Corporations and Political Speech: Should Speech Equal Money?

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Martin Redish,[*] *Scott Thomas*[**]

David Skover: Welcome now to the panel on corporations and political speech. We will explore the First Amendment jurisprudence of campaign finance regulation and some of the more controversial issues raised by corporate involvement in the marketplace of political ideas and elections.

In July of 1997, *Nation* magazine published a forum entitled *Speech and Power: Is First Amendment Absolutism Obsolete?* [1] The forum featured ten free speech theorists, including my coauthor Ron Collins and me, who suggested that liberals and progressives should rethink their traditional ideas and beliefs about free speech, given that speech is power. Also, because massively powerful corporate conglomerates are particularly active today in using the First Amendment to advance their business interests, much current free speech law appears anti-democratic. We wrote, "the trend of ceding power to the powerful represents the collapse of liberalism into libertarianism, the triumph of corporate liberty over social equality. Equality is [really] no longer one of the central principles of the First Amendment. Incredibly, it is now a First Amendment 'evil.'"

Our notion that equality is no longer a central First Amendment principle originated, of course, from the Supreme Court's watershed 1976 decision in *Buckley v. Valeo*,[2] the per curiam opinion popularized by the sound bite, "money is speech,"[3] at least in the context of campaign

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1. Ronald K.L. Collins & David M. Skover, *Speech & Power: Is First Amendment Absolutism Obsolete?*, THE NATION, July 21, 1997, at 12.

2. 424 U.S. 1 (1976).

3. *Id.* at 262.

finance reform. But perhaps the most stunning language from that opinion is the following:

> [The Federal Election Campaign Act] is aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups.[4]
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> . . . But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed . . . to assure unfettered interchange of ideas for the bringing about of political and social change[s] desired by the people.[5]

In support of this proposition, the Supreme Court cited to *New York Times v. Sullivan*.[6]

My coauthor and I found it particularly strange and ironic that *New York Times v. Sullivan* was aligned with the *Buckley* Court's view that the First Amendment could tolerate no equality principle permitting the government to enhance the voice of the relatively dispossessed. After all, the First Amendment defamation law of *New York Times v. Sullivan* was developed to protect African American clergymen, who had libeled a southern segregationist governmental official in an advertisement in the New York Times entitled, "Heed Their Rising Voices."[7]

At least as a matter of constitutional history, the intrinsic relationship that existed between Fourteenth Amendment equality norms and First Amendment speech rights cannot be denied. The modern First Amendment reached its nadir when it was married to the equality norms of the Fourteenth Amendment, going beyond *New York Times v. Sullivan* to *NAACP v. Alabama*,[8] *Edwards v. South Carolina*,[9] *Brown v. Louisiana*[10] and *NAACP v. Clairborne Hardware Co.*,[11] among many other decisions. During that period, every civil rights lawyer took as gospel that the First Amendment was to be used as a vehicle to buttress the anti-discrimination principles of the Fourteenth Amendment in the interest of political and social equality. Free-speech scholar Harry Kalven, Jr. built

4. *Id.* at 17.
5. *Id.* at 48–49 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).
6. 376 U.S. 254, 266 (1964).
7. *Id.* at 256.
8. 377 U.S. 288 (1964).
9. 372 U.S. 229 (1963).
10. 383 U.S. 131 (1966).
11. 458 U.S. 886 (1982).

the academic case for that alliance in his celebrated book, *The Negro and the First Amendment*.[12]

It is obvious that, theoretically speaking, equality norms of some character must exist within the First Amendment. For the free speech guarantee to operate at all to protect political dissent, it must operate to shift power. In other words, one cannot really talk about the First Amendment without talking about the presence of some significant power-leveling principle. How much can and should the First Amendment operate to level the playing field of political and socioeconomic power? There's the rub.

Of course, reasonable minds may differ as to the extent of the role of equality norms within free speech law. Since we are extremely fortunate today to have three eminently reasonable minds on our panel, I will leave it to them to explore the degree to which the First Amendment can and should tolerate governmental regulation of powerful individual and corporate voices in the political marketplace of ideas.

Each of our panelists is an expert in his or her own right in the arena of corporations and political speech. In the order in which they will be speaking to you, I give you, first, Martin Redish, the Louis and Harriet Ancel Professor of Law and Public Policy at Northwestern University School of Law. A nationally recognized authority on civil procedure, federal jurisdiction, constitutional law, and freedom of expression, Professor Redish is the author of some seventy-five articles and fifteen books, the most recent of which is a work on free expression in the McCarthy era, called *The Logic of Persecution*.[13] Two of his earlier books are very closely tied to the topics of the hour, *Freedom of Expression: A Critical Analysis*,[14] in which Professor Redish lays out his First Amendment normative value theory of individual self-realization, and *Money Talks: Speech, Economic Power, and the Values of Democracy*,[15] in which he dedicates an entire chapter to free speech and the flawed postulates of campaign finance regulation. I would suspect that some of the more fundamental ideas from those works will sneak their way into his presentation today.

