with me on that.
 17 PROFESSOR NAGLE: Shockingly enough.
 18 PROFESSOR LEVITT: Shockingly enough. I think it
 19 was wrong. I think the one concern led into another, and
 20 now I have questions about whether similar approaches
 21 will run over the Wisconsin state line, right. This is a
 22 constitutional concern the Wisconsin Supreme Court had.
 23 I don't know the extent to which other state Supreme
 24 Courts will adopt similar reasoning. There are many
 25 state campaign finance regimes that regulate coordinated

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1 campaign activity. And I don't know the extent to which,
 2 if the FEC ever changed its rules on what coordinated
 3 activity consists of, whether the Wisconsin Supreme
 4 Court's analysis would find its way into federal law.
 5 PROFESSOR STEPHANOPOULOS: My intuitions are similar
 6 to Justin's. You know, first off, I think, you know, if
 7 the question is when are nominally independent
 8 expenditures actually the functional equivalent of a
 9 contribution, to answer that question by focusing on
 10 whether the independent expenditures are express advocacy
 11 or issue advocacy is just a total non sequitur. Like we
 12 don't care about what kind of speech you're engaged in.
 13 We care about how coordinated is it with the candidate.
 14 That's the issue, you know, not what the content of your
 15 communication is.
 16 So I just think like the Wisconsin Supreme Court's
 17 answer cannot be the right answer. And we see that in
 18 the FEC regulations which, you know, have nothing to do
 19 with whether it's express advocacy or issue advocacy and
 20 everything to do with, you know, various proxies for
 21 various ways to think about coordination. Like whatever
 22 the right answer is, I don't think it's this.
 23 That being said, I do think there are vagueness
 24 concerns here, right. Like if Congress said we are going
 25 to simply allow the FEC to decide on a case-by-case basis

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1 when something constitutes coordination, and therefore
 2 when an expenditure that you thought was independent is
 3 actually going to be treated as a contribution, I think
 4 that would raise vagueness concerns. You know, or if the
 5 test was something like -- if a test was just the word
 6 coordination, when we think there's coordination, it's a
 7 contribution. I think then, you know, parties would not
 8 be on notice as to what they have to do to make their
 9 activity a truly independent expenditure as opposed to
 10 something that would be treated as a contribution and
 11 then will expose them to, you know, serious criminal
 12 liability for, you know, massively exceeding the
 13 contribution limit.
 14 So I think there are constitutional concerns, but
 15 the way to address them is by clearly defining
 16 contribution -- sorry, coordination. You know, the
 17 Buckley move of trying to avoid a constitutional
 18 vagueness concern by focusing on the type of speech just
 19 seems, you know, utterly unavailable when the relevant
 20 question is coordination.
 21 PROFESSOR TORRES-SPELLISCY: If you are going to run
 22 for Congress, you really do need a campaign finance
 23 lawyer on your team, or you at least need some
 24 availability of a campaign finance lawyer on your team to
 25 advise you about like these ever-moving targets, what's

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1 in bounds, out of bounds, what's okay.
 2 PROFESSOR NAGLE: (Inaudible) lawyers, by the way.
 3 PROFESSOR TORRES-SPELLISCY: Yes. It does create an
 4 endless market for election lawyers, so maybe I should
 5 like it a little bit more. But I do think that, you
 6 know, the combination of what I think were bright line
 7 rules, so take the electioneering communication
 8 definition, and then it gets litigated up to the Supreme
 9 Court and Wisconsin Right to Life II, and suddenly your
 10 bright line test turns into another subjective test. And
 11 the court keeps on doing things like that such that you
 12 can't even trust that if you open the statute and read
 13 the statute in its plain English meaning that you will be
 14 okay, you know, come next Tuesday when a different, more
 15 aggressive prosecutor looks at it. And I think that we
 16 need to work on.
 17 And so the more that we can have black law
 18 definitions in campaign finance and get out of this realm
 19 of subjectivity of like, oh, this appeared to be the
 20 functional equivalent of express advocacy, I think those
 21 things are just completely unworkable in the long-term.
 22 PROFESSOR STEPHANOPOULOS: I just had one quick
 23 thing there, which is that, you know, to put my statist
 24 and socialist hat back on, one advantage of the law that
 25 Congress, you know, actually passed in the 1970s that

