

## JOURNAL OF LEGISLATION SPRING SYMPOSIUM 2019

### CAMPAIGN FINANCE

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**MS. CRAIG:** Good morning, everyone. Thank you very much for being here today. My name is Kristine Craig, and I'm the executive editor of the Journal of Legislation.

I would like to begin with some introductions for our speakers. First we have Professor Ciara Torres-Spelliscy on the right. Professor Torres-Spelliscy teaches at Stetson on election law, corporate governance, business entities, and constitutional law. Her academic work has appeared in the Harvard Journal of Law and Public Policy and the Duke Journal of Constitutional Law and Policy. She has also written pieces for The New York Times, The Economist, and Forbes Magazine. She has testified before Congress on campaign finance reform and has spoken at 31 universities on topics around the country.

Next we have Professor Nicholas Stephanopoulos. Professor Stephanopoulos teaches and researches at the University of Chicago on a variety of areas within election law, constitutional law, and comparative law, in addition to publishing in academic journals such as the Harvard Law Review, Standard Law Review, University of Chicago Law Review, and the Yale Law Journal. He has written for publications such as The New York Times and the Chicago Tribune. He's also been involved in a variety of recent litigation efforts, including his work on the efficiency gap for the first successful partisan gerrymandering lawsuit in more than 30 years.

Next we have Professor Justin Levitt. Professor Levitt is a nationally recognized scholar of constitutional law and the law of democracy at Loyola Law School in Los

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Angeles. His academic work has been published in the Harvard Law Review, the Georgetown Law Journal, the William & Mary Law Review, and the Election Law Journal. He has served several presidential campaigns in a variety of capacities, has testified for committees of the United States Senate, and served as a deputy assistant attorney general in the Civil Rights Division of the U.S. Department of Justice.

Next we have our own Professor Lloyd Mayer. Professor Mayer has been a faculty member at Notre Dame Law School for 14 years, teaching courses in not-for-profit organizations, business enterprise taxation, election law, and professional responsibility. His academic work has been published in the Stanford Law Review, the Yale Law and Policy Review, and the Boston University Law Review, to name a few. Professor Mayer also serves as the Journal of Legislation's advisor.

I would also like to introduce Professor John Nagle, who will be joining us late in Symposium. Professor Nagle has been a faculty member at Notre Dame Law School for 21 years, teaching courses in environmental law, torts, property, and legislation. His academic work has been published in the Harvard Journal of Legislation, the Yale Law Journal, the Columbia Law Review, and the University of Pennsylvania Law Review. Please join me in giving them a round of applause.

I would also like to thank the Journal's executive board, especially our Symposium chair, Matt Sachaj, for organizing this event today.

Lastly, we would like to thank our co-sponsors for making this Symposium possible, namely the Notre Dame Law School Program on Constitutional Structure, the American Constitution Society, and the ACLU.

With that, I will turn it over to our first speaker, Professor Torres-Spelliscy.

**PROFESSOR TORRES-SPELLISCY:** Good morning.

So I am going to talk about lawyers, guns, and money, which I know is a different title than is on the program, and this is a preview of a book that I'm writing right now. So this will be my second book, and its title is "Political Brands," and I've been working on commercial branding in politics for about five years now, and so each chapter in this book is going to be an aspect of American political life that is being branded.

So we're going to have a chapter on branding treason, branding greed, branding corruption, and branding tragedy. And it's that last chapter, branding tragedy, that I'm going to talk about today. And I really could use the feedback and some help, because I am still noodling through how exactly to capture what tragedies, especially around gun violence, what is going on in the country right now.

I was just listening to NPR, and they had a remembrance of a kid who was at Marjory Stoneman Douglas High School, and she and her mom were talking to StoryCorps. And I think that's just sort of emblematic of what is going on with our discussion of that topic.

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So I come to this through the lens of money and politics. And to understand why I'm talking about gun tragedies, I first have to ask a broader question, which is: Why do I want transparency of money in politics? And to answer that question I have to ask an even broader question, which is: What is going on with corporate political spending? And this is something that I have spent many a day, hour, minute, of my mental space thinking about especially ever since Citizens United.

So I'm going to start in 2012. In 2012, you get corporate publicly traded companies stretching their legs, using their Citizens United rights, and this is all spending at the federal level. And so our big spender in 2012 is Chevron. But it's a modest number of corporations, and the aggregate amount that they spend is around \$4 million.

The story is very similar in 2014 in the midterm. We get Chevron again is one of our big political spenders. But again, it's not that many companies, and the aggregate total is around five million. Publicly traded companies in 2016, there are more of them, and they are spending more money. And -- but we're only up to 16 publicly traded company donations for around \$7 million.

Now, in our last election, I think one of the things that has been somewhat underreported is that there were far more publicly traded companies spending in the 2018 election for a bigger grand total. I think this story has gotten underreported in part because the big story from the midterm election was the blue wave that flipped the House. And all of this money was actually going the other direction. All of this money was actually pro-Republican. So this takes four slides to show you.

So we have 30 publicly traded company donations to super PACs in the midterm, and the total is significantly higher in terms of \$18 million. And so the trend over time is that more publicly traded companies are spending more money, and they are doing it in a disclosed way.

So what I like about this trendline is that more companies are spending on the record. What I don't like about this trendline is that they're spending at all. And the reason that those last bubbles were red is nearly all of the publicly traded company spending that goes to super PACs is almost entirely pro-Republican. There's this one teeny tiny little sliver of a publicly traded company giving to a Democratic super PAC, but the overall trend is that that money is going all to the right, which is sort of interesting, because if you actually look at the employees or the customer bases of these companies, they are politically heterogeneous. And so I apologize for the smallness, but these are 30 different Fortune 500 companies, and what this slide is looking at is the political giving from the employees of those companies. This is not money coming from the corporate treasury. This is coming from the individuals who work there. And what you can see is Democrats in blue and Republicans in pink.

You can tell that there are very few companies that are either hard left or hard right if you look at the donations from their employees. And even our good friends at Chevron, if you look at the money from the employees of Chevron in the last election, there was more money going to Democrats than to Republicans. And fun fact, the biggest beneficiary of Chevron employee money in 2018 was Beto O'Rourke.

So that's all the money you can see. What's great about money you can see is you can actually see some of these trends. What I am more deeply concerned about is the money that we can't see. So this is the trendline of dark money in federal elections. We had a high mark in 2012 when Obama and Romney were running against each other, and we've never hit that high water mark since.

I do put a huge asterisk over the 2016 election. I think we don't know exactly how much money was spent in the 2016 election. We may know more as more indictments roll in, but we know that certain spending should have been reported during the 2016 election which simply was not. So I'm hoping that one day we will have a clearer picture of that particular slice of the pie.

But even in 2018, there was around \$150 million in dark money in the federal elections alone. And one of the reasons that I care about dark money is I think it really thwarts accountability, and accountability in many different directions: Accountability for politicians; accountability of corporations to their shareholders; accountability to their customers as well.

So here is a little preview of this chapter in this book that I am still grappling with, and the chapter title is "Branding Tragedy." So one of the ways to think about dark money is if you compared the dark money that was spent in 2016 compared to what I showed you in some of my previous slides, the dark money would completely eclipse the disclosed publicly traded money that we can actually see. And what I deeply suspect is that in that dark part of the circle, there's other publicly traded corporations giving, but they are not showing the courage to spend under their own name.

And one of the sources of dark money in the 2016 election was the NRA, who were responsible for over \$35 million of dark money in 2016. So we could ask the question: What would accountability look like for the NRA? Now, one thing that it might look like is Bob Mueller knocking on their door, and in the question and answer period we can get into why I think Bob Mueller might be at the NRA's door.

But so far, in the past year, one of the ways that the NRA has been held accountable is by these teenagers. These are some of the survivors of the Parkland massacre, which happened nearly a year ago on Valentine's Day, and I'm going to talk about a couple of the tactics that they have used.

And what it strikes me with the Parkland students is this is different than a normal boycott. So with a normal boycott, usually you have some sort of finite objection to a particular brand doing a particular thing, and you boycott, and you try to get that brand or that company to change that sort of small behavior. And usually it doesn't work.

I feel like with the Parkland students, they are trying to break a line of causality that led to their friends' deaths and their teachers' deaths. And so I think part of that link of causality for them is the nexus between corporations, politicians, and the NRA. And this is -- it's some other level than a boycott. This is like trying to siege Carthage. This is we will burn down your houses and salt your land.

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So here's some of the things they have been up to. So this is my local grocery store. I too live in Florida. And as a grocery store, I like it very much. I'm there every week buying my groceries. As someone who studies money in politics, I'm not a big fan. And one of the things the Parkland students noticed was that Publix, both its corporate treasury and the founders of Publix, and some of their corporate leaders presently, were giving a goodly amount of money to a candidate for governor named Adam Putnam. And when they figured this out, they went into action.

And one of the things that the Parkland students objected to is Adam Putnam's relationship with the NRA, and this is not the students putting words in his mouth. These are things he would say. He would proudly pronounce that "I am an NRA sellout." And he would brag about his A-plus rating from the NRA. And so the Parkland students went to their local Publix, which is right near their high school, and did a die-in at Publix. And, you know, they called the media, and they got a lot of press for this. And I'll tell you how that story ends in just a moment.

Another tactic that they had was they organized a huge march in Washington called the March for Our Lives. And that march included lots of students from Florida, some from Parkland itself, and others from around the state. And you may have seen this while you were looking at coverage of the march but not really realized what certain things meant.

So they had these price tags on their bodies, and the price tags for the students from Florida said \$1.05. And the way that they arrived at that amount is they looked at the amount of money that the NRA had spent supporting Senator Marco Rubio, and then they divided it by the number of students in the state of Florida, and that's where they get that number. They also have numbers for the other 49 states, and so the numbers were different depending on how much the NRA had spent in those states compared to how many students were in those states.

So we can ask the question: Has there been accountability in terms of Publix? Publix announced immediately after this die-in at their store that they would end all corporate political donations. Whether it's causal or not, Adam Putnam lost his primary. Now, Senator Rubio is not up for election until 2022, and I think this will be very interesting to watch whether the passion that these students have now will peter out, and they may, you know, pick a different target, or it's possible that Marco Rubio will continue to be hard-headed and continue to like being supported by the NRA. We don't know how this particular story will end.

Now, I think if we're honest about looking at marches on D.C., there are a lot of marches on D.C. A lot of them don't have a lot of impact, even when they are as big as the March on Our Lives. But every now and then you get movement, and you never can tell what will be persuasive to another American. And one of the things that the Parkland students did is they were trying to break up this causal chain between corporations, the NRA, and politicians. And so one of the things they went after were the corporate relationships between very famous brands and the NRA itself. And the result of that in terms of accountability for the NRA is these are all brands that stopped doing discounts for NRA members. This isn't a complete list, but this was basically all I could fit on one slide at one time. And some of this I find remarkable, like that you

could get an airline to change any policy whatsoever is just amazing.

And the Parkland students also caught the attention of the governor of New York. And so the governor of New York used his authority as the head of the Department of Financial Services, which regulates banks and insurance companies, because either they are based in New York or they do sufficient business in New York to be regulated. And he put out this directive that companies that are regulated by the State of New York should assess their relationship with the NRA. And one of the things I found very striking about this particular pronouncement is he actually pointed to Parkland as a reason why businesses should do this reassessment.

And then a month later the governor of New York, through the Department of Financial Services, also went after an NRA product called Carry Guard, and the State of New York has taken the position that selling Carry Guard, which I am not an expert on insurance, but my understanding is the idea behind Carry Guard is it's an insurance policy that kicks in after you have killed or maimed someone with your gun. And so the State of New York has taken the position that this type of insurance is illegal in the state of New York, and so they have made Chubb and Lockton stop selling it in the state of New York, and then they put a hefty fine on these two entities part of the consent decree.

As a result, the NRA is now suing Governor Cuomo, and in this lawsuit they assert that Cuomo's directive has blacklisted the NRA to the point where the NRA itself, the big nonprofit entity, cannot get insurance.

The other thing that they claim is that the NRA is nearly broke, and we can tell from public facing documents that the NRA has been running a deficit for the past two years. So this is a form of accountability, but this, for me, goes back to the question of whether money in politics is transparent.

If you don't know that Publix is supporting Putnam, then you can't put pressure on either Publix or Putnam. If you don't know the NRA is supporting Rubio, you can't put pressure on either the NRA or Rubio. And I would say what's good for the goose is good for the gander.

I imagine some of you find what Governor Cuomo did completely reprehensible, over the top, not okay. Well, I think you can look at Cuomo's donations and see if you can put pressure on his donors to change his behavior. But if you have dark money, then all of that accountability is impossible. So for me, I go back to first principles, which is I still fight for disclosure laws, because I want a society where there is some accountability.

So that's the end of that, and then we can sit and chat.

**PROFESSOR MAYER:** Well, first I would like to open it up to our fellow panelists. Do you have any questions for Ciara? And then we'll open up to the audience.

**PROFESSOR STEPHANOPOULOS:** One question is just, you know, if we

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think about the categories of post-Citizens United spending, we have, you know, disclosed corporate spending, we have dark money, and then we have, you know, super PAC contributions and other forms of spending, but not by corporations, right. And if we think about those three categories, the final one is one that you didn't talk about is by far the biggest, right?

**PROFESSOR TORRES-SPELLISCY:** Bigger. Yeah.

**PROFESSOR STEPHANOPOULOS:** I think like an order of magnitude, there were, let's say, \$20 million of disclosed corporate spending, \$150 or \$200 of dark money, but over a billion in total super PAC spending. And so I wonder, I guess, first, how concerned should we be about the two categories you're focusing on when they're a lot smaller than the non-corporate super PAC spending pile. And then what are your thoughts about that pile, the biggest pile of money?

**PROFESSOR TORRES-SPELLISCY:** Yeah. So the biggest pile of money actually comes from very rich individuals like Sheldon Adelson. And I guess a few things. One, because Sheldon Adelson is a human being, you can reason with him, which I think is very different than money that's coming out of Chevron where you're trying to reason with a corporate structure which is different. And I feel like Chevron's shareholders and the shareholders of the publicly traded companies have to -- well, in my ideal world, we would solve two distinct problems. One is a lack of transparency. So right now corporations do not have to tell their shareholders where they're spending in politics, and moreover, they don't have to give consent to that political spending.

So this is very different than what happens in the UK. In the UK, the spending by corporations is transparent, so they actually account for all of the money that's going into politics from the corporate treasury. And moreover, it has to be approved before it's spent by shareholders. And so I would advocate for that kind of UK model in the United States. And it's not that I'm not concerned with the Sheldon Adelsons of the world, but it's a different problem. I think the corporate money comes with all of these corporate law problems attached to it, which are sort of separate and distinct from the Adelson problems.