Professor Redish may be known to you as the lead author of the excellent case book, *Federal Courts*,[16] and the accompanying treatise,

12. HARRY KALVEN JR., THE NEGRO AND THE FIRST AMENDMENT (1966).

13. MARTIN H. REDISH, THE LOGIC OF PERSECUTION: FREE EXPRESSION AND THE MCCARTHY ERA (2005)

14. MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS (1984).

15. MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY (2001).

16. MARTIN H. REDISH & SUZANNA SHERRY, FEDERAL COURTS: CASES, COMMENTS AND QUESTIONS (6th ed. 2006).

Federal Jurisdiction: Tensions in the Allocation of Judicial Power.[17] But for me, personally speaking, Professor Redish is a longstanding friend.

Marty graced my coauthor Ron Collins and me with his trenchant and unabated criticism of one of our earliest articles. The revised version of that piece found its way into the first chapter of our book, *The Death of Discourse*,[18] and Marty can still be found there as one of the critics engaged in our orchestrated print dialogue.

Next, I give you Scott Thomas, a specialist in campaign finance, ethics, and lobbying laws at the federal and state level. Mr. Thomas currently has a political campaign law practice at the firm of Dickstein Shapiro in Washington D.C. From 1986 to 2006, however, he served as commissioner of the Federal Election Commission, holding the chairmanship four times, during some of its stormiest periods. Mr. Thomas has written extensively in the field of campaign finance, including several law review articles and numerous opinions and statements of reason regarding Federal Election Commission decisions.

I know Scott Thomas, however, as a close personal friend—we worked together as colleagues from 1975 to 1976 in the Federal Election Commission, where we drafted regulations and advisory opinions. Scott Thomas, I am delighted that you are among us today.

Finally, I give you Lisa Danetz, a campaign finance and election lawyer at the National Voting Rights Institute. Ms. Danetz has spearheaded the organization's federal election campaign enforcement work. She has advised officials and other advocates on the National Voter Registration Act, has handled constitutional litigation seeking public finance in North Carolina, and has drafted legislation and published articles on campaign reform. Ms. Danetz also wrote an amicus brief regarding corporate political speech for the *Nike v. Kasky*[19] case. Her expert advice on voting right issues has guided many newspaper reporters across the nation, and she has frequently been interviewed in this regard on radio and television shows. Thank you so much for joining us today to explore the parameters of corporations and political speech.

Martin Redish: Thank you so much. Professor Skover didn't mention that the first line of my critique of their work said, "with friends like Collins and Skover, the First Amendment is in no need of enemies." So I'm glad that not only will he defend to the death my right to say that, he still considers me a friend, because I certainly consider him one.

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17. MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER (2d ed. 1990).

18. RONALD K.L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE (2d ed. 2005).

19. 539 U.S. 654 (2003).

I'm entitling my talk, "Turning Into the Skid." For those of you who ever lived in places like Chicago where there's a lot of ice, when your car skids, they tell you to turn into the skid. This advice is completely counterintuitive. You initially want to turn away from the skid, but you're going to get into a lot of trouble turning that way. But if you have enough faith in the system that taught you to turn into the skid, you'll come out okay.

That's what I say about the First Amendment and campaign finance reform. It is both distressing and shocking that so many individuals whom I normally consider political and constitutional allies abandon the First Amendment when it comes to campaign finance reform. I look at the cases finding campaign finance limitations unconstitutional, and I look at the dissents, and I see all the liberal justices, or at least what passes for liberal justices. But the closest thing we have to liberals now are on the anti-free speech side, and I find myself aligned with Justice Thomas, for whom I have enormous respect. But I am not normally his intellectual, ideological, or constitutional bedfellow.

So, when thinking about the issue of campaign finance spending and campaign finance reform and the First Amendment, I would ask you to separate out the extent to which you find the political results distasteful. Instead, think about the broader constitutional values involved, which are on occasion going to lead to political results you don't appreciate. The fact that I believe that campaign finance limitations are unconstitutional says nothing about my politics.

To illustrate, Professor Skover mentioned that I wrote a book a few years ago called, *Money Talks*.[20] I gave a copy of that book to my colleague Steve Presser. Steve is an old and dear friend, but he's also extremely right wing. In response, he wrote me an e-mail—not saying thank you for the book, congratulations, nothing like that. The e-mail had one line: "Redish, I always knew you were a closet Republican."

This email was quite a shock to me. I wrote back to him, explaining that the fact that I can defend the First Amendment rights of corporations and commercial advertisers no more means that I am a Republican than the fact that people who defended the free speech rights of Communists in the 1940s and '50s meant that they were Communists. Again, he wrote me back one line: "Weren't they?" To this day I haven't had the nerve to ask him whether his response was a joke. I don't think I actually want to know the answer to that question, but this anecdote illustrates the approach I'm asking you to take. Whenever my free speech theory comes to a conclusion that's consistent with my own personal political values, I

20. REDISH, *supra* note 15.

immediately go back and rethink it because I may have been fudging. Look at this issue from that perspective.