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1 would have regulated independent expenditures is in a lot
 2 less would hinge on whether something is a contribution
 3 or an expenditure.
 4 You know, the reason this distinction is so
 5 important right now is if you fall in the contribution
 6 bucket, your money is, you know, harshly limited, but if
 7 your money falls in the expenditure bucket, there's no
 8 permissible constitutional restraint. So the legal
 9 regulation is utterly different depending on which
 10 category you're in.
 11 PROFESSOR TORRES-SPELLISCY: Yes. To make this
 12 really real, one of the reasons that Michael Cohen is
 13 going to jail is because they are considering what he did
 14 contributions and thus subject to a hard money limit. If
 15 they considered it an expenditure there would be no limit
 16 on how much you could pay mistresses.
 17 PROFESSOR STEPHANOPOULOS: That's probably a little
 18 bit I guess -- my point is that, you know, the
 19 expenditures ought to be regulable too.
 20 PROFESSOR TORRES-SPELLISCY: Yes.
 21 PROFESSOR STEPHANOPOULOS: And so Michael Cohen
 22 could be going to jail regardless if he exceeded, you
 23 know, the expenditure limit that I'm imagining in my
 24 hypothetical world. But I guess legally I would prefer a
 25 world where both are capped, maybe at different amounts,

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1 and so, you know, still maybe something would hinge on
 2 whether you label something a contribution or an
 3 expenditure. But a lot less would hinge on that, because
 4 maybe in the one case you face a \$2,000 limit, maybe the
 5 other case you face a \$10,000 limit. But either way you
 6 would be facing some kind of limit, and the only question
 7 would be, you know, which limit it is. So I think the
 8 stakes would go down dramatically in my preferred world
 9 where Buckley came out the other way and Congress was
 10 allowed to regulate expenditures.
 11 PROFESSOR NAGLE: Questions on this?
 12 PROFESSOR LEVITT: Just to seed the questions a
 13 little bit. So I think that the things that we have
 14 discussed outside of the realm of straight-up
 15 expenditures and straight-up contributions in foreign
 16 speech, the most interesting developments in the campaign
 17 finance arena are probably in the worlds of disclosure,
 18 what we disclose and what we are allowed to disclose, and
 19 this coordination approach, right, when you're spending
 20 money on something that amounts to a gift to a candidate.
 21 It's also the realm where the weirdest stuff happens
 22 in campaign finance. So when Mitch McConnell releases a
 23 B roll of 20 minutes of him smiling in various happy,
 24 sunny ways -- I don't know whether you saw there was a
 25 whole nightly comedy show riff on McConnelling, because

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1 the speaker released essentially film that his
 2 consultants thought would look favorable, but there was
 3 no speech to it. It was just music and him smiling. And
 4 that was offered to various individuals to use in their
 5 own independent speech promoting McConnell.
 6 So McConnell wanted people to use his footage, make
 7 his footage available, but because of the restriction on
 8 coordination couldn't tell people how to use it. He just
 9 had to say, here's some nice footage of me, and lo and
 10 behold, some people used the footage in ways to support
 11 Mitch McConnell, and the nightly comedy shows got hold of
 12 it and used it in a bunch of really fascinating ways that
 13 might not have been what McConnell was intending at all.
 14 But part of the reason behind that are the restrictions
 15 on coordination. I mean, this is part of what makes the
 16 campaign finance system really bizarre.
 17 (Audience member responded which was inaudible to
 18 transcribe.)
 19 PROFESSOR STEPHANOPOULOS: I don't have the details.
 20 Do you know the details?
 21 PROFESSOR TORRES-SPELLISCY: I don't know. So right
 22 now one of the open investigations that has been reported
 23 in the press is that the FBI is looking into whether the
 24 NRA got money from any Russian national and then used
 25 that money to spend in support of the Trump campaign.