And then the other thing, I guess, to think about is Adelson is a casino mogul, so you could put pressure on his casinos if you're objecting to his political spending.

**PROFESSOR LEVITT:** So actually I want to follow up on that. I've got, I guess, two or three short comments, and then I want to ask you what the problems coming out of corporate spending are that are different from the problems from Adelson and whether we ought to be more concerned about the Adelson problems than the corporate problems.

With respect to the dark money sort of trendline, I'll add a category. So there's the direct corporate spending, there's the dark money we know about, then there's all the other dark money.

**PROFESSOR TORRES-SPELLISCY:** Yeah.

**PROFESSOR LEVITT:** And then there's super PAC spending. So just one thing to realize -- and I know that Professor Torres-Spelliscy knows this really well -- I think the stats that are up there for the dark money that is being spent roughly tracks media spending on particular types of advertising where there's a responsibility to report that the money was spent, but not who spent it.

But we've got a drunkard streetlight problem in that we're searching where the light is, which may or may not be -- this is a long-ago fable. Cop wanders across a dark street and finds a guy obviously intoxicated, scrambling around in the dark, right below a street light, on the ground. He's obviously looking for something. The cop walks over and says, "Sir, are you okay?" Guy says yeah.

Can I help you?

I think I dropped my keys.

Oh, do you know where you were coming from? Do you know what the path you took to get here was?

Oh, I wasn't anywhere near here. I was over there. But the light is much better here.

I think we know what spending has been reported in various ways, because there are some disclosure laws requiring the disclosure of amounts spent on certain types of public media ads. But there's a whole bunch of political spending, including money to buy chairs for a campaign, including money to buy staff for a campaign, including money to buy the sorts of ads that aren't required to disclose the fact that they exist, that we don't know anything about. And so all of the trendline things that you've seen -- including, by the way, and this important -- prior years don't reveal what we don't know. These are in Secretary Rumsfeld's formulation. These are the known-unknowns.

And so it's actually, I think, really difficult, and maybe an unanswerable question, I think it's really difficult to know whether dark money has been growing or not. We know the amount that we can see under the streetlight, but we don't know whether that represents a transfer from other spending, an increase in spending, or a total decrease, just we can see the part that's growing. So one, I don't know if that's true.

The second comment is that I think what you saw in the employee mix for the corporations up there, there was a study I know that was done just after Citizens United that tracked the corporate boards of the major Fortune 100 companies, and they look very similar, actually. There are very few corporate boards that are unilaterally Republican or unilaterally Democratic. There are a few that are pretty well skewed, but very few. Massey Energy I think is one of them. I mentioned it because it shows up in a lot of campaign finance cases.

To Nick's question, should we be worried about corporate giving to candidates when the boards are generally mixed, or spending on candidates when the boards are

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generally mixed, we'll either see lots of spending on all sides, trying to bank on a winner, or we'll see little spending at all compared to this other pot of money from the Sheldon Adelsons of the world.

And then the third question is: So why should we be more scared of Chevron than Sheldon?

**PROFESSOR TORRES-PELLISCY:** Especially when Sheldon outspends Chevron like by times 50, depending on the year. So it's not that I am not worried about Sheldon Adelson and, say, his wife's Medal of Freedom that she got recently. But I guess I've spent a lot more time thinking about mitigating the impact of Citizens United.

And so I think one of the things that has happened over the past nine years is corporate shareholders have been very engaged on this particular issue. And so one of the rights that corporate shareholders have in publicly traded companies is the ability to put shareholder resolutions on the corporate proxy so that they can be voted on by their fellow shareholders.

And the -- there's a lot of the shareholder resolutions on ESG topics, which is environment, governance, and social topics. And the one that has, year over year, been either number one or number two in terms of the number of shareholder proposals out there has been asking for transparency of money in politics.

And those come in two different flavors. One is asking for better disclosure of where the corporation is spending its lobbying dollars, and the other is where the corporation is spending its money in electoral politics.

And then there's sort of a third, tinier category which in a few corporations there have actually been shareholder proposals to stop political spending altogether. And the proposals that have got even majority support tend to be the ones asking for just transparency. The proposals about stopping corporate political spending have done very poorly. That does not seem to have support among shareholders yet. But I think even asking the question has brought a conversation between corporate boards and investors about whether it's actually appropriate for corporations to be spending the way that they are.

For example -- and this will maybe go back to the gun rights discussion that I had in my presentation. So one of the things that corporations have spent a lot of money on in recent years is support for a group called ALEC, and ALEC is a conservative group that is mostly corporate funded, and then they go state to state to state, and they draft legislation. And one of the pieces of legislation that they drafted and then marketed it around the state legislature was stand-your-ground. And when Trayvon Martin was killed, also in my state in Florida, people recognized, oh, stand-your-ground was from ALEC. Who supported ALEC? And then they looked at these blue chip companies supporting ALEC, and a lot of those companies under that pressure temporarily, at least, pulled the financing from ALEC. So again, that's one of these questions of accountability. If you can't tell that the corporation is supporting ALEC,

which has been marketing the stand-your-ground laws, and you object to the stand-your-ground laws, then there's no one to pressure, like you don't know where to push.

And so I sort of come back to first principles that I wish that people had the courage to spend under their own names so that if they are spending in a way that is socially pernicious, someone somewhere can be held to account for that spending. So it's things like that that I hope we get more transparency, especially as shareholders push for more transparency.

And there has been a tick up because of these -- the pressure that investors have put on their own companies so that you're getting more of the Fortune 500 or the S&P 500 who are being transparent about where their money is going. And that is another type of accountability, because right now the Securities and Exchange Commission, they've been asked by over a million people, please promulgate a new rule that actually says we will have transparency of money in politics that come from publicly traded corporations. And the SEC during the Obama administration, they would have had the votes. They didn't do it. And then Mitch McConnell stopped this, has put in riders to our federal budget that literally say the SEC cannot promulgate a rule on dark money, and that rider is still in the budget today.

**PROFESSOR MAYER:** I'd like to open up for questions from anyone in the audience. Yes. Go ahead.

(Audience member responded which was inaudible to transcribe.)

**PROFESSOR TORRES-PELLISCY:** Yeah. Yes. So there are two categories of reportable expenditures in our campaign finance world in terms of independent spending. So there are independent expenditures, so those are ads that use Buckley's magic words, so they literally say, "vote Quimby." And then there are ads that qualify as an electioneering communication, so an electioneering communication is a broadcast ad that costs at least \$10,000, that reaches 50,000 viewers, and mentions a federal candidate right before a federal election.

**PROFESSOR LEVITT:** And these are statutory definitions, not constitutional ones, right? They exist because Congress passed a law saying, report this stuff?

**PROFESSOR TORRES-PELLISCY:** Yes. And so there are ads say if you are 61 days out from an election, but you don't say vote Quimby, but you feature someone who's running for federal office, those are not captured by any of these systems, and that's what I think Justin is talking about. There is dark money which is reported, which means someone has paid for an electioneering communication, or someone has paid for an independent expenditure.

And so what you see is a report of a million dollars is spent, and then you look for a list of donors, and there's a big hole, because the way that the FEC interpreted its own rule making authority, they allowed for this anonymous spending. So what we see is a million dollars was spent, and then zero donors are listed, and that's what I call dark money.

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But there is this other universe of what I sometimes call black hole money, which is being spent on politics, but it's not being captured by the regulatory system at all. And I have no idea how big that is. I mean, we can get some sense of it from there's this group called CMAG that captures, essentially, the satellite feeds of ads, and so they can pull the satellite feeds, which comes with a little bit of data, and they can tell that more money is being spent on political ads than is being reported. And so that's an even bigger universe of political spending that is not captured.

And the other thing that we didn't even get into is online ads. So one of the things that you see being discussed, in part because of the Russia investigation, are ads that were bought on Facebook that would have met, actually, the statutory definition of an independent expenditure under the Buckley test that were not reported at all by anyone. And they were sort of doubly illegal, because they came from a foreign government, which is another layer of mischief.

**PROFESSOR MAYER:** Other questions? Yes.

(Audience member responded which was inaudible to transcribe.)

**PROFESSOR TORRES -SPELLISCY:** That's an open question, I guess. One of the things that I found sort of interesting in the past two years -- and this may be a Trump era phenomenon. So for a long time, when you polled after Citizens United, and you either asked voters or you asked consumers, do you want corporations involved in politics, the answer was overwhelmingly no.

There has been a weird change in the past two years. So pollsters who are looking at consumers, they've started asking these questions, like if you found out that a corporation disagreed with your politics, would you boycott them? And different questions like if you found out that a corporation had this stance on gay marriage, would you change your buying patterns? And I think corporations are going to get caught in this very weird vortex, which looks like this. When you poll especially Millennials and Generation Z's, they actually want corporations to take political stances. They just want them to take their political stances, which is somewhat different than if you interview older cohorts who are much more likely to still say no, I want corporations to stay out of politics.

And it might really matter about what your target demo is for your product. If your product is aimed at like 18- to 24-year-olds, you may have to really think about do I make a stance on one of these bathroom bills, like the transgender bathroom, you have to be your assigned birth gender to go to this bathroom.

So if I'm targeting that young demographic, do I, as Coke, Pepsi, running shoes, should I actually take a stance on that issue because that is likely to align with the target demo that I'm trying to sell to? Or is it better to stay neutral? Will I get hit for being neutral on it, or do I actually take a stand that is anti-transgender because I think my market is very religiously conservative? And I think depending on the corporation will determine which path they go on. But they are likely to get slammed no matter

what choice they make.

**PROFESSOR MAYER:** Yes.

**PROFESSOR LEVITT:** That's not hypothetical. In North Carolina in 2016, actually the biggest movers on the issue were private entities like the NBA, and not corporate entities, but things like the NCAA suggesting that they would cancel their sporting events in North Carolina, and in North Carolina that was big news. None of that captured by "political spending."

**PROFESSOR TORRES-SPELLISCY:** Yes.

**PROFESSOR LEVITT:** But zero of the influence there was captured by any political dollar spending, as these private entities were taking a political stand. And so, yeah, the scenario that Professor Torres-Spelliscy lays out is not hypothetical. It actually happened.

**PROFESSOR MAYER:** We need to move on with our program, but I want -- please join me in thanking Professor Torres-Spelliscy. And now Professor Nick Stephanopoulos.

**PROFESSOR STEPHANOPOULOS:** I may need help to switch Power Points. All right. Great. Thanks very much to Notre Dame and to the Journal of Legislation for setting up this Symposium.

So I'll be talking today about non-campaign finance law, the law that governs money in non-electoral politics. And I should note that this is a very, very early stage project that I'll be discussing. It has its origins in a conversation I had with a colleague two or three months ago, and since that conversation, my thoughts have not advanced at all until last night after the Symposium dinner back in my hotel room where I sort of forced myself to try to impose a little bit of structure on just various hazy ideas that have been floating around in my head. So I wouldn't even call this a half-baked idea right now. I don't think it's even entered the oven.

Okay. So what do I mean by non-campaign finance? Well, I mean things that are not classic campaign finance, things that are not classic money in politics. So I'm not talking about contributions to candidates for office or contributions to political parties or contributions to tax political action committees. I'm not discussing some of the forms of communication that Ciara just talked about, electioneering communication, express advocacy. All of that is the core of campaign finance, but I want to talk about non-campaign finance.

I'm also not talking about lobbying. So lobbying is distinct from campaign finance. Lobbying is money that's spent, communications with elected officials in an effort to influence the decisions of elected officials, that lobbying is itself a distinct category from campaign finance. But it has already been written about, so it's not my focus either.

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What is my focus are efforts to influence the political views of the public outside the context of an election. So that's what I mean by non-campaign finance. And also four aspects of this definition are important in my view. So I care about efforts to influence. I'm not thinking about polls or efforts to register voters or get them to the polls. You know, those aren't attempts to change the views of voters.

I'm interested in efforts to influence the political views of voters. You know, that's why I think this is relevant to this Symposium. So I'm not discussing marketing, for example. You know, there are lots of nonpolitical entities that really try to influence the views of the public on nonpolitical matters, and that's also beyond the domain of this project.

Third, I'm interested in efforts to influence the views of the public. There are a lot of different audiences for persuasion efforts. Elected officials, elites, bureaucrats, etc. I'm interested here in mass persuasion, you know, efforts to change the views of the voting public, the electorate.

And then fourth and finally, what distinguishes this from classic campaign finance is that it's political but non-electoral. And so, you know, normal campaign finance meets aspects one to three of this definition. It just doesn't satisfy the fourth criteria, which is that the efforts to persuade the public involve non-electoral political issues.

So non-campaign finance clearly is linked in interesting ways to both campaign finance, classic campaign finance, and lobbying. So most obviously, both campaign finance and non-campaign finance are trying to influence voters' views. The difference, again, is that campaign finance is trying to influence voters' electoral choices, whereas non-campaign finance is trying to influence their general political or ideological or policy views.

There's also a relationship, but not as close of a connection, between lobbying and non-campaign finance. So lobbying is an effort to directly change the views of elected officials. Non-campaign finance doesn't directly target elected officials, but one of the ultimate rationales for engaging in non-campaign finance might be the hope that once you successfully change the views of voters, those changed views of voters in turn will have some impact on the positions taken by elected officials.

So I do think there is a connection between lobbying and non-campaign finance in that at some level they're both concerned about influence on elected officials, and therefore, the end of the process on enacted policy.

And a key point to note is that these different forms of political action are either substitutes or compliments for sophisticated actors. You know, well-funded, savvy political players commonly engage in all three of these tools. You know, it's common to give money to candidates, spend money on electoral ads, lobby elected officials, and do non-campaign finance, you know, and do non-electoral efforts at voter persuasion.

Sort of some examples of non-campaign finance, a number of them are linked to the Koch Brothers. You know, the origins of this project have to do with just a

conversation I was having about all the sort of unconventional, non-electoral techniques that the Koch brothers are using to move American society in a libertarian, small government, anti-regulatory direction.

So Americans for Prosperity is one of the flagship Koch brothers organizations. It doesn't do electoral politics, or it doesn't do much electoral politics. The vast majority of what Americans for Prosperity does is hold rallies, talk to voters, organize other kinds of events, have people going door-to-door, circulate their literature. You know, that's how Americans for Prosperity is trying to influence American politics, not through electoral activities.