We start out with a question, is money speech? Well, of course it is. How could anyone suggest the contrary? In fact, there's a contradiction on the part of those who want to regulate it. They want to regulate it because it buys so much communicative power. But then they say it's not really speech. Well, consider a law that says newspapers are not allowed to pay for newsprint. They can publish, but they're not allowed to pay their workers. One might say that such a law regulates only money, not speech, and that it doesn't stop the newspaper from publishing. But that interpretation would be nonsense.

Very often you are required to spend money to speak. For example, if government forbids picketers from purchasing sign board and magic markers but otherwise allows them to make signs as long as they spent no money on it, you would be significantly interfering with their ability to communicate effectively. The more money spent, the more communication. The less money spent, the less effective the communication. When government restricts the ability of a candidate to spend money, when it restricts the ability of a contributor to contribute, it is reducing the ultimate flow of communication to the electorate.

Now, maybe we should want that. We can debate whether we want to reduce the flow of information to the electorate, but don't kid yourself about what's happening. Once you realize what is going on, the severe harm to basic First Amendment values is obvious, no matter what one's theory of the First Amendment is. We could take a theory that is antagonistic to my own theory. We could take Alexander Meiklejohn's political speech concept.[21] It doesn't matter.

Members of the electorate are really the governors. The voters are the governors. The people we put in office are just agents, Meiklejohn told us. Therefore, as governors, we perform our governing function in the voting booth. We need as much communication of information and opinion as possible from both sides, all sides, so we can be better informed. The less money that can be spent, the less communication. In the area of free speech, that is a core concept. I've been arguing for years that speech protection should go well beyond political speech, but political speech is what we're talking about. Mark Lopez talked before about the law that says sixty days before a general election and thirty days before a primary, you can't take out an issue ad if it mentions the

21. *See* ALEXANDER MEIKLEJOHN, FREEDOM OF SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961).

candidate.[22] What a constitutional outrage. That restriction significantly disrupts the flow of information to the electorate.

One could make the argument that as long as we leave the limits sufficiently high, enough speech is getting out. The problem, however, is deciding who gets to figure out what is "enough." In fairness, Alexander Meiklejohn would probably accept that argument, because he embraced the fallacy of the New England town meeting, where everybody sits around and each person gets up and talks. The town meeting takes place in a confined space, where everyone knows who's talking and who's listening.

That's not, however, the way a campaign works. It's impossible to know who saw an ad on TV or read an ad in the newspaper just because the ads were out there. Given that impossibility, at what point can we decide there has been "enough" communication? Setting some arbitrary barrier is completely inconsistent with the basic notions of free, uninhibited, robust, and wide-open speech.

It is true that some contributions and expenditure limits have been held unconstitutional, and the Court continues to view them as unconstitutional. Contributions have been afforded a watered-down kind of protection, and the Court's attitude could be described as, "in for a dime, in for a dollar." Whatever amount you can give, you have exercised your associational rights. That's like saying as long as you're allowed to work one day as a campaign volunteer, you don't have to be allowed to volunteer five days a week because during that one day you've exercised your political associational rights.

One of the sad ironies is that as a result of the *Buckley* dichotomy,[23] we swam halfway across the river. Now rich people aren't limited in what they can spend, but those without a substantial fortune have trouble competing with the rich people because they're limited in what others can contribute to them. We're left with a completely incoherent system that, in fairness, Congress didn't intend, but by the Court's split constitutional analysis, we have ended up with.

What arguments justify campaign finance regulation? Of course, the argument is "equality." We need to make everybody equal. But equal in what sense? What about a law that says no one can say anything about anything? Is that equal? No one can say anything, right? No one has an advantage. But surely that would violate the First Amendment. Merely satisfying equality is not enough if it's an equality of ignorance. Imagine

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22. *See* Ronald Collins et al., *Corporations and Commercial Speech*, 30 SEATTLE U. L. REV. 895, 909 (2007).

23. Buckley v. Valeo, 424 U.S. 1 (1976) (upholding federal limits on campaign contributions but allowing candidates to contribute unlimited amounts of money to their own campaigns).

that candidate *A* has $50,000 to spend, and candidate *B* has $200,000 to spend. The problem is that the public really can't get to know candidate *A* because candidate *A* only has $50,000. So what do we do? What if we limit candidate *B* to $50,000 so that the public is equally ignorant about both of them? Is this consistent with what the First Amendment is about? Is this consistent with the notion that we need an informed electorate? I really don't think so.

But what about the danger that contributions can lead to corruption? Well, I suppose it depends on how one chooses to define the word *corruption*. Does corruption mean bribery? We already have laws against bribery and many contributions are made with no possible basis of bribery. Yet we still use this corruption-bribery concern as a justification for restricting the amount of contributions, even though there's absolutely no empirical basis for doing so.