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1 Now, what we know is that they did spend in support
 2 of the Trump campaign. We also know that their spending
 3 in the 2016 election was way bigger than they had spent
 4 in any previous election, midterm or presidential. And
 5 what --
 6 PROFESSOR LEVITT: That we know of.
 7 PROFESSOR TORRES-SPELLISCY: That we know of. Yes.
 8 There's always a caveat of like, you know, what was
 9 reported. And there are two figures that they are
 10 interested in. One who has been arrested, her name is
 11 Maria Butina. She is the striking redhead who you may
 12 have seen with pictures of various guns. She and her
 13 boss, Alexander Torshin, are suspected of trying to
 14 manipulate the NRA for Russian ends. And one of the open
 15 questions is: Did Alexander Torshin provide any of the
 16 \$19 million of extra funds that the NRA had.
 17 And the reason why people are particularly
 18 suspicious of Alexander Torshin is he is wanted for money
 19 laundering in Spain, and the way that he would launder
 20 Russian mob money in Spain was through buying hotels. So
 21 he is a person of great interest, but we don't know
 22 whether there's any there there. A, we don't know
 23 whether he's the source of the \$19 million in the NRA,
 24 and we also don't sort of know what the ultimate game
 25 plan for Butina and Torshin was for the NRA. They got to

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1 meet Don, Jr. at an NRA meeting in Kentucky in 2016, but
 2 we don't know what the content of that meeting was. So
 3 there is smoke here and there, but what we don't know is
 4 whether there is fire.
 5 PROFESSOR LEVITT: And in addition to that, there
 6 are also sort of more usual questions about the spending
 7 that the NRA did engage in. Did they use vendors who are
 8 common vendors with the Trump campaign or with the RNC?
 9 Did they borrow polling that the campaign did, or did
 10 they give polling to the campaign in order to make sure
 11 that the messages were effective and targeted to the
 12 right groups, and those are the traditional indicia of
 13 when spending might be coordinated.
 14 I'll say I don't know that we know the answers to
 15 any of those questions. I know there are current
 16 investigations into them. And there are further
 17 questions about whether, even if there was some shared
 18 stuff, whether it amounts to the sort of coordination
 19 that federal laws currently regulate. Like I mentioned,
 20 this is -- federal law is narrower than -- much narrower
 21 than some of the laws in Wisconsin, that the Wisconsin
 22 Supreme Court was addressing, and there are very
 23 particular elements of when things will be considered to
 24 be coordinated spending. And it's not clear even if the
 25 NRA shared some stuff with the Trump campaign or vice

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1 versa, whether that amounts to the things that would be
 2 regulated under the federal law. But I understand some
 3 of the allegations are that it might and that there's an
 4 investigation into that as well separate, and apart from
 5 whether the foreign sources of funding were inherently
 6 troublesome.

7 PROFESSOR STEPHANOPOULOS: I'll also note that the
 8 NRA's potentially illegal activities continued in 2018.
 9 My law school classmate, Josh Hawley, who is now the
 10 senator from Missouri, there have been investigations,
 11 allegations, that nominally independent NRA expenditures
 12 on the Missouri Senate race were in fact illegally
 13 coordinated with Josh's campaign. And so, you know, if
 14 the NRA was breaking coordination rules, it may have
 15 continued to do so in 2018.

16 I'll note there is an interesting legal implication
 17 of this that supports Justin's position, right. Like if
 18 it were really true, as I was arguing before, and, as you
 19 know, Justice Thomas thinks on the other side, that
 20 contributions and expenditures are basically the same
 21 thing, then you wouldn't see the NRA, you know, trying to
 22 breach that boundary and coordinate. You know, if true
 23 independent expenditures were just as potent and just as
 24 useful as contributions, the NRA would just do that,
 25 right.