There are quite a few other Koch-related groups that I would also categorize as non-campaign finance. One more nice example is the LIBRE Initiative. Its goal is similar to Americans for Prosperity in that it's trying to promote the Koch message of small government libertarianism. The LIBRE is focused on Hispanics, so it has I don't know how many staff. Hundreds of staff members who go door-to-door in Hispanic neighborhoods, who attend neighborhood events, and just talk to people about the Koch brothers philosophy, and who also organize lots of events, pushing this anti-regulatory message.

On the left there's nothing quite as systemic or large scale as the various Koch-funded initiatives. But Tom Steyer, one his vehicles is NextGen America. NextGen does a mix of electoral and non-electoral activity. But a substantial part of it is non-electoral, so it's, again, talking to voters, producing literature, organizing events. And in particular with NextGen America, there's a focus on climate change, avoiding environmental disaster, and also on youth mobilization. So even if the best-known examples are on the right, it's clear that there are people in groups on the left who are also involved in non-campaign finance.

Unions are another classic example, you know, who do large scale non-electoral political education, mobilization, persuasion, etc.

Okay. So I'm still grappling a bit with what counts and what doesn't count as non-campaign finance. There's a risk with this concept that it will just include the entire world of public discourse. You know, everything covered by the First Amendment that's not elections. Maybe that's the right way to think about it. I don't know.

But, you know, here are some entities that I'm currently unsure about their status. Think tanks. You know, there are Koch-funded think tanks and non-Koch-funded think tanks. There are lots of think tanks. Do they count as non-campaign finance? I don't think so currently, because I consider them more focused on idea generation and influencing the views of particular elites as opposed to being groups that are involved in mass persuasion. You know, voter contact, voter influence. But I'm not sure if that's the right way to think about this.

What about media organs? You take Fox News, you take MSNBC, clearly they are involved in efforts to influence the political views of the mass electorate. I also don't think that I'm talking about media organs. One reason is that they're typically for

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profit, so they're engaged in their efforts partly for the sake of persuasion, but also, very importantly, for the sake of money. And so I think that profit motivation is a major distinction between Fox News and Americans for Prosperity, let's say.

And then what about philanthropy? There are, you know, lots of major foundations funded by all sorts of folks that do lots of things that might have an influence on public opinion. As an example, you know, George Soros founds the Open -- founded and funds the Open Society Foundations. You know, does that count as non-campaign finance? Again, I don't think so, because I wouldn't consider the fundamental purpose of philanthropy to be mass persuasion or mass political persuasion. You know, clearly, philanthropy can have an effect on public opinion, but it seems to me there's still a real distinction between any foundation and Americans for Prosperity or NextGen America.

But I'm still working through these conceptual meets and bounds of what I'm talking about, and so I'm open to people's views about what I should be discussing, what I shouldn't be discussing in this project.

Okay. So how much non-campaign finance is there? I really have no idea how much money is being spent in this way. Part of why I have no idea was alluded to in the last discussion, which is that we don't have requirements that this sort of spending be disclosed.

It's not entirely true. You know, the IRS does require that nonprofits disclose their total revenue and their total spending so we have some idea of how much money particular groups are raising and utilizing. To my knowledge, nobody has amassed this data and analyzed it. That's one thing I'd like to do as part of this project.

But I do think the amount of money we're talking about is very significant. You know, quite bit larger than the dollar sums we were talking about in the last discussion.

As an example, Americans for Prosperity spends roughly \$100 million every single year. You know, even Sheldon Adelson, he only does it every other year. Americans for Prosperity does it every year.

NextGen America, it's not quite on the scale of Americans for Prosperity, but in 2018, also in 2016, it spent on the order of \$30 million or \$40 million on non-electoral activities. It also spent a lot of money on electoral activities. NextGen also operates a super PAC that is firmly in the world of traditional campaign finance. But its non-electoral activities are still very significant.

Then if we start counting philanthropical organizations, they have enormous budgets. Just the one that I mentioned before, the Soros-funded Open Society Foundations, they spend \$100 million per year in the U.S. They spend a little more than a billion dollars worldwide every single year. So there is a lot of money in this non-campaign finance bucket.

Another issue is, you know, does non-campaign finance have any effect, you

know, if the purpose of this activity is to influence voters, persuade voters to, you know, mold the ideological or the policy views of voters, does it work? I don't know. I have no idea if it works. To my knowledge, nobody has ever done any kind of study to find out whether there is any return on investment for the Koch brothers, for Tom Steyer, for others involved in these sorts of efforts.

I could imagine studying this question empirically. We sometimes have information about when and where and how much money groups are spending and on what. So I can imagine if we knew that Americans for Prosperity was active in some states and in some years but not in others, and was focusing on certain issues but not other issues, I could imagine linking that data about, you know, Americans for Prosperity's activities with public opinion data and having a pretty good empirical setup to see if a group's activities actually have any measurable impact on public opinion. It would be a fascinating empirical project, although one that I have done nothing toward other than write down this phrase here.

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

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

So I think this shows us that, you know, one very sophisticated funder of non-campaign finance thinks of it as a compliment and a substitute to other modes of political action. It also thinks you need to do this. If your goal is to eventually win on policy, you can't only spend money on elections. You can't only spend money on lobbying. You also have to try to influence voters' underlying political views. You know, is Koch succeeding in doing this? I don't know. But he thinks it's important.

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

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

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

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

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

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

Okay. So if we thought that non-campaign finance was a problem in at least some of its manifestations, what can we do about it? We almost certainly couldn't take direct action against it. It's, I think, virtually certain that outright prohibitions on non-campaign finance or ceilings on non-campaign finance would be unconstitutional. They plainly implicate poor political speech. You know, trying to persuade voters about political matters. And there, any such restrictions would be missing the crucial link to preventing corruption, which is the one existing justification for campaign finance regulation. And so, you know, if you take the anti-corruption interest off the table, it's very hard to see how restrictions that are permitted in the campaign finance contracts would have a prayer of surviving traditional scrutiny in the non-campaign finance context.

I think the very good analogies for non-campaign finance are to independent electoral expenditures and to lobbying, and both of those forms of political activity can't be constitutionally banned or capped.

A couple other regulatory avenues are disclosure, and I'll talk about public financing last. So disclosure, there's currently not enough disclosure of non-campaign finance. We know some of the top level spending and revenue of these actors, but that's about all we know. So we could require non-campaign finance involved groups to release more information about their donors. There might be some constitutional problems with doing this, but I think it would likely be okay for most groups.

We could also, I think, entirely constitutionally require groups engaged in non-campaign finance to tell us a lot more about what they're doing. You know, the FEC requires groups that engage in electoral expenditures to tell us the purpose and the payee for all disbursements above a certain level. I think we can do something similar with non-campaign finance expenditures.

Last, maybe wackiest idea, you know, if we can't limit non-campaign finance, maybe we could subsidize it and give opportunities to groups that aren't wealthy, that don't have connections or corporate power, to also engage in non-campaign finance.

One could imagine the government offering grants with certain criteria, and if you win one of these grants, you could then go around engaging in voter persuasion, voter mobilization relating to various political issues. You could imagine grants to political parties. If we think that this is all just, you know, a cousin of electoral activity, then you could, you know, authorize the parties to be the ones who are involved in more non-campaign finance activity courtesy of public funds.

The idea that I like best is a voucher system. There have been voucher ideas proposed for campaign finance over the years. I think non-campaign finance vouchers would also be a very intriguing possibility. Let's say every American gets \$25 that the voter can then or the citizen can then assign as the citizen wishes to the group of the citizen's choice that's engaged in non-campaign finance activities. It would be a huge pool of money. It would be, you know, an effective counterweight to Koch money or Soros money or Steyer money. And it means you have non-campaign finance activities involving a far wider range of political issues than we see today.

So I think I'm well over my time, so I'll stop there, and I invite your questions and your comments. Thanks a lot.

**PROFESSOR MAYER:** First I'll open it up to the other members of the panel. Want first shot at it?

**PROFESSOR TORRES-PELLISCI:** Sure. So what are you not writing about may be the question.

So several thoughts come to mind. One, in terms of if you are going after the Koch brothers, one of the things that I noticed a couple of years ago is that in certain poor communities, some offshoot of the Kochtopus was paying poor people's electric bills. And I think this was literally a way of trying to curry favor with those individuals. But, you know, our campaign finance system doesn't have anything to capture something like that.

Other things that I was thinking of are maybe if you limited this by a topic, so you could talk about this non-campaign finance in the context of climate change, and if you were doing climate change, then I would point you to the Heartland Institute. If you were doing tobacco you could look at that effort to make it look like there was a debate about whether tobacco is causing cancer. There's a similar effort around sugar

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to try to make sugar not look like it was linked to heart disease, which goes to trying to frame an entire debate for the public.

The other thing that I think of is during World War II, one of the things that American corporations did, because there were rations, and there were all of these limits on what you could sell, so they ended up with all of these extra advertising dollars in their budgets, and so what they advertised was, quote, the American way. And it was just broadly pro-capitalism. But that was one of those efforts that is not really electoral in the traditional sense, but is trying to shape the way everyone thinks about what it means to be a true American, which, in their mind, was to be a consumer.

And then the last point is there's this great report from RAND out from last year called "Truth Decay," and they point out other periods in American history where truth has literally decayed in American discourse. And part of what they talk about is when opinion takes over facts, and so that might be an interesting jumping-off point.

So I'm not even sure that I have a question other than: How are you going to cabin this? Because I think there's risk that it's either you're talking about, as you said, all political discourse, or maybe at the very least, all discourse that's coming out of the nonprofit sector.

**PROFESSOR STEPHANOPOULOS:** Yeah. I don't know yet how I'm going to cabin this. You know, part of what I'm wrestling with is why I don't think I'm talking about, you know, Fox News or foundations or think tanks. I think what I'm trying to focus on is the category of non-campaign finance that is closest conceptually to regular campaign finance.

So, you know, if you imagine just moving one step over from classic campaign finance, where the motivation is clearly to influence the political views of the mass public, you know, I mean, really what I think I'm talking about is pure issue advocacy, right. Like we often think about a fake issue advocacy where it nominally counts as issue advocacy, but the motivation clearly is electoral. So I think I'm really just talking about real issue advocacy, and, you know, which is currently unregulable, and I think it's probably going to continue to be the case. But it's still, I think, really interesting to grapple with the contours of real issue advocacy and to think about what, if anything, the government should do about it if it can't actually, you know, restrict issue advocacy.

**PROFESSOR LEVITT:** So this is fascinating. I kind of suspected -- and let me back up. So in most of my policy priors, I'm fairly progressive. And I kind of expected in the campaign finance world to be the mild libertarian of the bunch, and I find that I have suddenly taken on the mantle of the raging libertarian.

So to go back to an earlier point of Ciara's presentation, I am deeply disturbed by the government deciding to suggest that companies supporting a nonprofit reassess their contributions to the nonprofit lest they be financially regulated. I think that's an enormous amount of government power, and so that degree of regulation, of quote/unquote "regulation -- that's a really nice nonprofit you got there, be an awful shame if something happened to it" -- strikes me as deeply alarming.

And I think I'm even more alarmed by what Nick just presented. So I think what you're talking about is social activism. "It is pure issue speech" is right, but on everything, and you describe this spending as unconventional. But I think it's what social activism has been for hundreds of years, not just in the American system.

So the entities that engage in non-campaign finance, it strikes me, are not just unions and not just the sorts of organizations that you've got up there, but the Center for American Progress, and the NRA, and the Parkland students, and the ACLU, and the American Constitution Society, and the other organizations that are hosting today, and the League of Women Voters, and the NAACP, and Planned Parenthood, and the National Right to Life Foundation.

I think it's all of civil society. And if you're cabining off the organizations that also have any profit motives, which may also engage in social activism, if you're cabining off those, you still leave all of the rest of organizing for social change, including the suffragettes and the civil rights movement, right. Those were the original non-campaign finance leading all of the spending on efforts to persuade the public.

You're talking about the anti-smoking campaign that changed the way Hollywood portrayed people smoking cigarettes and the seatbelt campaign that portrayed the way Hollywood portrayed people riding around in cars.

And I don't know how you know when that's distorting or when that's just us. So I don't know how you establish a benchmark for when there hasn't been social activism, or what it would look like if there were no social activism, that is, if people spent no money trying to persuade other people about stuff. I don't know how you set a baseline for what the non-skewed version of that is. I don't know how you ask for disclosure of it, and I'm actually -- I'd be frightened of that amount of regulation.

And as to the voucher idea, I think we've got it already. I think it's the tax deduction for (c)(3)'s. I think that in order not to pay a certain -- you get to deduct from the taxes that you pay a certain amount of money that the government -- whether you call it gives or lets you retain, it is an amount of money that the government otherwise claims from you that you get to keep to use on social advocacy as you see fit.

And so I deeply appreciate the intellectual project of trying to get your arms around what this is, but I guess I have real questions about even if we can define what the world we live in looks like absent it, to know whether it's a problem or not.

**PROFESSOR STEPHANOPOULOS:** Yeah. So a couple of thoughts. One is that I'm not sure what I think normatively we ought to do, if anything, about this. It might be that the right answer is to, you know, let it be. And one major aspect of this project is just descriptive. How much money is being spent on this? What do we think about the effectiveness of this money? What do we know about the ideological, you know, pursuits or ambitions of this money? Like there's a lot I just want to learn about non-campaign finance. And it may be that, you know, we don't do anything, we just appreciate having learned something about this, you know, quite vast amount of

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money.

In terms of, you know, if we think there is a problem, I think we're all on the same page that tools that are available to the government in the campaign finance context are just entirely unavailable here. I'm not sure if disclosure would be a huge imposition. You know, there is disclosure for nonprofit groups currently. It just doesn't go as far as I would like, because it tells us, you know, this is the total amount that Americans for Prosperity took in as revenue and spent in a given year. We don't know in more detail what are the uses of that money. Where is that money being spent, you know, on what?

I don't think there's a serious constitutional problem with just, you know, having a more detailed tax form for Americans for Prosperity. I don't think that, you know, disclosing uses of money raises the First Amendment associational questions that, you know, being forced to release your donors might raise, for example.

And then I agree that the existing tax code is absolutely already a subsidy, you know, an implicit subsidy for non-campaign finance activities, but it's one that benefits, you know, the wealthy much more. You know, it's an inegalitarian subsidy, so I would be interested in exploring the possibility of an egalitarian subsidy for non -- I think it's great that the tax code, you know, foments this kind of activity. It would be even better if it fomented it in a way that represented, you know, all Americans instead of disproportionately allowing the -- you know, the wealthy to contribute and to drive the non-campaign finance activity.