Finally, the argument has been made that if money isn't restricted, those with the money can control the political agenda. Well, there's an inconsistency there as well, because if those with money control the political agenda, how did these campaign finance laws get passed in the first place? Regardless, this argument degenerates into a basic political value choice that one doesn't like the ideological basis of the agenda made by those with money. Frankly, I'm not a big fan of that agenda myself, but that's not the point. We need to separate ourselves and our own narrow political views from higher process-based values. In the end, we're turning into the skid, meaning that the car should stop without anyone getting hurt. Thank you very much.

Scott Thomas: I am delighted to be here, and I want to briefly thank my good friend David Skover for this opportunity. We have known each other a long time. Years ago at the Federal Election Commission he did remarkable work as we were trying to figure out what sort of rules consistent with the First Amendment should be implemented for delegates who want to help someone become a president. He sifted through all of the delegate practices, all the delegate rules, all the campaign finance rules, and put together a coherent set of laws in the form of regulations. If you ever decide you want to become a presidential delegate, you could pull out about five or six pages of Federal Election Commission regulations; they are the same ones that David Skover wrote in 1976, and they still work.

We also have some other history worth mentioning. We were on opposite sides of a case that reached the United States Supreme Court. The *California Medical Association*[24] case does not get much discussion

24. Cal. Med. Ass'n v. FEC, 453 U.S. 182 (1981).

these days, but it will. The case involved a challenge by the California Medical Association to the limit on the size of contributions that could be given to a federal PAC each year. The association was unincorporated and wanted to be able to give more than the $5,000 limit to provide administrative support to the California Medical Association PAC.

And this young man David Skover had written a very good law review article[25] predicting the $5,000 limit was going to fall because it was unconstitutional. I was on the other side of the case, working for the FEC at the time, and had the thrill of going to the Supreme Court. I was third-chairing during the argument, meaning I wasn't in danger of ruining the case personally.

I have to say all these years later that the lawyer on the other side was largely responsible for our winning the case. First, Justice Rehnquist asked him a question about a particular case that was in his own brief, and the lawyer didn't appear to have any idea what the case was about. Second, that lawyer enraged Justice Marshall because the lawyer was trying to make the argument that the contributions were administrative support and didn't really do anything to support candidates. The lawyer argued the contributions had nothing to do with supporting the goals of the PAC. Justice Marshall thought that argument was somewhat insulting, and leaned over to this attorney and he said, "So what are you talking about? Booze? Women?" That was essentially the nature of the argument, and we at the Commission were able to successfully defend the constitutionality of that particular provision.

That is a little kernel of something I wanted to share with you. In the jurisprudence of campaign finance laws, there's a remarkable amount of the law basically determined by the quality of lawyering. There is some brilliant thinking that goes into preparing cases that reach the Supreme Court, but the quality of argument really does make a significant difference. And if you don't believe that, study the record of the *McConnell*[26] case. It had fantastic lawyering on both sides. But I've never seen anyone who was as brilliant a lawyer in the Supreme Court as the current Solicitor General, Paul Clement. He argues without notes and is flawless. He basically won the case for the government, defending the Bipartisan Campaign Reform Act of 2002[27] (BCRA) provision.

But all of that is water under the bridge. I wanted to start out by saying, with regard to Professor Redish's comments, that I think what he

25. David Skover, *The Constitutionality of Limitations upon Donations to Political Committees in the 1976 Federal Election Campaign Act Amendments*, 86 YALE L.J. 953 (1977).

26. McConnell v. FEC, 540 U.S. 93 (2003).

27. Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended in scattered sections of 2 U.S.C.).

has written is really a thorough analysis. It cuts to the core of whether these arguments about campaign finance laws hold water or not. Since the article was written initially in the *Pennsylvania Journal of Constitutional Law*,[28] a lot has happened. The developed record of the *McConnell* litigation helped explain and further the concern that campaign finance laws are addressing. This concern is that if some individuals have vast amounts of money to support candidates who are eventually elected, the chances are very high that the supporting individuals have a good shot at getting their policies enacted in the legislature or in the executive branch.

The underlying concern is that there is a danger that government action can be bought, and that these officials are weak enough that they will endeavor to make a deal. You will never see anything as clear as a bribery connection, nor will you see the understanding or the agreement made. It's a very subtle process, a delicate dance. But I think a lot of people saw, coming out of *McConnell*, a very thorough record of situations where people who had been in the campaign process, like former senators Simpson and Simon, said this happens.[29] They said that as legislators, they knew about soft money donors and knew what was expected.[30] That process is so unseemly that I believe the repugnance is the driving force behind support for campaign finance laws.