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1 We can tell that the NRA, at least, thinks that
 2 there's extra value if you coordinate with the candidate,
 3 because that's why they're, you know, bending over
 4 backward. It appears to do that. So I think that
 5 actually, you know, substantially supports Justin's
 6 thesis that there is a real distinction between true
 7 independent expenditures and contributions.

8 (Audience member responded which was inaudible to
 9 transcribe.)

10 PROFESSOR LEVITT: So this is exactly the discussion
 11 that Nick was just having. I think there is something to
 12 the sand in the gears of truly independent spending when
 13 you make those decisions, and you might be right, but you
 14 might be wrong. So if you're checking with Kamala Harris
 15 about what would be most helpful to her campaign, that
 16 feels like a gift to her, and no different from simply
 17 giving the money that you would have been spending to her
 18 for her to spend as she sees fit.

19 If you are banking on what you think will be most
 20 effective to her campaign based on your political
 21 analysis and astute polling, you might be right, but you
 22 might not be right. And she's -- here's the main point
 23 for the driving force of the campaign regulation when it
 24 comes to corruption. She may be less grateful to you,
 25 which is the primary source of the concern we have.

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1 So when there is a massive amount of spending on a
 2 particular race that is truly independent, if it works,
 3 there's likely to be the same sort of gratitude that is
 4 exchanged. This is part of why Caperton recognized that
 5 spending vast amounts on someone on a judicial race
 6 might, in some instances, lead to recusal.

7 It's why I love -- and I mentioned before -- I'm not
 8 sure whether you were here at the time -- the legislating
 9 recusal idea, I think is really smart in particular cases
 10 where there's really something that feels owed. But if
 11 you're wrong, if you come in with a massive ad on
 12 something that you think is really going to be helpful,
 13 and it's not, or it throws the message off, or it causes
 14 me to have to deal with hours of explaining to the press
 15 why I do or don't support the position that you just
 16 espoused, that sand in the gears, I think, is important.
 17 And so I think there might actually be some there there
 18 some of the time, if not all of the time.

19 PROFESSOR STEPHANOPOULOS: There's extra sand in the
 20 gears too just because of like TV stations will give the
 21 lowest rates to candidates themselves, and --

22 PROFESSOR LEVITT: Because they have to.

23 PROFESSOR STEPHANOPOULOS: Yeah. And the rates are
 24 a lot higher for noncandidates. You know, so not only do
 25 independent expenditures lose some potency because

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1 they're not based on, you know, all of the details, all
 2 of the nuances of campaign strategy that only the
 3 candidate knows, they just plain old get diluted,
 4 because, you know, for a given million bucks, you get a
 5 lot more air time if you're a candidate than if you're a
 6 super PAC.

7 And like those differences are big. That's actually
 8 a major part of why Democratic candidates had a big media
 9 advantage in 2018, because a lot more of the Democratic
 10 money was hard money contributions as opposed to Sheldon
 11 Adelson's \$150 million in a super PAC, all of which had
 12 to pay the higher noncandidate rates for TV ads.

13 PROFESSOR NAGLE: How much higher is it?

14 PROFESSOR STEPHANOPOULOS: Pretty big difference.
 15 like 100 percent, 200 percent. I mean, I think they're
 16 really big differences. I don't know the details though,
 17 the numbers.

18 PROFESSOR TORRES-SPELLISCY: So one thing we haven't
 19 talked about is our ineffective FEC. So for the most
 20 part, federal campaign finance law is not regulated
 21 because the FEC deadlocks on so many issues. And so
 22 what's been interesting watching the Southern District of
 23 New York and the Mueller investigation is they're
 24 actually enforcing campaign finance laws.