But yes, I think ultimately this project will be, you know, 75 percent descriptive and 25 percent, you know, throwing out some potential regulatory ideas, but I'm certainly not taking the position that we need to, you know, export the campaign finance system to non-campaign finance.

**PROFESSOR MAYER:** Open it up to questions from the audience. Yes.

(Audience member responded which was inaudible to transcribe.)

**PROFESSOR STEPHANOPOULOS:** The utility of the voucher idea is just that if you're the median American, you're not itemizing your deductions, and you're not claiming any kind of deduction for charitable contributions, and so you are simply not benefiting from the tax code's implicit subsidy for non-campaign finance activity.

But if we said that every American gets 25 bucks to allocate to the nonprofit group of their choice, then all of a sudden you would actually have, you know, a small say, but, you know, but some ability to directly, you know, promote non-campaign finance activity. And \$25 times, you know, 300 million Americans all of a sudden becomes a huge amount of money that can be, you know, a real counterweight to wealthy and corporate interests representing, you know, typical Americans.

And so, you know, I do have this worry about distort -- even if I can't define the distortion very precisely, I do have a worry about it. And so I think that, you know,

having a huge amount of noncorporate, non-wealthy non-campaign finance would result in a healthier public discourse and a less distorted distribution of use. I can't probably prove any of that, but that's my strong intuition.

**PROFESSOR MAYER:** Yes.

(Audience member responded which was inaudible to transcribe.)

**PROFESSOR STEPHANOPOULOS:** My thinking through this issue amounted to a bullet point last night. I think it ought to be in addition to, not instead of. You know, for most Americans, this would be their only route to getting, you know, public support for engaging in non-campaign finance. For the wealthier, yeah, fine, give them 25 bucks also and let them, in addition, deduct their \$5 million contribution to Americans for Prosperity. I'm not too concerned about the extra \$25 going to, you know, the top one percent or the top .1 percent. But yeah, I haven't at all thought about eliminating the charitable deduction as a proposal. This is purely a supplement to existing law.

**PROFESSOR MAYER:** We have time for one more. Yes.

(Audience member responded which was inaudible to transcribe.)

**PROFESSOR STEPHANOPOULOS:** So it is a point that there could be more public interest in non-campaign finance in nonelection years?

(Audience member responded which was inaudible to transcribe.)

**PROFESSOR STEPHANOPOULOS:** More willing to accept what is true? The distortion of public opinion or...

(Audience member responded which was inaudible to transcribe.)

**PROFESSOR STEPHANOPOULOS:** Or, interesting. You know, is the public more or less persuadable at certain times than at others? I don't know. Yeah. I'm really not sure, you know, how the public's openness to opinion change might vary from one time to another. I have no idea. That's really interesting.

**PROFESSOR MAYER:** We need to move on to our final panelist, so please join me in thanking professor Stephanopoulos. And now Professor Justin Levitt.

**PROFESSOR LEVITT:** So hi, and thank you very much for the invitation to be here. I am going to manage to fly without Power Point, which is deeply distracting for law students, I know, and equally distracting for law professors.

I also want to thank Notre Dame Law and all of the various sponsors and the Journal for putting this together. I think it's fantastic. I thank you for inviting me here. I will say that 11 degrees -- I'm coming from Los Angeles, and that is what we use as the threat when kids don't eat their vegetables, they'll be sent to a place where it's 11

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degrees, like that's the downside repercussion. It is very warm and welcoming in here, so thank you very much for that.

I have -- actually, this entire setup is really one big question for my co-panelists and for you all. So I want to talk about a -- in a way, this is small ball compared to what both Professor Stephanopoulos and Professor Torres-Spelliscy have talked about so far. It is a doctrinal constitutional distinction that might make absolutely no difference going forward. But it's something that's been bothering me, and I want to find out whether it's something that should be bothering me or not.

So you've heard it mentioned a couple times today already. The origin story of modern campaign finance is a case called *Buckley versus Valeo*, 1976. And among the very, very, very many things that *Buckley* did is it set up a fundamental divide between the way that constitutional law treats expenditures and the way that constitutional law treats contributions. Expenditures: "I am spending money on" -- and you can think of it as the paradigm case, although there are ways in which they bleed into each other in some circumstances. "I'm spending money on a political ad" is the paradigm expenditure. Contribution: "I'm giving money to a political campaign." That's the paradigm contribution.

And the Supreme Court in *Buckley* took an overall regulatory regime, a campaign finance regime, and essentially cut it in half. It said that expenditures under the First Amendment effectively can't be regulated beyond disclosure, effectively they can't be limited, they can't be capped, they can't be -- later on they got to a point where they can't even be slowed or compensated for. But spending money is essentially core First Amendment activity, extremely close scrutiny, strict scrutiny, and it's turned out to be fatal in pretty much every circumstance.

Contributions, on the other hand, they said were subject to a lesser degree of scrutiny, an intermediate type of scrutiny-ish. They weren't very clear about it then. They haven't gotten all that much clearer about it since.

I'm maybe the only academic left who thinks that makes sense. And I don't mean makes sense as a matter of a campaign finance system that makes political sense. There's a whole lot to criticize about the incentives that that structure sets up.

But in particular for a court, I think a court's job is not to build a campaign finance system that makes sense. While it may be fine to acknowledge that it should be thinking about a campaign finance system that makes sense, its primary job is to apply constitutional law, and that may be different in many ways from building a sensible campaign finance system.

And in particular, in *Buckley* and in the cases that follow, I think that as a matter of the court deciding what the government may do, rather than building a system that it should create, I think the distinction in *Buckley* makes an enormous amount of sense as a matter of constitutional law, and I'm starting to worry that I might be the only one. So the big question I want to pose is: Why am I wrong about this?

If you ask the professorial commentariat, they will tell you that contribution limits, or that the scrutiny of contribution limits, are going exactly the way that scrutiny of expenditure limits went -- right -- that there is a deregulatory trend, that the courts will, as soon as they can, as soon as they get their hands on a contribution limit, they'll decide that it's subject to the same strict scrutiny, they'll strike it down. You see this in the courts as well, sort of, so a ratcheting up of the skepticism of contribution limits in cases like, most notably, *McCutcheon* versus *FEC* was about aggregate limits to a bunch of candidates at the same time.

And there, although just as Thomas was the only one who said, "you know what, I've never liked this distinction, we ought to scrap it" -- the plurality inched its way closer to treating contribution limits like expenditure limits. And I think various legal commentators have said they see that being the future of the courts' campaign finance jurisprudence.

Jim Bopp keeps serving up cases. One of them will get to the court eventually. I'm surprised one hasn't gotten there before now. And rather than ask what the court will do when it gets the next case about contribution limits, I want to ask what it should do.

So if you look at expenditures, if you look at the *Buckley* court and the courts since, and their jurisprudence on expenditures, it actually makes sense to me that as a matter of constitutional law, that courts would look very skeptically at limits on how much you can spend to speak your mind in a political context.

Expenditure limits really do, in my mind -- and I know some of my other panelists may disagree with me here -- they do impact core speech, the stuff that we think of as the stuff the First Amendment fundamentally protected. Once you hit a limit, the only way you can speak is literally by standing outside and yelling or by walking up to somebody and having a conversation. But just about everything else costs money, including the money that you pay for your wireless subscription in order to access what are now otherwise free methods of speaking using a computer. Once you hit an expenditure limit, if you really, really believe that no more money can be spent on speaking, then the money that you pay for your Internet access gets cut off as soon as you use it for political speech.

And there's no other constitutional right that we treat like that. We don't put a cap on your ability to travel interstate. We don't put a cap on your ability to seek reproductive freedom or educating your kids. We don't put a cap on your ability to hire a lawyer or a legal team to support your defense in a criminal prosecution. And I think when you start thinking of caps in those other areas, you can see why -- at least I can see why -- the court was really resistant to putting a cap on the amount of money you can spend to further putting a message out to the world. Even buying poster board and magic markers costs money, and once you hit a limit, it starts to curtail that activity.

I think it's especially understandable in the context of *Buckley* itself. So *Buckley* involved a \$1,000 cap on political expenditures, and I often wonder actually if we'd have the same constitutional law today if the cap were \$10 million. But at \$1,000, even in 1976, that struck the court as a rather low limit to spend, right.

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Let me make this personal. You can only hire a lawyer for criminal defense if you pay them 50 bucks an hour, and once you hit \$5,000, you're done. And as law students, all of you think, "okay, I don't like that rule at all." And I think the very low limit on expenditures that Buckley set up struck the court as quite constraining in a way that it might not have had the same reaction had there been a much higher cap.

It also struck the court, I think, as inherently incumbent protective. So when you've got the name recognition of an incumbent, you can do a lot more with a small amount of money than you can as a challenger, and I think the court was sensitive to this. It thought that part of the regulatory regime was actually favoring those who were already in office.

The counterargument to all of this is that expenditure limits help foster equality, particularly equality of political participation. And I'm a little skeptical, or at least I'm a little skeptical that they do enough of the job to justify the restriction. So especially in the Internet era, I am skeptical that you can actually drown out speech with paid speech. It has never been easier to put speech out into the world. I'm a little bit skeptical that money will actually buy your belief in a particular idea or in a particular policy matter.

The last time that you made decisions about something probably involved a lot more of your talking to friends or family or teachers or other influencers than it did paying attention to an ad, whether you knew it was a paid ad or not.

I'm not at all skeptical of the idea that expenditures can buy political influence. There was a case called *Caperton* written by Justice Kennedy in which he either intentionally or unintentionally elided the difference between expenditures and contributions -- this is a judicial spending case, and millions of dollars for spending in a judicial race, and Justice Kennedy said, I understand how this outside independent spending could actually buy favors from a judge.

In a way, that was shocking, because I can't remember -- I think it was the year after -- he said outside independent expenditures can't possibly buy you favors from a legislator. So I don't believe that outside independent spending can't possibly buy you favors from a legislator at all. I think that if you put *Citizens United* and this *Caperton* decision together, what you actually realize is he's resisting the notion that the fact that expenditures may buy you influence means we should cap expenditures.

And actually, one of your faculty members showing up later today, Professor Nagle, has proposed a system of legislative recusal, like judicial recusal, that I'm quite fond of as a means of dealing with the potential improper access that expenditures might buy.

But all of that means that capping expenditures seems to me to be correctly prompting really strict government scrutiny.

I'll also say one more point toward the under-inclusiveness of capping expenditures. If you had expenditure limits across the board, if no individual could

spend more than "insert your dollar amount" on campaign spending or political spending, Warren Buffett still gets his call returned faster than I do, and Bill Gates still gets his call returned faster than I do, and I have absolutely no question about that. Whether he gives or spends "political money" or not, we have a wealth bias in this country, as Nick and others have amply documented. And although political spending may contribute to that, I'm not sure it's more than a drop in the bucket in the total amount of wealth bias we have. That is, I think that legislatures are structurally more likely to respond to the interests of wealthy people whether they are spending in the political arena or not.

And so I don't know that expenditure limits -- A, they impact core speech, and B, I'm not sure that they produce measurable or meaningful amounts of egalitarianism in the way that we might hope. So there is both more to resist them and less to speak in favor of them, and so it makes sense to me that the court would be skeptical. And again, here I'm playing the part of raging libertarian, at least in most progressive campaign finance discussions.

Similarly, it makes sense to me that the court would actually be much more lax, allow much more regulatory "freedom" in the area of contributions. Again, not in furthering a building of a campaign finance regime that makes any sense, but in deciding the freedom with which the government has to regulate, it makes sense that contributions would provoke less government -- less court ire, less close scrutiny.

So for example, contributions are not what we think of as typically core speech. My giving money to somebody else might well further speech I agree with, or it might not. It might be used to buy chairs. It might be used to give to somebody else that I don't agree with. It might be used to promote one of many messages that I don't agree with even if I like, generally, what a particular candidate happens to be saying. It's a very indirect way of furthering speech to give money to somebody else to use as they see fit in a political campaign.

It's not particularly indicative of a degree of support, right. My ability to give money depends more on my wealth than how much I like somebody, and sure, if I give somebody \$10 million, it means I support them a whole lot more than if I give them \$500. But if Charles Koch gives somebody \$10 million, it might not mean that there's a higher degree of support than if I give somebody \$500 just from the very different starting points that we begin with.

It is vital in the aggregate. So we could not actually have a political system -- unless it were entirely government funded -- that did not rely on some form of private contributions, and so it is truly vital toward getting speech out into the marketplace in the aggregate. But for any individual, and the court -- you can say whether this make sense or not -- the court has always viewed campaign finance in an individualized lens.

It's not particularly vital for me to contribute to somebody else in order to further expression, in order to put ideas out to the marketplace, at least nowhere near as much as expenditures. So there's less of a core First Amendment value. And on the other side, regulating contributions actually does have a pretty strong effect in preventing the sorts of corruption that we think are not only bad, but still well within the regulatory

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zone in making sure the representatives respond to us.

Giving someone a suitcase full of cash can indeed affect their willingness to pass policy for the suitcase cash giver, and comparatively involves a whole lot less sand in the gears than somebody spending money truly independently -- big caveat, we don't have true independence -- but somebody spending money truly independently without knowing whether it will benefit a politician exactly or not, knowing whether it will be on message, knowing whether it targets the right voters, that's a little more removed.

My giving a suitcase of cash to somebody, well, that's as valuable as it possibly gets to an incumbent politician, and so could well be used to trigger corrupt activity, activity that is designed for individualized interests that are not in the public interest. It may not be that \$2,800 is the right threshold for that contribution, but having some contribution limits and allowing the government to place those contribution limits, that makes sense to me as a -- not just a prophylactic measure, but as a measure to directly combat the most serious and perhaps most pernicious forms of legislative inattention to the rest of us.

So there's less First Amendment activity in the contribution zone, it seems to me, and there's more risk. And to the extent that the court is concerned about legislative entrenchment, in the same way that I mentioned a \$1,000 expenditure cap really benefits the incumbents, it's probably not true with respect to contributions. That is, if you raise contribution limits, incumbents have a very natural fundraising advantage, because they have the entire regulated community that would love to get in well with any legislator that is in charge of policy. And so it strikes me that contribution limits actually limit incumbents in a way that is not true in the expenditure limit zone. That is, if you're worried about entrenchment, contribution limits give you less to worry about than expenditure limits might.

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

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

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

But I don't think the notion that there are tricky in-between cases should stop us from recognizing the sensibility that there are different constitutional balances between spending money of my own on speech activity and giving money to somebody else that inspire different levels of court scrutiny. That's not the direction recent cases seem

to be headed, but I don't know why, other than general skepticism of the campaign finance regime. That is, I find the skepticism in the recent cases to be not particularly grounded in constitutional law values.