That being said, I also want to say that these laws are a real jumble and are very hard for people in the political process to understand. The FEC started with an "in connection with a federal election" standard and a "for the purpose of influencing federal elections" test.[31] The *Buckley* case considered an independent expenditure made "for the purpose of influencing" an election and the question of whether the expenditure was "relative to a clearly identified candidate."[32] And that is where the Court said the influencing test is not clear enough; an "express advocacy"[33] standard was necessary. So then we marched along with the "express advocacy" standard.

The Federal Election Commission time after time tripped and stumbled, while everybody in the world knew what these advertisements were. We at the FEC didn't seem to be able to get anyone to say that

28. Martin H. Redish, *Free Speech and the Flawed Postulates of Campaign Finance Reform*, 3 U. PA. J. CONST. L. 783–818 (2001).

29. *McConnell*, 540 U.S. at 149–50.

30. *Id.*

31. *See id.* at 144.

32. Buckley v. Valeo, 424 U.S. 1, 19 (1976).

33. *See id.* at 43–44.

these advertisements were "express advocacy," an inability that ultimately led to the rage that you saw behind BCRA.[34]

I think Members of Congress were willing to go along with essentially any legislation that would at least try to establish bright lines with which people could feel comfortable. Some may not like these bright lines. However, if an advertisement makes reference to a clearly identified federal candidate; is run within sixty days of the general election; reaches the targeted electorate; is not run in some other part of the country; and is on radio or TV, it makes sense to conclude that on balance the advertisement can be deemed election-advertisement communication. And those types of advertisements will be subject to restriction—corporations cannot use their treasury money to fund such ads. PACs can spend for that kind of ad, as can individuals. It's not as though those types of advertisements will disappear.

So that is the landscape we have. There is a long array of different tests that have been tried over the years, but the speech is still generally happening. It's going on, and the government is always a couple steps behind, which brings me to my last point. The reality is, at least from my perspective, that there really hasn't been a great deal of restriction of corporate speech in this area. As a practical matter, these days you have the ability to put out an advertisement. That said, you do have to steer clear of an advertisement that would be deemed express advocacy, so you do not want to put "vote for" or "vote against" in the message. But that is not too difficult to accomplish.

You also need to steer clear of making your advertisement a coordinated communication. In other words, you cannot coordinate in the development of the communication with the candidate or the party committee. And then you need to avoid the rule we just talked about, the so-called electioneering communication rule: if you want to run a television or radio advertisement close to the election, make sure it does not contain the name of a particular candidate. You can still beat the tar out of someone without making a reference to him or her as a candidate or making reference to him or her at all.

If you have a situation where everybody understands that one candidate supports the President on the Iraq war and the other does not, you can simply put out an advertisement to the effect, "We don't want someone in Congress who doesn't support our President on the Iraq war." You can have a dramatic impact and use corporate resources without falling prey to any of these election restrictions. There is still great leeway for

34. Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended in scattered sections of 2 U.S.C.).

corporate speech. We have seen the ads, and we see large sums of money being put into these kinds of communication.

Therefore, as a practical matter, I don't see these laws having had a dramatic negative impact on the ability of corporations to speak in the political process. This carries over, by the way, into the lobbying sphere, grassroots lobbying, and grassroots lobbying ads. As an example, you can craft an ad that says, "Senate Bill 666 is truly diabolical. It will ruin America," and then you can just say, "Call Congress. Tell them to stop it. Tell them to vote no." You are not making reference to any particular federal candidate; you can be as hard on that legislation as you want; and you can put that kind of ad on radio or TV any time you want. You can spend as much corporate (or union) money as you want.

So I don't think there is an effectively real and measurable restraint on the ability of corporations, or unions for that matter, to get out their political speech.

Lisa Danetz: I'm an attorney with the National Voting Rights Institute. Our mission is to ensure meaningful political participation regardless of socioeconomic status. I'm sure that you can imagine what my answer would be to the question of whether money should equal speech.

As a practical matter, the question of whether money is considered speech from a jurisprudential basis has been answered many times over by the Supreme Court, unfortunately not in the direction I would prefer. *Buckley's*[35] equation of money with speech was reaffirmed just this last term in *Randall v. Sorrell*.[36] Even in *Austin v. Michigan State Chamber of Commerce*, a case that those of us who are in favor of campaign finance reform revere and in which the Court upheld restrictions on corporate participation in the political process, the Court said the use of funds to support a candidate is speech.[37]

So what am I going to talk about? I really want to reframe the question. I want to ask you to think not about the abstract legal arguments, but to focus on the reality of what actually happens in the political process. Before that, I want to take a step back because there are some really important questions that need to be answered prior to the question of money and speech, and more particularly, money, speech, and corporations.

The important questions are: How do you ensure adequate representation in a democracy? Does that relate to political equality? How do you ensure that there is meaningful discussion of issues such that multiple viewpoints are considered? Does that require participation by the

35. 424 U.S. 1.
36. 126 S. Ct. 2479 (2006).
37. 494 U.S. 652, 657 (1990).

citizenry? And if so, how do you ensure that that participation is meaningful in some way, not just cursory?