25 And so I think one thing to think about if we're

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1 talking about coordination is signals intelligence and
 2 the idea that people are texting each other this
 3 coordination or emailing each other this coordination.
 4 And so when you have an FEC that does nothing, then
 5 they'll never find the underlying texts, and they'll
 6 never find the underlying emails. But when you have a
 7 prosecutor who actually gives a damn and actually will
 8 pull the signals intelligence and will pull the emails
 9 and the texts, I think that those are going to be easier
 10 cases to make than they have been in the past. Because
 11 if you are coordinating person-to-person like you and I
 12 talking in this room, if all these other people were not
 13 listening, I think that's the hardest coordination to
 14 catch, because you're trying to catch a live conversation
 15 between the two of us, and you have to have a prosecutor
 16 who can flip one of us against the other to get that
 17 prosecution.
 18 But when people are idiotically and obsessively
 19 texting one another, I think there are more cases that
 20 can be made on a coordination basis simply because you
 21 have pages and pages and pages of yeah, should we do this
 22 there, should we drop this ad there? Yeah, okay, let's
 23 do it.
 24 PROFESSOR LEVITT: On the other, other hand, the
 25 part of what got us the Wisconsin Supreme Court decision

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1 was a charge -- I don't think it was accurate, but a
 2 charge that there was a politically motivated
 3 prosecution, a state prosecution, not a federal one in
 4 Wisconsin that was digging for exactly this sort of stuff
 5 in an overly intrusive way, and I think that spurred part
 6 of the -- what I think is an overreaction or a different
 7 reaction to something that's not really responsive to the
 8 issue they said they were concerned about. But I think
 9 that sort of allegation that the prosecutor was
 10 politically motivated in pursuing the allegations of
 11 coordination caused a reaction and caused the campaign
 12 finance law to shift, and in the Wisconsin Supreme Court
 13 precisely because of that view that it was intrusive.
 14 (Audience member responded which was inaudible to
 15 transcribe.)
 16 PROFESSOR TORRES-PELLISCY: That's an interesting
 17 question. Yes. Yes. It might be probable cause if you
 18 had the precise mirror image to the Kamala Harris
 19 campaign, what they would have wished for, but then if
 20 you actually then pull the text messages, you're either
 21 going to find that people were coordinating or not. And
 22 if you don't find the evidence to back up the
 23 prosecution, then I think the prosecution has to fall
 24 apart.
 25 PROFESSOR LEVITT: And I'll say I think if you're

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1 worried about that and that being a concern, the right
 2 way to respond to that is by requiring probable cause not
 3 of outcome, but of conduct. So if you have to have
 4 probable cause that there were actually impermissible
 5 communications between people before you go after the
 6 communications themselves, that's going to help insulate
 7 the extremely astute, truly independent spender in a way
 8 that it wouldn't insulate somebody who was engaged in a
 9 lot more conversations.
 10 That inevitably is going to put some distance
 11 between political campaigns and candidates and those who
 12 would be spending on their behalf. But again, I mind
 13 that a little less. I think the primary constitutional
 14 value of protecting expenditures is to protect what you
 15 want to say independent of an actual candidate. And if
 16 that sort of conduct rule puts a little more distance
 17 between those who want to spend independently and a
 18 campaign, I'm less troubled by that.
 19 PROFESSOR STEPHANOPOULOS: An interesting question
 20 is why federal prosecutors have done so little of this,
 21 right. I don't really have the answer. Like we know the
 22 FEC is gridlocked and toothless. We also know that
 23 federal prosecutors, you know, can bring prosecutions for
 24 campaign finance violations. I suspect the campaign
 25 violations -- campaign finance violations are rampant