And so where I'll end is really with a question. Have I got it totally wrong? Is there a logic in treating contributions and expenditures similarly? Is the court or the direction of the court or the predictions of legal commentators, do they see something in the similarity that I don't? Or is it really the case that this distinction makes sense as a matter of constitutional regulation even if the regulatory system that Congress has built, that the FEC has built, doesn't make any sense from the perspective of funding campaigns? That is, if we're not talking about political philosophy, and we're not talking about campaign practice, but we're talking about the First Amendment and what it allows government to regulate, am I wrong that this distinction is not actually the original sin of Buckley, but something that given what a court is good at, actually, the original value of Buckley?

And so that's really a question that I have. I'll leave it there. I'm sure that's going to provoke a lot of reactions from the other folks on the panel, so thank you.

**PROFESSOR MAYER:** And now four of the reactions.

**PROFESSOR TORRES-PELLISCI:** Go for it.

**PROFESSOR STEPHANOPOULOS:** So I guess like -- I think that I'm wearing the cap in this Symposium of the statist or the socialist, and so I guess I'll continue wearing that hat. So I think I want to just -- I, you know, defend the position that we ought to think about contribution limits and expenditure limits similarly, and we ought to just, you know, permit both of them. This is the exact -- this is the Stevens position. This is the exact opposite of the Thomas position, which is that, yeah, we ought to think about contribution limits and expenditure limits the same way, and we ought to get rid of both of them.

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

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

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that tries to combat that really is serving, you know, a vital, vital end.

Three, like I think it's relevant that a whole bunch of other countries, you know, real Western democracies have equivalents of the First Amendment and have upheld various regimes of expenditure limits. You know, Canada is probably the Western society most like ours, and they've upheld something very similar to what the Supreme Court -- to what our Supreme Court struck down in *Buckley*. They have a First Amendment. They have a real free speech doctrine. They just put a lot more stock than our court does on, you know, preventing the undue influence of the wealthy and of corporations over the system.

Four, I don't think that the Internet era is a great argument. Anybody can blog. Anybody can tweet. Anybody can post things on Facebook, and nobody reads it, right, like you have no influence when you tweet or when you post on Facebook or when you blog. You know, how do you get influence over the Internet? With money, right. Like it takes a lot of money to reach millions of people over the Internet. And still, even in today's Internet era, much more -- most especially older people still spend a lot more of their time with TV than with blogs or social media. So, you know, maybe this won't be true in 50 years, but for now I still think that traditional TV media are more significant and more influential than the Internet.

Last point is I don't know why we would think that expenditure limits aren't a major tool of, you know, plutocracy. You were suggesting that Warren Buffett would have just as much influence if we had a real regime of expenditure limits. I don't know why. Sure, he would have more influence than I do, but I think the gap would go down a lot if, you know, Tom Steyer or Michael Bloomberg or whoever was limited to, you know, \$1,000 or \$10,000 of electoral influence, not \$100 million of electoral influence.

You know, yeah, there's still all the non-campaign finance I was talking about. There's all the lobbying. You know, there's other roots of influence. But you've got to think this is a big one. If you just terminate this root of influence, I've got to think that will have, you know, significant positive effects even if it doesn't, you know, solve the problem of economic inequality.

**PROFESSOR TORRES-PELLISCY:** Oh, where to begin? So I preface this with I've spent the last two years looking at what happened in the 2016 election, and I am very concerned that the entire model that the Supreme Court has adopted in terms of it assumes that our marketplace of ideas actually works. So they assume that bad ideas will be displaced by good ideas, that the remedy for bad speech is more speech. And one of the things that happened in the 2016 election is American voters were exposed to more fake news than real news, and so I don't actually agree with you that it doesn't matter what's going on online. I think that has turned into the game.

And even the dinky Trump campaign compared to other presidential campaigns, they were able to put out on a daily basis, you know, 40,000 iterations of a particular ad where each little target demographic got a different version of it because they thought that they had psychological profiles on every American voter.

And so I don't know if that means that we need to re-argue some of the way we structure campaign finance given that the Supreme Court, A, is on this deregulatory track, and B, is only ratcheting up scrutiny of all campaign finance regulations. But whatever regime we have I think is not being protective of voters or their interests. And I spend my days horror of what comes next after this.

The Senate Intelligence Committee commissioned two reports. One was from a group called New Knowledge, and another was from Oxford University. And what those two entities did is they looked at the Facebook ads and Twitter bots and all of the social media campaigns that the Russian Internet research agency put into the American election in 2016, and it was horrifying in its effectiveness. And part of what they did is they played on divisions in American society. So they had ads that were targeted towards black people. They had ads that were targeted towards people who were in the right wing. They had ads targeted to people on the left wing.

And what they did was super insidious. They would basically create personas, and the personas would get themselves into conversations with real Americans and try to build trust with that American audience. They did that for years before the 2016 election, and then once they had established trust with those audiences, then they pushed in, you know, fake, you know, for lack of a better word, bullshit. And people fell for it. And they fell for it because it came through a network of trust. And if a bunch of Russian intelligence officers can do that, I would imagine that what we're going to see in the next set of campaigns is American campaigns trying to do that too.

And so is that pure First Amendment speech? Yeah, I guess so, but the -- I feel like we have to almost change what voter education looks like, because I think before it was just like, can you get up on the issues. Now I think it's can you spot a deep fake video and process the information in a meaningful way so that you don't fall for nonsense?

**PROFESSOR MAYER:** You want to respond?

**PROFESSOR LEVITT:** Yeah, 30 seconds, because then I really actually want to hear questions as well. So I couldn't agree more with all of that, and I don't think any of that was driven by money. So the fake news that was out there didn't require vast amounts of spending. In fact, it required very little spending. The advocacy by the Internet Research Agency didn't require vast amounts of spending. In fact, if anything, what was remarkable was how unbelievably efficient it was. Very small dollars with an awful lot of impact. The transmission of fake news doesn't require a lot of cash.

It turns out that we are virally susceptible, and once you plant the virus, it spreads, but I don't think money is driving that. I think that our susceptibility is driving that, and I don't know how to regulate it. I agree that it's a problem.

The capacity to regulate also brings with it the capacity to misregulate, and I don't like the government branding what truth is, even though I'm not claiming that we cannot tell the difference between truth and not truth. I just don't like the government telling us which things are true and which things are not true.

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And I agree with you entirely that voter education is probably the solution, but I don't know that the money train is the hammer there. And so I can say yes. I can also say one of the policy matters that would address that are different types of disclosure. I think both more and less, actually. The fact that you contribute \$200 to a campaign that's spending billions isn't really meaningful disclosure in any way. I think knowing the top five people behind any particular set of marketing campaigns might be meaningful disclosure, and there's an awful lot that we don't need to know. The current disclosure regime is not calibrated to give us information that is useful.

But I'll go back to where I started, which is: that's building, not regulating whether we can regulate. That is, that's not a matter of constitutional law. That's a matter of building a sensible campaign finance policy, and so I agree with you.

The same, I'll agree with at least one of the things that Nick said as well, which is that independent spending isn't independent, that that dividing line is, at this point, pretext. It's a joke. But that too is more a function of the regulation that we have and not a function of constitutional law. So the court was fairly clear that when it is talking about expenditures, it's talking about this in a very abstract way, I mean, this very formalist way, as truly independent. And it would seem to follow from that that the political system could establish more lines to keep people in a zone of independence so that you're not just giving to Chuck Schumer's super PAC. You just haven't. And there too, that's a failure of building the regime rather than regulating it with the Constitution, that is, regulating what the regulators can do. So I agree with the need to recalibrate disclosure regulations.

I would also like to recalibrate coordination, and we'll have a chance to talk about some of that this afternoon, or in the second panel, and independence rules. But I don't know that those are constitutional lines. I think that's a failure of regulators rather than a failure of the courts. That's the only thing I would say about that.

**PROFESSOR MAYER:** Let me open up for questions. Yes.

(Audience member responded which was inaudible to transcribe.)

**PROFESSOR LEVITT:** So a great question, and I'll try to get to it quickly. The short version is that I think Citizens United got it wrong, but not on the issue that most people think Citizens United got it wrong about. I emphatically think that the group Citizens United should have been allowed to produce the documentary, advertise the documentary that it was producing.

**PROFESSOR TORRES-PELLISCY:** And I can say I knew Justin at the time, and he made this argument at the time.

**PROFESSOR LEVITT:** That's true.

**PROFESSOR TORRES-PELLISCY:** Yes.

**PROFESSOR LEVITT:** We used to work at the same organization, and I told them explicitly when I was hired there, "Ciara is not going to want me anywhere near her stuff." And that turned out to be right.

So I think the group Citizens United is a traditional -- is a group that traditionally organizes to promote expression, to promote political ideas. I think it is far less different from the ACLU and the ACS and other organizations that traditionally get together in order to promote ideas than many other people think. It happened to take corporate money, but so does the ACS, and so does the ACLU. And I don't think that changes the speech that they produce.

Historically, corporations that have -- not groups that have not banded for First Amendment purposes have not been provided the same amount of protection under the First Amendment. So that's the reason why municipal entities can regulate gangs in a way that they may not be able to regulate associations of citizens banding together for First Amendment purposes is because there are protections on groups that get together in order to promote expression that don't exist for groups that get together for other purposes, or at least that historically has been the case.

Citizens United was addressing a nonprofit group that engaged in advocacy and made a rule -- in part because Justice Kennedy loves super expansive language -- that appeared to apply to everything under the sun.

The media corporations are actually a proof point for me and tell me that I'm more right than wrong, I think. I don't know why -- it's not in keeping with our historical traditions that we would cap the ability of The New York Times to endorse candidates. The New York Times is a for-profit company. It exists for First Amendment purposes. It makes its profit in First Amendment activity, but it's a for-profit company. Vice is an Oscar nominated film that has a decided political perspective, and I would hate to say that you couldn't spend more than X amount of dollars making the movie Vice.

That strikes me as different from -- and the reason why I think the court is right to be skeptical of expenditure limits in that context. That strikes me as different from the regulation of other corporate expenditures when the corporation itself doesn't have a First Amendment purpose. And I am more concerned about that expenditure, to be sure. I don't know whether we will ever be able to put the genie back in that bottle. So that was a long answer.

**PROFESSOR MAYER:** Other questions? Yes.

(Audience member responded which was inaudible to transcribe.)

**PROFESSOR STEPHANOPOULOS:** Yeah. I think it was Jeb.

**PROFESSOR TORRES-PELLISCY:** Yeah. Oh, man. It was a lot.

(Audience member responded which was inaudible to transcribe.)

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**PROFESSOR LEVITT:** Yeah. And to the extent that legislators that get overaggressive, that may be driving some of the doctrine. So unfortunately, like I said, I think Buckley might have come out differently if the expenditure limit were ten million than if it were a thousand dollars. I think that some of the court skepticism of -- or some of the justices' skepticism of disclosure registration laws -- and to be clear, the court is -- has said over and over and over again disclosure laws and registration laws are generally constitutional, but some of the dissenting justices on that have expressed these sorts of concerns about smaller entities. I think if those laws were better calibrated that you wouldn't see so much hesitation even in the dissents.

So I think part of it has to do with the "nature of design" rather than "the fact of" that drives the court to categorical rulings. So all expenditure limits fell because they were evaluating ones that were \$1,000. They drive the court to categorical rulings, but that's in part an unfortunate aspect of the way that constitutional regulation works, and the logic of constitutional law.

That needn't necessarily be the case. So you could have assessments of the burdens of particular regulation based on the amounts regulated, based on the sophistication of the entities, right.

**PROFESSOR MAYER:** Well, we're out of time, so I want to let the students that may have other commitments go, but please thank me in joining -- join me in thanking Professor Levitt and all of the panelists. We'll take a break. We'll take about a ten-minute break until 11:30, and then we'll have a second session which Professor Nagle will moderate. See you in a few minutes.

(Recess taken.)

**PROFESSOR NAGLE:** All right. Why don't we resume here. I'm John Nagle. I'm delighted to be here in many ways. I am, in some respects, an odd choice for moderating the second panel since I was not here for the first panel. And for that, I beg your forgiveness. I thought I had a really good excuse, which was that I gave a talk in Oregon yesterday and didn't roll into town until 4:00 a.m. this morning. But then I found out that Justin didn't roll in until 3:00, and he got up here for the first panel, so, so much for my excuse. He's just a better man than I.

In any event, we have a kind of neat opportunity, which is something you don't always see in events like this, where we don't have particular presentations scheduled. Rather, we're able to kind of continue the discussions which we've had so far this morning as well as kind of expand them into some other related areas which we haven't had the opportunity to address.

So I have a handful of questions myself. The panelists have suggested some. Certainly we want to get everyone else involved. Again, there's no kind of out-of-bounds kind of place we would go with this here. And I hope that this, you know, kind of format gives us a chance to really kind of develop a lot of the ideas that you were able to explore this morning.

So with that, Justin actually, you know, took the lead and set up some questions, so why don't we kind of begin with those, and then I have some others in mind as well. And, well, should I read your question or -- we'll stage this well. I'll ask him the question that he asked. So hold on. Let me find it here.

**PROFESSOR LEVITT:** I'll pretend to be totally surprised.

**PROFESSOR NAGLE:** Exactly. Who would have ever thought to ask that? Well, generally, I guess the first issue we would like to talk about now here is -- that's an issue. I thought I had a question. It's basically on foreign campaign spending, which I know is something was touched on a little bit, is something which has been litigated, *Bluman versus FEC*, but I think that there's still a sense that there's more to be said about it.

The idea here of course is, you know, to what extent, you know, does campaign finance law allow for under the First Amendment and under the applicable statutes kind of differential regulation when we're talking about foreign individuals, foreign entities getting involved in the United States, not that that could ever happen in an American election. But that's the issue we have here. So let me kind of -- we'll tee it up like that, and Justin, what do you think about this?

**PROFESSOR LEVITT:** So we did mention a little bit in the first panel, Ciara mentioned that we had this report out of the Senate Intelligence Committee, and there's more coming, and we've had indictments, and there's more coming, and we saw some foreign spending, some of which may be illegal, most of which is probably not illegal, question mark-ish. And that's in part because the law in this area is in a weird point of stasis in that we have a decision, and there may not be a way to revisit it, and we're not sure what the decision means.