The answers to all of these questions are of constitutional significance. When you are dealing with campaign finance and campaign finance reform, the First Amendment is not the only constitutional value at stake. The issue is not just related to speech rights of the affluent. It is about structuring a system where you can have meaningful discussion and participation so that there really is true "consent of the governed," and where that consent is also informed. In our current system where money equals speech, elections often come down to a simple matter of economics: who raises the most money wins.

A few stories about that: a couple of years ago in Virginia there was a Senate race. In that Senate race, the Republican incumbent was running unopposed. A woman went to the Democratic Party and said she would like to run against the incumbent as the Democratic candidate, given that the Democratic Party had no other candidate. This happened in December, and the Democratic Party of Virginia told this woman to come back in May if she could raise a million dollars. If she was unable to raise a million dollars, the Democratic Party did not want her wasting its time; the Party would rather have an unopposed election. I don't think an unopposed election yields a meaningful discussion of ideas.

In the 2004 races for state legislators, the candidates who spent the most money won 87% of the time.[38] In that same year for U.S. House of Representatives elections, the candidates who spent the most money won 97% of the time.[39] I would be remiss if I did not tell you that part of that result was due to the advantages of incumbency. However, in a study of open seats where incumbency was not a factor, four out of the five of the higher spenders won the election.[40] The study showed that as the ratio of spending between the candidates increased, so did the likelihood of victory for the higher spending candidate.[41]

This is not my idea of a functioning democracy. I do not believe that the amount of money a candidate can raise is equivalent to political support or votes.

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38. MARK DIXON, NAT'L INST. ON MONEY IN STATE POLITICS, MONEY AND INCUMBENCY: ADVANTAGES IN STATE LEGISLATIVE RACES, 2004 3 (July 20, 2006), http://www.followthemoney.org/press/Reports/200607201.pdf (last visited May 17, 2007).

39. Opensecrets.org, The Big Picture, 2004 Cycle—Winning vs. Spending, http://www.opensecrets.org/bigpicture/bigspenders.asp?Display=A&Memb=H&Sort=D (last visited April 6, 2007).

40. *See* CHRISTOPHER M. DUQUETTE, CTR. FOR NAVAL ANALYSES, DOES MONEY BUY ELECTIONS? EVIDENCE FROM RACES FOR OPEN-SEATS IN THE US HOUSE OF REPRESENTATIVES, 1990–2004 3 (February 2006), http://pubchoicesoc.org/papers_2006/duquette.pdf (last visited May 17, 2007).

41. *Id.* at 14.

How does a candidate raise the most money? As Professor Redish has pointed out, there are no spending limits. The Supreme Court has repeatedly held them to be unconstitutional.[42] There is no set amount at which a candidate can say, "Enough. I can stop now, and I can focus on other things." As a result, candidates must focus on the narrow range of supporters who can give the most money. No particular moneyed interest is replaceable, because there is no point at which a candidate can stop fundraising.

That is simply reality, and policy positions reflect it. That means that the most important part of our democracy happens not when a voter pulls the lever, pushes the touch screen, or puts a ballot in the optical scanner at a polling place. The most important part of our democracy, in choosing our candidates and coming up with policies, happens before anybody gets to the polling place. The small subset of people who are able to contribute the majority of money essentially decide the candidates and the issues to be discussed as well.

That may not be a problem if this subset of people is somehow representative of the population. But they are not. Less than 1% of the U.S. population makes a financial contribution over $200 to federal candidates, but those contributions represent the vast majority that candidates receive from individuals.[43] Of that less than 1%, approximately 85% have household incomes of $100,000 or more compared to 13.7% of the U.S. population.[44] Seventy percent are male, compared to slightly less than 50% in the U.S. population, and 96% are white.[45] This is just not representative of the populace. If political money is the dominant factor in campaigns, even if it does translate into speech, then less than 1% of the population is able to participate in the most important part of democracy. Why is this a problem? It is a problem because it affects representation. There is no effective representation when 98% or 99% of the population is not involved in the process.

Getting back to how the system really works, there are basically two different situations that exist. First, there are incumbents who raise so much money that they deter any challengers from running against them. There is no discussion of issues because there is no contest, and

42. *See* Randall v. Sorrell, 126 S. Ct. 2479 (2006); Buckley v. Valeo, 424 U.S. 1 (1976).

43. UNITED STATES PUB. INTEREST RESEARCH GROUP EDUCATION FUND, THE ROLE OF MONEY IN THE 2002 CONGRESSIONAL ELECTIONS 16 (2003); *see also* Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 76 (2004) ("Although approximately 51.3% of voting-age Americans cast a ballot in the 2000 general presidential election, less than 2% contributed $200 or more to a presidential or congressional candidate.").

44. Overton, *supra* note 43, at 76.

45. Overton, *supra* note 43, at 102.

thus no need for any debate. That is one reason we end up without adequate representation.