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1 across the country. You know, I can't really prove my
 2 intuition, but I think there's a lot of illegal
 3 coordination going on.
 4 So I'm quite curious like why in fact, you know,
 5 U.S. Attorneys aren't bringing these kinds of cases.
 6 Like a little bit of criminal prosecution would go a long
 7 way toward deterring illegal coordination much more so
 8 than FEC investigations after the fact that merely
 9 resolved in a fine.
 10 So, you know, I don't know the answer to this. I
 11 mean, I understand like why the current administration
 12 wasn't doing it, like they don't want to put, you know,
 13 the NRA officials, you know, Wayne LaPierre in jail. But
 14 I don't get why like in other periods there hasn't been
 15 much more aggressive federal prosecutorial enforcement of
 16 these laws.
 17 PROFESSOR LEVITT: Part of that is that federal law
 18 actually prohibits it in most cases, and I confess I have
 19 to look more carefully into how the Cohen prosecution
 20 came about to know this. But in most cases, you need a
 21 referral from the FEC before taking criminal action. So
 22 that's a predicate in the federal campaign law itself
 23 precisely because Congress wanted to have a limit on when
 24 there could be criminal prosecution for exactly this sort
 25 of thing. So there are procedural limitations in the

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1 campaign finance law that require an FEC finding before
 2 going forward for most prosecutions, and like I said, I
 3 confess I don't know how -- I would have to trace how the
 4 Cohen prosecution came about in light of that. But the
 5 reason is because it's built into the statute that it
 6 can't actually go to criminal prosecution before an FEC
 7 finding in most cases.
 8 PROFESSOR NAGLE: Last question.
 9 (Audience member responded which was inaudible to
 10 transcribe.)
 11 PROFESSOR LEVITT: So I think you're right that
 12 that's one of the things that drove the court's opinions,
 13 and you can read in the court's opinions in Wisconsin not
 14 only the sort of determinations of coordination, but
 15 follow-on opinions about the role of the special
 16 prosecutor in Wisconsin, the role of John Doe
 17 prosecutions in general, you can certainly read a lot of
 18 perceived disturbance at the way that the law was
 19 enforced.
 20 I'll say that I would welcome -- and now I can turn
 21 my raging libertarian hat off and put the progressive hat
 22 more back on. I would welcome a discussion about the
 23 degree of force used in police activity generally. What
 24 you saw in that particular case was in no way unusual for
 25 the vast amount of law enforcement, particularly in

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1 minority communities, and not only with violent felonies,
 2 but across the board.
 3 People get very exercised when what are generally
 4 normal police tactics are used against the political
 5 class in a way that they don't seem to get exercised when
 6 normal police tactics are used against the nonpolitical
 7 class.
 8 And I would absolutely welcome a discussion about
 9 the way in which law enforcement approaches entry into
 10 lower class neighborhoods to do things that are arrests
 11 for nonviolent crimes or where there's no reason to
 12 believe that there's, you know, a gun on the premises.
 13 Unfortunately, we don't usually get that
 14 conversation. We usually get the outrage at this
 15 particular exercise of prosecutorial authority or this
 16 particular exercise of police authority without a broader
 17 conversation about the circumstances in which the police
 18 can conduct investigations or conduct arrests. But if
 19 that led to a broader discussion about the way that law
 20 is enforced more generally, I would love that
 21 conversation.
 22 PROFESSOR NAGLE: So I think we have next year's
 23 Symposium topic, so that conversation is set. Appreciate
 24 that.
 25 We've run out of time. We've actually managed to

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1 use Justin's two questions as ably assisted by Nick and
 2 Ciara and all of you. Thanks to our panelists. Thanks
 3 to all of you. Thanks especially to the Journal editors
 4 who put all this together. You know, I am privileged to
 5 have been here for this part of it. I only wish I had
 6 been able to be here from the first, and look forward to
 7 continuing this conversation at whatever opportunities we
 8 have. Thanks so much.
 9 (Symposium completed.)
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1 CERTIFICATE

2 I, JEANNE R. GROTH, a Notary Public, in and for the
 3 nty of Elkhart and State of Indiana, do hereby certify:
 4 That I personally transcribed the proceedings herein from
 5 ideo recording of such proceedings;
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 10 IN WITNESS WHEREOF, I have hereunto set my Notarial seal
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