So the governing law in this area is law that was made by a three-judge court in a case called *Bluman versus FEC*. It came right after *Citizens United*. And after *Citizens United*, I said: Given what the court has just said, you should expect non-*Citizens United* tomorrow, because given what the court said in *Citizens United*, it's very hard to believe that the blanket prohibition on foreign engagement in American elections is constitutional. There's a statute that says essentially no giving, no spending, no stuff.

**PROFESSOR TORRES-PELLISCY:** And no solicitations.

**PROFESSOR LEVITT:** And no solicitations. So zero activity intended to influence American elections by noncitizens is essentially -- I think I'm not exaggerating.

**PROFESSOR TORRES-PELLISCY:** Yeah.

**PROFESSOR LEVITT:** It is as blanket as you can get. Congress said "no, flat-out." *Citizens United* seemed to give free speech rights to entities that were not traditionally part of the American political community, right. American business corporations don't vote. They don't run for office. They are not traditionally what we

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thought of as the American political community. But it seemed to say nevertheless, there are individuals that comprise these business entities, and collectively, they can spend money, not only because they collectively are individuals with rights themselves, but because we want to hear their speech, because the speech itself is too valuable. There are listeners' rights as well. And corporations have a viewpoint, and we would be deprived of them if you read -- again, massively broad -- Justice Kennedy's opinion. We would be deprived of the particular unique perspectives that corporations have to offer, and that would be detrimental to us.

Well, the same is true of noncitizens, right. It might be interesting to me in voting on American elections as an American citizen what people in France think, or what people in Russia think, or what people in China think, as long as we knew where they were coming from. Disclosure question. It might well influence how I thought about a candidate to hear what people in other countries thought about the candidate, particularly when a lot of what we do is foreign engagement, right. It might actually influence how I thought about a candidate if I heard from folks in Syria, or I heard from folks in Iran, or I heard from folks in the UK on either side of Brexit about what the political candidates thought about trade or other stuff.

So after Citizens United, I would have thought most of those restrictions on, at least speaking were coming down and probably should have come down. The D.C. -- this three-judge court, which again is a weird entity, it has a direct appeal to the Supreme Court. It's one of the few remaining zones that has this procedure. Said no, this statute can stand despite Citizens United because noncitizens aren't part of the American political community, period. The logic was deeply unsatisfying to me.

And then it did something else which is equally dissatisfying in a totally opposite direction. It said, but we're going to construe this statute, which touches everything under the sun, to only involve express advocacy and giving money directly to a campaign. We're going to construe the statute to not touch noncitizens talking about issues or otherwise trying to influence American elections. That's what the statute prohibits if they don't use magic words.

That is almost certainly dicta. That is, the case itself didn't involve any expressed wish of a noncitizen to engage in issue advocacy. It only involved desire to engage in magic words -- "vote for," "vote against" -- or to give money to campaigns. But it exists. The court said it. Didn't really explain why.

There had been a distinction in campaign finance law between express advocacy and other stuff on the basis of vagueness concerns, right. We want American citizens with American speech rights to understand when they might be running afoul of the law and when not, and we can't just hold people subject to a \$1,000 cap on expenditures when you're not sure when you might be getting into the expenditure zone. That was the rationale for confining speech acts to certain magic words.

If you are mentioning a candidate, are you going to be on the hook for capping your expenditures even when you're not actually intended to get them reelected? When you talk about the McCain-Feingold law, are you going to be on the hook because you're mentioning McCain and Feingold -- both of them were at the time candidates -

- even if you're not trying to get them reelected. So the Supreme Court said there are vagueness concerns here, we're going to narrow what the domestic statutes incorporate, but it's actually not clear to me the First Amendment vagueness rules apply extraterritorially. They might. They might not.

**PROFESSOR NAGLE:** It's hard to say. Right.

**PROFESSOR LEVITT:** And if you are a noncitizen, at least one thing is clear. You know when you're a noncitizen. So being in the category of people whom this regulation affects is clear. It's not clear that the Constitution is as protective of the rights of noncitizens, at least who aren't present in the country.

So there are certain rules that certainly apply to people with a connection to the U.S., but somebody sitting in Russia, spending money in Russia, it's not clear that vagueness concerns apply to them, and so it's not at all clear that this decision is right on the other side.

So on the one hand, it said we're going to uphold these prohibitions on noncitizens coming in and spending money on the campaign, because they're not part of the community. On the other hand, we're only going to keep them -- we're going to construe the statute. We're only going to keep them from spending money on some stuff, and it's not at all clear that the logic there holds either.

So I guess the broader question that I have is: Does any of this make any sense? And even whether it's likely to come up again or not, do we think that as a matter of constitutional law, it is correct? What it has done is it's made some of the stuff that we found out in the indictments that foreign countries engaged in -- if you believe that this decision isn't dicta, it's made it legal.

So the fact that Russia came in and expressed opinions about Donald Trump and Hillary Clinton without saying "vote for" or "vote against" in all of their -- some said "vote for" or "vote against," but some of them didn't. And to the extent they didn't, if this opinion is binding, that means that what Russia did was not unlawful. And that confusion, whether it's dicta, whether it's binding, whether it means anything, whether it makes any sense, may well be why the indictments actually did not process this activity as campaign finance violations. The indictments that we've seen so far have focused entirely on hacking and on wire fraud and on pretending to be somebody else, but not at all on breaking the campaign finance rules. So that's just the setup. It's a long setup.

**PROFESSOR NAGLE:** No, that's great.

**PROFESSOR STEPHANOPOULOS:** We just had two points. I think I agree with virtually everything Justin said, so none of what I'm saying is a direct response to Justin.

One point is -- I think unlike everyone else on this panel -- I'm skeptical that the foreign activities in 2016 had huge effects on the election. I think the motives were

deeply insidious, you know, clever, and, you know, diabolical too. But, you know, my reading of the available social science literature on the impact of fake news, fake Twitter accounts, fake Facebook accounts, is that first of all, they were a drop in the bucket, you know, dwarfed by genuine American social media activity, and also dwarfed by the activities of the presidential candidates and other American political actors.

What I think is the best study of the influence of foreign entities in 2016 is Yochai Benkler's book *Network Propaganda*. And his conclusion is that as far as we can tell, the Twitter bot, the fake Facebook profiles, the Macedonians coming up with fake pro-Trump stories, none of that was very influential. You know, the impact was probably trivial of those things.

Some of the other Russian activities, you know, the hacking of the emails and the disclosing of emails, you know, that could have been much more impact, but that's real news, and that's also more clearly a crime as well. But, you know, our conversation about social media, fake news, like that doesn't seem to be very influential. That's my understanding of the current literature.

The other point is that, you know, I loved Bluman because my biggest frustration with campaign finance doctrine is that for 40 years plus, we've been stuck with the same governmental interest, you know, the government interest in preventing corruption. And, you know, it is hackneyed. It is frustrating to always be talking about corruption. So to have another interest, you know, the preservation of a political community, you know, the regulating of the boundaries of a political community, that is deeply exciting.

You know, it's not the single interest that I'm most concerned about. You know, I think promoting equality, preventing the distortion of the political system, those are values I care more about. But I'll take what I can get. And so having a non-corruption interest, you know, asserted by conservative -- by Judge Kavanaugh, and then being upheld summarily by the Supreme Court, that's really exciting, and I can think of lots of applications of this interest that don't involve foreign actors at all.

**PROFESSOR NAGLE:** Let's think about that for a second, how excited you are. Yeah.

**PROFESSOR STEPHANOPOULOS:** Some state wants to regulate its state level campaign finance, and it says that we consider the state of Indiana to be the relevant political community, we are banning contributions to Indiana, you know, gubernatorial or state legislative candidates from non-Indiana entities. Why? Because we think of it, you know, we want the people of Indiana to govern Indiana. And if you're not an Indianian, you know, stay out of our election. Like I think that there's a colorable case that one could, you know, invoke Bluman for that sort of a law.

**PROFESSOR NAGLE:** You think it would work just as effectively for state offices as it would for federal offices?

**PROFESSOR STEPHANOPOULOS:** I mean, I use the state example because I think it's a lot trickier if you save it -- you know, we think that the relevant community is the 23rd Congressional District. But it's like, well, wait a second, whoever wins the 23rd Congressional District is then going to be voting on matters of federal policy in Washington, and also is going to belong to a party that is national in scope. So I'm not at all sure that this argument works for federal elections.

It's also very unclear if a nonfederal government could pass these sort of regulations about federal elections. It might all be preempted or might be able to. I don't know. But I think the case -- the Bluman argument is much stronger if you have a state or if you have a municipality, a county, you know, some nonfederal governing body.

**PROFESSOR NAGLE:** What about initiative campaigns?

**PROFESSOR TORRES-PELLISCY:** I'll get to the initiatives.

**PROFESSOR NAGLE:** I knew it was a perfect segue.

**PROFESSOR TORRES-PELLISCY:** So in terms of Bluman, Bluman could well be the reason why Donald Trump, Jr. could be in a lot of legal trouble. So the argument here is -- so we know from public facing documents, including Don, Jr. put out his own emails, thus authenticating them, and in those emails we have an offer from the Russians to provide, quote, dirt on Hillary Clinton, and so that could be considered under campaign finance law to be a thing of value from a foreign entity.

And so the meeting at Trump Tower in June of 2016 where they get into a room, and it's Paul Manafort, who was the campaign manager at the time, Jared Kushner, and Don, Jr., and then a bunch of Russians. And depending on how that negotiation went, if a thing of value was provided to the Trump campaign from those foreign nationals, the way I read Bluman, that could be a violation of this section of federal campaign finance law.

But one of the things that makes me incredibly nervous about this is at least so far in terms of the campaign finance charges that have been leveled in the Trump orbit, so we have Michael Cohen pleading to violations of the Tillman Act and of FECA. And what is sort of interesting about that from my perspective is that he pled guilty to those charges.

And so I am very worried that if they charge Don, Jr. with a campaign finance violation of the prohibition on foreign contributions, that he will raise a First Amendment objection to the foreign ban, and it's possible that he could win.

And to the point of initiatives, so one of the demonstrated cases of a foreign national spending in a U.S. election post-Citizens United happened in 2012 in Los Angeles. Los Angeles had an initiative that was trying to have safe sex in pornography. It was basically a requirement that the actors in pornography wear condoms during the act, and they actually put those to a vote in Los Angeles. And --

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**PROFESSOR LEVITT:** Not just warm out there.

**PROFESSOR TORRES-PELLISCY:** Yes. And a foreign pornographer actually spent in that election against the initiative, because he did not want his actors to have to wear condoms during the act. And this generated two different complaints. One was to the FEC, because the law that we've been talking about, it doesn't just apply to federal elections. It applies to state and local elections as well.

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

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

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

**PROFESSOR NAGLE:** Any idea why that -- you know, would think this would be a logical area given what we've seen for, you know, those who are particularly concerned about what happened with the 2016 election, to try to tighten this up, especially given the apparent, if ambiguous, you know, approval in Bluman. No one is pushing this?

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

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

So I think a lot of those aspects of H.R. 1 are a response to the 2016 election and the concerns about foreign influence. They're just focused on social media regulation as opposed to the sort of the higher level regulation of foreign activity, period.

**PROFESSOR LEVITT:** And one of the reasons might be this statute prohibiting

foreign spending elections exist, right?

**PROFESSOR TORRES-SPELLISCY:** Yeah.

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

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

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

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

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

**PROFESSOR TORRES-SPELLISCY:** Yes. Yes.

**PROFESSOR STEPHANOPOULOS:** It would have covered, you know, that ad, whereas Kavanaugh's construal of the existing statute would not cover the Obama is Satan ad.

**PROFESSOR TORRES-SPELLISCY:** Can I add one thing? And there were ads from the Russian IRA that would fall under the Buckley test. So one of the things that they did is they targeted African Americans, and they had two basic messages. One was vote for a third party candidate, or don't vote at all. And so they pretended that they were African Americans themselves, so they had handles like Woke Blacks,

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or Blacktivist, but it's just a Russian intelligence officer behind that profile.

And then they put out ads that said Jill Stein is the better candidate, vote Stein. And that vote Stein falls under Buckley's magic words test, and so that was actually a regulable ad. So it wasn't all just pure issue advocacy. And I agree under our current laws, most of what the Russian IRA did would fall outside of where we regulate now, because we don't regulate electioneering communications online. It has to be broadcast, which means radio, TV, satellite.

**PROFESSOR NAGLE:** Before we move on to the next section, let me see. Is there any questions on the whole kind of foreign involvement on spending from our student body?

**PROFESSOR LEVITT:** Or just stuff that we were talking about that didn't make any sense. We're using a lot of jargon.

(Audience member responded which was inaudible to transcribe.)

**PROFESSOR LEVITT:** Say another sentence, if you would, for me, at least, on the distinction you're trying to make there.

(Audience member responded which was inaudible to transcribe.)

**PROFESSOR STEPHANOPOULOS:** I think most radical reformers would be pretty satisfied with equity under your formulation, right. Like if we had a law that said everyone gets a \$100 voucher to allocate to the candidates of their choice, and that is the only money in the electoral system, I still think of that as equity, not equality, because no one is going to force you to use your \$100, so it's equality of opportunity. Everyone has the same opportunity to, you know, participate in the electoral system, to, you know, give their voucher to a candidate. But if you want to sit at home and not use your voucher, that is totally fine.

A good example of this is, you know, I don't know if folks know that Seattle recently adopted the first publicly financed voucher system in American history. It's very large. It is \$100 per capita per election, which is an unbelievably huge amount of money for a municipal election. If you did \$100 per capita for an American federal election, that would be \$30 billion. The actual total amount of spending in 2016 was \$6 billion.

**PROFESSOR LEVITT:** That we know of.

**PROFESSOR STEPHANOPOULOS:** Yeah. Yeah. Right. But so, you know, a \$100 voucher system federally would be on the ballpark of five times more money than we currently have in the system.

But in any event, so in Seattle, you suddenly have this gift from the government of \$100 to every voter. Something like -- I forget the numbers now -- tiny proportions of Seattle citizens actually used their vouchers. I forget if it was like five percent or

three percent or two percent or something. But like that's the order of magnitude we're talking about.

I'm disappointed by that low level of use, quite disappointed by the low level of usage, but as a reformer, I'm satisfied. I mean, it's good enough for me if we have the system where everyone has the potential to give \$100 in publicly financed money. If you choose to squander the opportunity, that's fine. And so the end result in Seattle, you know, is not equality of outcome, but it is equality of opportunity, which I think is, you know, so much better than the status quo, even if it's not actually equality of outcome.

**PROFESSOR LEVITT:** And I'll make the same point or a similar point tying back to the presentation I gave before. And maybe this helps to explain why I can understand the concern about expenditure limits more than I can understand the concern about contribution limits.