In the other situation, the vast majority of time a candidate spends fundraising is spent with a very small subset of the population. That subset of the population gets to express its opinion over and over again. There is nothing inherently wrong with that; however, it means that the candidate potentially hears minority positions so often that the candidate get a skewed sense of what the populace believes. If you hear from all of the people you surround yourself with, "X policy is a good idea," and the remaining 99% of the population cannot express their opinions—or if they do, it is in a much smaller way—you are going to think that the viewpoint of the 1% is the more prevalent view. So the effect of money amplifies the speech of the wealthy in a way that has nothing to do with the merits of the ideas. To me, that means democracy is nothing more than marketing or branding. This affects policy.

Social science research indicates that spikes in contributions to incumbents occur in order to affect policy outcomes, not to express support for a candidate.[46] This is the same reason for bribery. As an example about policy outcomes, consider the bankruptcy bill. The first draft of the law was written in the mid-1990s by lobbyists for the credit industry. As they explained it themselves, the lobbyists then shopped the bill to friends in Congress, who then advanced it. It was passed and vetoed by President Clinton. It was a top priority of the credit industry, and they didn't give up. It was derailed a second time by abortion politics, and then enacted finally on the third try.[47]

Was the bankruptcy bill the best policy? The law generally made it more difficult for individuals, although not businesses, to declare bankruptcy. Academic research shows that about half the families in bankruptcy filings have serious medical problems.[48] Two-thirds of those who file for bankruptcy have lost a job or a small business.[49] Twenty percent have suffered a family breakup, such as a husband who disappeared, a

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46. *See* Thomas Stratmann, *The Market for Congressional Votes: Is Timing of Contributions Everything?*, 41 J.L. & ECON. 85 (1998); Thomas Stratmann, *How Reelection Constituencies Matter: Evidence from Political Action Committees' Contributions and Congressional Voting*, 39 J.L. & ECON. 603 (1996); Thomas Stratmann, *Campaign Contributions and Congressional Voting: Does the Timing of Contributions Matter?*, 77 REV. ECON. & STAT. 127 (1995); Thomas Stratmann, *Are Contributors Rational? Untangling Strategies of Political Action Committees*, 100 J. POL. ECON. 647 (1992); Thomas Stratmann, *What Do Campaign Contributions Buy? Deciphering Causal Effects of Money & Votes*, 57 S. ECON. J. 606 (1991).

47. *See* William C. Whitford, *A History of the Automobile Lender Provisions of BAPCPA*, 2007 U. ILL. L. REV. 143, 171 (2007).

48. Elizabeth Warren, Editorial, *Show me the Money*, N.Y. TIMES, Oct. 24, 2005, at A21.

49. *Id.*

wife who died, or a family separated by long distances.[50] So we have a law for the economic benefit of a major industry, a law coming on the backs of the poor and down-trodden, working class, sick, and the down-on-their-luck. This is not how to arrive at the best policy outcome.

And then there is a long line of case law invalidating voting requirements that skew representation based on financial clout, rather than the interest of the whole community or the strength of ideas, voting requirements that undermine our political system; think of the poll tax cases,[51] think of the Guarantee Clause.[52] In the late 1800s, the Supreme Court said that a distinguishing feature of a republican government is legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves.[53] As the Court said in *Reynolds v. Sims*, "legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."[54]

I believe all of this calls out for campaign finance regulation. However, I also want to step back for a moment and talk about the metaphor of election campaigns to the marketplace of ideas, a metaphor with which I am not sure I agree. Even if you accept that as the appropriate mode of analysis, campaign finance regulation is needed. Essentially, less than 1% of the population has a monopoly on the political process and the ideas and issues discussed. Think about how that kind of monopoly would be addressed in the financial market. In the 1990s, Internet Explorer became the dominant browser over Netscape. Why? Even though there was broad consensus that Netscape was considered the better product, Explorer won out in the market because of a Microsoft monopoly over operating systems. Microsoft leveraged dominance in one area to prevent competition in another, and the government intervened to ensure proper market functioning.

This is essentially what has happened in our political system. The need for money has eclipsed almost all other factors, possibly all other factors. As a result, the vast majority of the populace is shut out of the system. Just like in the context of Explorer, the better products are not winning. Instead we have policies for those with a monopoly over the system. Those with economic power are leveraging their power into the political arena. It is truly a triumph of market values, and the triumph has occurred at the expense of those values not accounted for by the rational market.

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50. *Id.*

51. *See, e.g.*, Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

52. *See* U.S. Const. art. IV, § 4.

53. *See* Duncan v. McCall, 139 U.S. 449, 461 (1891).

54. 377 U.S. 533, 562 (1964).

These are the externalities of the money-equals-speech regime: concepts like fairness, inclusion, broad participation, and ultimately meaningful consent of the governed.

David Skover: Thank you. Now that you've heard our panelists, you understand why we're so excited to have all three of them present to you today. I'm going to ask one question of all three panelists, although it's directed first to Professor Redish. And then I will moderate question and answers from a discussion session.