Contribution limits, I think, do foster equity. It's about equality of input. Expenditure limits, particularly expenditure limits on campaigns, on political candidates, that's more a measure of equality of outcome. And I am more skeptical of them, and I can understand why the court is more skeptical of them.

So contribution limits, if you're only allowed -- if every person is allowed to give \$1,000 to a particular candidate, if everybody decides that one candidate is the preferred candidate, that candidate may well end up with vastly more money than an alternative candidate.

Expenditure limits on campaigns essentially say whatever the level of support, you can each only spend the following amounts of money. And that may help to explain my skepticism, because whatever the level of support, you can only spend this much money seems to be a differential system -- seems to be a system that -- well, as I explained it before, that puts a cap on a value that I think a lot of Americans hold dear.

**PROFESSOR TORRES-PELLISCY:** I'll take another lens on this, which is: Should Indiana elections be funded by Indiana citizens? Before Citizens United, there were a few cases in the lower courts that asked that question, and the result was actually very split. In some cases, a judge would find that it was actually appropriate to have this geographic limit, and then in other cases, courts would find that, no, we allow the freedom of movement of capital, and we shouldn't draw these geographic limits on who can spend in which election.

There are two contradictory ways to think about this. On the one hand, if you look at certain congressional races, the winner would not have the money that they had if they only raised money from their congressional district. There's just not enough like wealth to support a sustainable campaign. And the average winning congressional candidate spends over \$1 million, and they have to raise that in hard money amounts, which takes an enormous amount of time.

And so one way to think about it is allowing for funds to cross state lines and other

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political boundaries facilitates certain people being able to run for Congress at all, because they can draw on the donor locations, which tend to be New York State and California.

The flip side to that story is what happened with Prop 8 in California. So Prop 8 was an amendment to the California Constitution to define marriage as between one man and one woman. But when people pulled the campaign finance data of who was supporting Prop 8, there were a number of people from Utah who supported having Prop 8 on the California ballot. And you can ask yourself, do you think it was appropriate for all of those people from Utah to put this question before the California electorate? Is there something sort of untoward or inappropriate about that type of out-of-state funding? And so I can see both sides of that equation.

**PROFESSOR NAGLE:** Anything else on this line? Yeah.

**AUDIENCE MEMBER:** Talking about vouchers, is there any literature on the correlation between some of the actual voting outcome of what they give the money to? Because I would assume that people who give their money to a candidate will also vote for them. And if that's the case, isn't that just a massive waste of money? Because the voting system without these vouchers, taxpayer money is going to sort it out anyway.

**PROFESSOR STEPHANOPOULOS:** Yeah. A big part of the case for vouchers is that they're supplanting other funds in the system, right. So it is true that at some level, your voucher contribution is going to be virtually perfectly correlated with your votes, so what's the point of the voucher contribution?

The point is that from the candidate's perspective, if they can easily raise enough money to run a viable campaign through vouchers, they don't have to resort to private financing, you know, to private contributions. So all of the fears that flow from private financing no longer exist when the private financing is replaced by public financing. Quid pro quo corruption, you know, out the window when there is no privately financed quid to begin with. Broader notions of corruption out the window.

You know, interest the current Supreme Court doesn't recognize as valid, you know, fostering of inequality, lack of egalitarianism, all those concerns too no longer applicable if the source of the money is public and universal instead of coming from, you know, wealthy donors or from corporations.

So in my view, that's the real selling point for vouchers, that they allow us to have a vibrant electoral system. You know, \$100 per capita, much more vibrant than the status quo. But they do it without any of the corruption, any of the distortion, any of the inequality that I think are, you know, so deeply disturbing about the system that we currently have.

**PROFESSOR LEVITT:** And two add-on points to that. So you're right, if everybody actually chose to use their voucher, it would amount to a vote before a vote, and so what's the point? It serves a purpose when you have a limited percentage of

people who ever exercise the voucher at all, because then people would be contributing funding toward persuading the rest of the electorate. So it only works -- if you get 100 percent participation on vouchers, it's a vote before a vote, and it doesn't matter. It only works or it only has a practical purpose when you have a smaller percentage of people using these vouchers, which provides financing or persuasion.

Just on the notion of other interests that the courts don't recognize, I think one of the more -- one of the shoddier campaign finance precedents in this zone is a case out of Vermont that was dealing with the interest in regulating the time that legislators spent, and particularly the time that legislators spend on cash calls. It takes away from legislation, takes away from getting along with each other, it takes away from all of the things that we want legislators to do if call time is taking up what, in some cases, amounts to 70 percent of their day, or at least 70 percent of some days. And I think the average is 30 percent across the board of all of the time that a legislator spends working is call time, which is a little weird.

Vermont tried to regulate its campaign finance structure in order to further this interest. And the Supreme Court essentially said the outcome we got to in Buckley is an outcome we want to preserve here, so I'm not going to pay attention to your other interest. We already have stasis. Let's preserve the stasis. That is a weird mode of constitutional analysis.

One of the things that vouchers might do, if you believe that they supplant other funding, is they might allow -- they might free up time for legislators to engage in legislative stuff rather than call time. There's a big if. I mean, that empirical premise that they might supplant other fundraising is a big if. There aren't many businesspeople I know who say "I've already got enough money, I'm not interested in making more," and the same might be said of legislators. So it's not clear that it would actually supplant fundraising time, but that's another interest that the courts haven't addressed.

**PROFESSOR TORRES-PELLISCY:** Yes. Go ahead.

**PROFESSOR STEPHANOPOULOS:** (Inaudible) saying if you want to receive any vouchers, you agree not to receive any private contributions, right. It's up to you. You can choose to run privately financed campaigns, but if you want access to \$100 per capita, then you simply cannot accept private contributions. Like that's a way to insist on the public funds, you know, supplanting the private funds.

**PROFESSOR TORRES-PELLISCY:** And if you're interested in the phenomenon of call time, so call time is the time that your member of Congress or a state legislator spends on the phone dialing for dollars to raise money for their next campaign.

I wrote an entire law review article on this called "Time Suck," and I meant it. Basically what we can see from leaked documents is the Republican Party and the Democratic Party tell their freshmen members of Congress to spend 30 hours a week on fundraising. And what happens in Congress then is that the legislating has to bow around the fundraising, and that means that your junior members of Congress don't

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have a chance to be at a hearing, or draft a bill, or meet with constituents. They are literally doing more telemarketing than a telemarketer.

And I think one of the interesting models that has just sort of popped up more recently is sometimes referred to as Netflix for democracy. So the idea there is if there's a candidate that you like, a member of Congress that you like, set up a like \$5 a month donation to them and let them know, I'm giving to you every month, so that they can actually budget. And the more people who do that, the more it frees members from being stuck in that cubicle on call time.

And so one of the ways that we have to get creative with the current system that we're somewhat stuck in is thinking about how do we use all of this brilliant technology that we have to actually free our members of Congress to have the literal time to do their jobs.

(Audience member responded which was inaudible to transcribe.)

**PROFESSOR LEVITT:** So it's an interesting sort of international relations theory. I think the foreign campaign ban, it's certainly been around for decades. I don't know whether it was part of -- or part as extensively -- original OG 1910s, 1920s campaign finance structure.

**PROFESSOR TORRES-PELLISCY:** It really kicked in in '66.

**PROFESSOR STEPHANOPOULOS:** It was tightened much more recently.

**PROFESSOR TORRES-PELLISCY:** Yes.

**PROFESSOR STEPHANOPOULOS:** Bluman in 2007 tightened of the law though. I'm not sure.

**PROFESSOR LEVITT:** Loosening of the law.

**PROFESSOR STEPHANOPOULOS:** No, tightening. Tightening.

**PROFESSOR LEVITT:** How so?

**PROFESSOR STEPHANOPOULOS:** I mean, I think the current language of the law that was considered in Bluman I think didn't take its final form until quite recently, and I think the -- you know, it's as radical as it can be right now, but I think that -- like it became that sweeping I think only quite recently. Maybe I'm -- (inaudible) accounting scandals in the 2000s, there might have been an amendment to that provision.

**PROFESSOR LEVITT:** So you're right -- you're absolutely right in response to some of the White House scandals of the 2000s, Congress tightened it up, but I think the scandals were scandals because there was already a prohibition in place for decades, and the empirical question is -- so I don't think other countries responded to

that. And Nick's absolutely right that it only took its final, most sweeping form relatively recently.

But I don't think -- I'm not an international comparative expert. I certainly don't get the sense that other countries reacted to the 1960s, 1970s regulation by strengthening their own campaign finance regimes in response. And that regulation existed, I mean, whether Bluman sort of siphoned some of it off or not, whether it took some of the existing regulation out of the sphere of congressional power, that happened quite recently. That was after *Citizens United*. So those who are more expert in international campaign finance regulation than I am can talk to whether other countries responded in kind. I don't get the sense that that was a tit-for-tat or quid pro quo.

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

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

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

**PROFESSOR LEVITT:** It's also true that the prosecutorial -- the ability of U.S. regulators to reach foreign conduct, both practically and legally, does not extend to the full scope of the regulation that the congressional statute would suggest, right. Congressional statute says no foreign spending or contributions in American elections at all, period. And you're not going to see an American prosecutor seeking criminal charges even against somebody who happens to land on American soil because they tweeted or because they sent an email or because they put a poster up in a foreign country about an American election. Both legally and practically, there would be limits on the extent to which that regulation could influence truly international speech.

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

**PROFESSOR LEVITT:** Sure. So I can set this one up more quickly, I think, and should anyway, because you're tired of listening to me. It's a very similar issue in some ways to the Bluman issue, or at least one of the Bluman issues. And it's an issue that comes out of vagueness concerns, or at least as I understand it, it comes out of vagueness concerns.

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

The courts treat that and federal law treats that and most state laws treat that as coordinated speech and therefore a contribution. So if you go in, and before you speak, you check in with the candidate about what would be most helpful, and then you do that thing, that's treated the same as a gift to the candidate, because effectively, money is fungible. If I spend \$5 million on whatever the candidate would like to spend, the candidate doesn't have to. And to the extent there's true coordination about that, that is no different from my giving \$5 million to the candidate, because that just saves them the bother of having to produce this very ad.

The question has arisen whether there are constitutional limits on the sort of campaign spending that can be coordinated. Federal law, generally speaking, has regulatory limits on what it will consider to be coordinated speech. So the FEC has a bunch of regulations that say before we're going to call something coordinated, it has to meet this test and this test and this test and this test. There are both content restrictions and conduct restrictions that come out of federal regulation.

State laws, including Wisconsin state laws, were significantly broader. Well, state laws are different. State laws are different all over the map. Wisconsin state law in particular was significantly broader. It didn't have the same sort of restrictions on what you could consider to be coordinated speech as a matter of building regulation. Wisconsin state law essentially said if you're engaging in electoral spending and you ask a candidate or coordinate with a candidate about the sorts of things that would be helpful, that amounts to a gift without confining the sorts of stuff that you would spend money on.

There was a scandal that developed in Wisconsin, and I'll say some people thought that the coordinated spending was scandalous, and some people thought the investigation into the coordinated spending was scandalous. Wisconsin has a John Doe law that allows a prosecutor to investigate stuff in a way that is not particularly transparent, and there was a quite vigorous investigation of Scott Walker's campaign and some independently financed speech, and whether that financed speech was coordinated in a way that amounted to a gift to Scott Walker's campaign.

Out of competing scandals, out of a quite aggressive prosecutorial investigation arose this state case from the Wisconsin Supreme Court, and the court construed its coordination rules quite narrowly. It essentially adopted the same magic words test that you see in Buckley that I mentioned before, that we've been talking about here, and said the only sort of coordinated expenditure that a government is allowed to regulate is expenditure that says "vote for" or "vote against" a candidate.

The Wisconsin Supreme Court said effectively -- and I'm paraphrasing a lot, I think the opinion is about 150 pages -- if there is coordinated speech about issues or that mentions candidates or you're just talking about things that are helpful and you get together with the candidate, that a state may not regulate that even if it effectively provides the candidate a benefit and that allows the candidate to use its money fungibly, right, even if the candidate would love to put out an ad that doesn't mention "vote for me," that just talks about the great things that I'm doing in the arena of [insert X] and we get together, and then you spend money on that ad rather than me spending money on that ad.

The Wisconsin Supreme Court essentially said that's off limits, and the analysis it did relied on vagueness concerns, essentially that regulated entities, that people would have to know when they were running afoul of the law, and if they were engaging in coordinated issue speech, they might not know that they were running afoul of the law.

I've got questions about that, because I think the act of coordinating itself might put you on notice that you were in fact potentially entering into a regulated zone. And it seems to me that the Wisconsin Supreme Court's analysis was more concerned with the scope of a potential prosecutorial investigation than it was with putting a regulated entity on notice that it might be running into a regulatory arena. That is, the court expressed its concern about vagueness and said we can't have these coordination laws that are so expansive because you might not know when you're getting in trouble, but I don't think that was actually its concern. I think it was just concerned with a prosecutorial investigation that it felt was going too far. And so we're left with this Constitutional holding that doesn't actually seem to be based on the theory that it espoused.

I actually think that there aren't many vagueness concerns as long as the degree to which conduct is coordinated is clear. I don't think there are vagueness concerns with the content of the speech, that is, I think it is entirely sensible to say that we can address any concerns about when you might be coordinating by having clear rules about what conduct is viewed as coordinated rather than the content of the speech that is coordinated. But the Wisconsin Supreme Court disagreed with me on that.

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**PROFESSOR NAGLE:** Shockingly enough.

**PROFESSOR LEVITT:** Shockingly enough. I think it was wrong. I think the one concern led into another, and now I have questions about whether similar approaches will run over the Wisconsin state line, right. This is a constitutional concern the Wisconsin Supreme Court had.

I don't know the extent to which other state Supreme Courts will adopt similar reasoning. There are many state campaign finance regimes that regulate coordinated campaign activity. And I don't know the extent to which, if the FEC ever changed its rules on what coordinated activity consists of, whether the Wisconsin Supreme Court's analysis would find its way into federal law.

**PROFESSOR STEPHANOPOULOS:** My intuitions are similar to Justin's. You know, first off, I think, you know, if the question is when are nominally independent expenditures actually the functional equivalent of a contribution, to answer that question by focusing on whether the independent expenditures are express advocacy or issue advocacy is just a total non sequitur. Like we don't care about what kind of speech you're engaged in. We care about how coordinated is it with the candidate. That's the issue, you know, not what the content of your communication is.

So I just think like the Wisconsin Supreme Court's answer cannot be the right answer. And we see that in the FEC regulations which, you know, have nothing to do with whether it's express advocacy or issue advocacy and everything to do with, you know, various proxies for various ways to think about coordination. Like whatever the right answer is, I don't think it's this.

That being said, I do think there are vagueness concerns here, right. Like if Congress said we are going to simply allow the FEC to decide on a case-by-case basis when something constitutes coordination, and therefore when an expenditure that you thought was independent is actually going to be treated as a contribution, I think that would raise vagueness concerns. You know, or if the test was something like -- if a test was just the word coordination, when we think there's coordination, it's a contribution. I think then, you know, parties would not be on notice as to what they have to do to make their activity a truly independent expenditure as opposed to something that would be treated as a contribution and then will expose them to, you know, serious criminal liability for, you know, massively exceeding the contribution limit.

So I think there are constitutional concerns, but the way to address them is by clearly defining contribution -- sorry, coordination. You know, the Buckley move of trying to avoid a constitutional vagueness concern by focusing on the type of speech just seems, you know, utterly unavailable when the relevant question is coordination.

**PROFESSOR TORRES-PELLISCY:** If you are going to run for Congress, you really do need a campaign finance lawyer on your team, or you at least need some availability of a campaign finance lawyer on your team to advise you about like these ever-moving targets, what's in bounds, out of bounds, what's okay.

**PROFESSOR NAGLE:** (Inaudible) lawyers, by the way.

**PROFESSOR TORRES-SPELLISCY:** Yes. It does create an endless market for election lawyers, so maybe I should like it a little bit more. But I do think that, you know, the combination of what I think were bright line rules, so take the electioneering communication definition, and then it gets litigated up to the Supreme Court and Wisconsin Right to Life II, and suddenly your bright line test turns into another subjective test. And the court keeps on doing things like that such that you can't even trust that if you open the statute and read the statute in its plain English meaning that you will be okay, you know, come next Tuesday when a different, more aggressive prosecutor looks at it. And I think that we need to work on.

And so the more that we can have black law definitions in campaign finance and get out of this realm of subjectivity of like, oh, this appeared to be the functional equivalent of express advocacy, I think those things are just completely unworkable in the long-term.

**PROFESSOR STEPHANOPOULOS:** I just had one quick thing there, which is that, you know, to put my statist and socialist hat back on, one advantage of the law that Congress, you know, actually passed in the 1970s that would have regulated independent expenditures is in a lot less would hinge on whether something is a contribution or an expenditure.

You know, the reason this distinction is so important right now is if you fall in the contribution bucket, your money is, you know, harshly limited, but if your money falls in the expenditure bucket, there's no permissible constitutional restraint. So the legal regulation is utterly different depending on which category you're in.

**PROFESSOR TORRES-SPELLISCY:** Yes. To make this really real, one of the reasons that Michael Cohen is going to jail is because they are considering what he did contributions and thus subject to a hard money limit. If they considered it an expenditure there would be no limit on how much you could pay mistresses.

**PROFESSOR STEPHANOPOULOS:** That's probably a little bit I guess -- my point is that, you know, the expenditures ought to be regulable too.

**PROFESSOR TORRES-SPELLISCY:** Yes.

**PROFESSOR STEPHANOPOULOS:** And so Michael Cohen could be going to jail regardless if he exceeded, you know, the expenditure limit that I'm imagining in my hypothetical world. But I guess legally I would prefer a world where both are capped, maybe at different amounts, and so, you know, still maybe something would hinge on whether you label something a contribution or an expenditure. But a lot less would hinge on that, because maybe in the one case you face a \$2,000 limit, maybe the other case you face a \$10,000 limit. But either way you would be facing some kind of limit, and the only question would be, you know, which limit it is. So I think the stakes would go down dramatically in my preferred world where Buckley came out

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the other way and Congress was allowed to regulate expenditures.

**PROFESSOR NAGLE:** Questions on this?

**PROFESSOR LEVITT:** Just to seed the questions a little bit. So I think that the things that we have discussed outside of the realm of straight-up expenditures and straight-up contributions in foreign speech, the most interesting developments in the campaign finance arena are probably in the worlds of disclosure, what we disclose and what we are allowed to disclose, and this coordination approach, right, when you're spending money on something that amounts to a gift to a candidate.

It's also the realm where the weirdest stuff happens in campaign finance. So when Mitch McConnell releases a B roll of 20 minutes of him smiling in various happy, sunny ways -- I don't know whether you saw there was a whole nightly comedy show riff on McConnelling, because the speaker released essentially film that his consultants thought would look favorable, but there was no speech to it. It was just music and him smiling. And that was offered to various individuals to use in their own independent speech promoting McConnell.

So McConnell wanted people to use his footage, make his footage available, but because of the restriction on coordination couldn't tell people how to use it. He just had to say, here's some nice footage of me, and lo and behold, some people used the footage in ways to support Mitch McConnell, and the nightly comedy shows got hold of it and used it in a bunch of really fascinating ways that might not have been what McConnell was intending at all. But part of the reason behind that are the restrictions on coordination. I mean, this is part of what makes the campaign finance system really bizarre.

(Audience member responded which was inaudible to transcribe.)

**PROFESSOR STEPHANOPOULOS:** I don't have the details. Do you know the details?

**PROFESSOR TORRES-PELLISCY:** I don't know. So right now one of the open investigations that has been reported in the press is that the FBI is looking into whether the NRA got money from any Russian national and then used that money to spend in support of the Trump campaign.

Now, what we know is that they did spend in support of the Trump campaign. We also know that their spending in the 2016 election was way bigger than they had spent in any previous election, midterm or presidential. And what --

**PROFESSOR LEVITT:** That we know of.

**PROFESSOR TORRES-PELLISCY:** That we know of. Yes. There's always a caveat of like, you know, what was reported. And there are two figures that they are interested in. One who has been arrested, her name is Maria Butina. She is the striking redhead who you may have seen with pictures of various guns. She and her boss,

Alexander Torshin, are suspected of trying to manipulate the NRA for Russian ends. And one of the open questions is: Did Alexander Torshin provide any of the \$19 million of extra funds that the NRA had.

And the reason why people are particularly suspicious of Alexander Torshin is he is wanted for money laundering in Spain, and the way that he would launder Russian mob money in Spain was through buying hotels. So he is a person of great interest, but we don't know whether there's any there there. A, we don't know whether he's the source of the \$19 million in the NRA, and we also don't sort of know what the ultimate game plan for Butina and Torshin was for the NRA. They got to meet Don, Jr. at an NRA meeting in Kentucky in 2016, but we don't know what the content of that meeting was. So there is smoke here and there, but what we don't know is whether there is fire.

**PROFESSOR LEVITT:** And in addition to that, there are also sort of more usual questions about the spending that the NRA did engage in. Did they use vendors who are common vendors with the Trump campaign or with the RNC? Did they borrow polling that the campaign did, or did they give polling to the campaign in order to make sure that the messages were effective and targeted to the right groups, and those are the traditional indicia of when spending might be coordinated.

I'll say I don't know that we know the answers to any of those questions. I know there are current investigations into them. And there are further questions about whether, even if there was some shared stuff, whether it amounts to the sort of coordination that federal laws currently regulate. Like I mentioned, this is -- federal law is narrower than -- much narrower than some of the laws in Wisconsin, that the Wisconsin Supreme Court was addressing, and there are very particular elements of when things will be considered to be coordinated spending. And it's not clear even if the NRA shared some stuff with the Trump campaign or vice versa, whether that amounts to the things that would be regulated under the federal law. But I understand some of the allegations are that it might and that there's an investigation into that as well separate, and apart from whether the foreign sources of funding were inherently troublesome.

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

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

We can tell that the NRA, at least, thinks that there's extra value if you coordinate with the candidate, because that's why they're, you know, bending over backward. It

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appears to do that. So I think that actually, you know, substantially supports Justin's thesis that there is a real distinction between true independent expenditures and contributions.

(Audience member responded which was inaudible to transcribe.)

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

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

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

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

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

**PROFESSOR LEVITT:** Because they have to.

**PROFESSOR STEPHANOPOULOS:** Yeah. And the rates are a lot higher for noncandidates. You know, so not only do independent expenditures lose some potency because they're not based on, you know, all of the details, all of the nuances of campaign strategy that only the candidate knows, they just plain old get diluted, because, you know, for a given million bucks, you get a lot more air time if you're a candidate than if you're a super PAC.

And like those differences are big. That's actually a major part of why Democratic candidates had a big media advantage in 2018, because a lot more of the Democratic money was hard money contributions as opposed to Sheldon Adelson's \$150 million

in a super PAC, all of which had to pay the higher noncandidate rates for TV ads.

**PROFESSOR NAGLE:** How much higher is it?

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

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

And so I think one thing to think about if we're talking about coordination is signals intelligence and the idea that people are texting each other this coordination or emailing each other this coordination. And so when you have an FEC that does nothing, then they'll never find the underlying texts, and they'll never find the underlying emails. But when you have a prosecutor who actually gives a damn and actually will pull the signals intelligence and will pull the emails and the texts, I think that those are going to be easier cases to make than they have been in the past. Because if you are coordinating person-to-person like you and I talking in this room, if all these other people were not listening, I think that's the hardest coordination to catch, because you're trying to catch a live conversation between the two of us, and you have to have a prosecutor who can flip one of us against the other to get that prosecution.

But when people are idiotically and obsessively texting one another, I think there are more cases that can be made on a coordination basis simply because you have pages and pages and pages of yeah, should we do this there, should we drop this ad there? Yeah, okay, let's do it.

**PROFESSOR LEVITT:** On the other, other hand, the part of what got us the Wisconsin Supreme Court decision was a charge -- I don't think it was accurate, but a charge that there was a politically motivated prosecution, a state prosecution, not a federal one in Wisconsin that was digging for exactly this sort of stuff in an overly intrusive way, and I think that spurred part of the -- what I think is an overreaction or a different reaction to something that's not really responsive to the issue they said they were concerned about. But I think that sort of allegation that the prosecutor was politically motivated in pursuing the allegations of coordination caused a reaction and caused the campaign finance law to shift, and in the Wisconsin Supreme Court precisely because of that view that it was intrusive.

(Audience member responded which was inaudible to transcribe.)

**PROFESSOR TORRES-PELLISCY:** That's an interesting question. Yes. Yes. It might be probable cause if you had the precise mirror image to the Kamala Harris campaign, what they would have wished for, but then if you actually then pull the text messages, you're either going to find that people were coordinating or not. And if you

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don't find the evidence to back up the prosecution, then I think the prosecution has to fall apart.

**PROFESSOR LEVITT:** And I'll say I think if you're worried about that and that being a concern, the right way to respond to that is by requiring probable cause not of outcome, but of conduct. So if you have to have probable cause that there were actually impermissible communications between people before you go after the communications themselves, that's going to help insulate the extremely astute, truly independent spender in a way that it wouldn't insulate somebody who was engaged in a lot more conversations.

That inevitably is going to put some distance between political campaigns and candidates and those who would be spending on their behalf. But again, I mind that a little less. I think the primary constitutional value of protecting expenditures is to protect what you want to say independent of an actual candidate. And if that sort of conduct rule puts a little more distance between those who want to spend independently and a campaign, I'm less troubled by that.

**PROFESSOR STEPHANOPOULOS:** An interesting question is why federal prosecutors have done so little of this, right. I don't really have the answer. Like we know the FEC is gridlocked and toothless. We also know that federal prosecutors, you know, can bring prosecutions for campaign finance violations. I suspect the campaign violations -- campaign finance violations are rampant across the country. You know, I can't really prove my intuition, but I think there's a lot of illegal coordination going on.

So I'm quite curious like why in fact, you know, U.S. Attorneys aren't bringing these kinds of cases. Like a little bit of criminal prosecution would go a long way toward deterring illegal coordination much more so than FEC investigations after the fact that merely resolved in a fine.

So, you know, I don't know the answer to this. I mean, I understand like why the current administration wasn't doing it, like they don't want to put, you know, the NRA officials, you know, Wayne LaPierre in jail. But I don't get why like in other periods there hasn't been much more aggressive federal prosecutorial enforcement of these laws.

**PROFESSOR LEVITT:** Part of that is that federal law actually prohibits it in most cases, and I confess I have to look more carefully into how the Cohen prosecution came about to know this. But in most cases, you need a referral from the FEC before taking criminal action. So that's a predicate in the federal campaign law itself precisely because Congress wanted to have a limit on when there could be criminal prosecution for exactly this sort of thing. So there are procedural limitations in the campaign finance law that require an FEC finding before going forward for most prosecutions, and like I said, I confess I don't know how -- I would have to trace how the Cohen prosecution came about in light of that. But the reason is because it's built into the statute that it can't actually go to criminal prosecution before an FEC finding in most cases.

**PROFESSOR NAGLE:** Last question.

(Audience member responded which was inaudible to transcribe.)

**PROFESSOR LEVITT:** So I think you're right that that's one of the things that drove the court's opinions, and you can read in the court's opinions in Wisconsin not only the sort of determinations of coordination, but follow-on opinions about the role of the special prosecutor in Wisconsin, the role of John Doe prosecutions in general, you can certainly read a lot of perceived disturbance at the way that the law was enforced.

I'll say that I would welcome -- and now I can turn my raging libertarian hat off and put the progressive hat more back on. I would welcome a discussion about the degree of force used in police activity generally. What you saw in that particular case was in no way unusual for the vast amount of law enforcement, particularly in minority communities, and not only with violent felonies, but across the board.

People get very exercised when what are generally normal police tactics are used against the political class in a way that they don't seem to get exercised when normal police tactics are used against the nonpolitical class.

And I would absolutely welcome a discussion about the way in which law enforcement approaches entry into lower class neighborhoods to do things that are arrests for nonviolent crimes or where there's no reason to believe that there's, you know, a gun on the premises.

Unfortunately, we don't usually get that conversation. We usually get the outrage at this particular exercise of prosecutorial authority or this particular exercise of police authority without a broader conversation about the circumstances in which the police can conduct investigations or conduct arrests. But if that led to a broader discussion about the way that law is enforced more generally, I would love that conversation.

**PROFESSOR NAGLE:** So I think we have next year's Symposium topic, so that conversation is set. Appreciate that.

We've run out of time. We've actually managed to use Justin's two questions as ably assisted by Nick and Ciara and all of you. Thanks to our panelists. Thanks to all of you. Thanks especially to the Journal editors who put all this together. You know, I am privileged to have been here for this part of it. I only wish I had been able to be here from the first, and look forward to continuing this conversation at whatever opportunities we have. Thanks so much.

(Symposium completed).