Professor Redish, your argument as I understand it, essentially equates viewpoint discriminatory regulation, which we would all agree is First Amendment violative, with the equalization of economic resources in political election campaign speech, which we clearly do not all agree is First Amendment violative. Why do you not accept that if there could have been a constitutionally permissible New Deal in the regulation of economic labor markets, there cannot be a constitutionally permissible New Deal in the regulation of the economic speech market?

Martin Redish: First, I need to get a question on the table, because I may not get the chance. I just want to throw out to the panel the question, if feminist groups say to a candidate, if you promise to support the ERA, we will work for you and send out a mailing and get the vote out for you, is that a bribe?

But back to your question, it's a great question, David. I'm reminded of the story that may be apocryphal, but I would like to think it is not. When the original National Recovery Act (NRA), the one that was held unconstitutional during the first part of The New Deal,[55] was shown to Benito Mussolini, the Italian dictator, apparently he said in Italian, "Ah, now there's a dictator." Frankly, if you really want to be honest about it, a lot of the New Deal violates some pretty foundational constitutional principles. If what you're saying, as might someone like Bruce Ackerman, is that we've all seen a burning bush and we've got a constitutional moment and things have changed—which I suppose describes the New Deal—then I suppose you're right. Just be careful what you wish for. A lot of people thought the McCarthy era was a constitutional moment about the First Amendment.

Scott Thomas: The question, which has been alluded to several times, is whether we have to narrow our constitutional analysis of compelling interests to the inquiry of whether corruption is present or apparent.

The Supreme Court does not find this analysis exclusive. For example, in *Austin,* the Court applied the concept that corporations are

55. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935).

unique creatures with the ability to amass huge war chests based on commercial activity, expend unlimited amounts, and act independently without candidate coordination.[56] If it's express advocacy, it might ultimately distort the political marketplace. It might have the effect of freezing out the little guy because the little guy will not have the basic opportunity to get on the airwaves. The little guy will not be able to compete in the marketplace with only one commercial.

The Supreme Court has already gone down that road a little bit. In some of the more recent Supreme Court cases, a couple of Justices have come forward with the concept that these campaign finance laws are an effort to basically further the speech of the little guy. In opposition to what Professor Skover started out with, one may view this as the Supreme Court restraining one sort of free speech to promote the speech of others. However, Justice Breyer may be retreating from this position. The concept is out there. It may develop; I suppose you all have noticed the Supreme Court has recently changed, and it is not likely that the current Court will promote this theory.

Audience Participant: Professor Redish, in a country that expresses itself as a democracy—defined as a government established by rule of the people, designed to protect those people—are we losing out on what a democracy is by turning corporations into "people?" At no point were people transformed into entities, and corporations are still entities. I am having a hard time wondering how I convince my students to continue trying to be involved if they cannot have access without money—because money is the means.

What happened to all those things that were put into place to help people have access because we required the media to give access to persons regardless of the massive millions and billions of dollars that it now takes to have access to the media?

Martin Redish: First, entities have some rights similar to individuals, and we protect many of those rights. For example, we protect unions and partnerships. Ironically, if you go back to the history of the American corporation, it really developed during the Jacksonian period where the common man took power, because the corporation was the only way the common man could battle the heavy money interests of Virginia and New England.[57]

I realize it does not look that way now. It is too myopic of a view to state that the corporation is this robotic, slavish, profit-maximizer. We have to recognize why people form corporations in the first place. They

56. Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990).

57. *See* Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553, 571 (1997).

form corporations as a means of self-realizing, as a means of getting from point A to point B. So corporations, while if you view them narrowly are acting myopically, they are really a means to a broader self-willed end. They are a kind of catalytic self-realization.

And as to democracy, democracy is not a situation where government can stop people from communicating to the voters in choosing their elected officials. And no matter which way you slice it or dice it, that's what this campaign finance reform is.

Lisa Danetz: I just wanted to make another comment. Notwithstanding my comments earlier, I would suggest that not all is lost. Although I believe that money is generally outcome determinative in elections, it is not always. Moreover, there are certainly policies that one might support, like public campaign financing, that help the little guys, because candidates get public funding after they show a certain level of voter support.

Audience Participant **Ron Collins**: Ms. Danetz, as a progressive I do not find it categorically problematic that money is outcome determinative. Let me give you an example. In 1990, my former boss, Hans Linde on the Oregon Supreme Court, a very esteemed, revered jurist, found himself challenged for his seat on the court by a young upstart in his 20s. The challenger was a prosecutor who had basically gone to MADD and victims' rights groups and painted Hans Linde as this demon because he defended the Bill of Rights and the state constitution. For months, Linde was on the ropes with one bad story after another, after another, and of course he was going to take the "high road" and not respond. Linde's clerks came back to Oregon, and organized a campaign with his grudging blessing. At the end of the day, the Linde campaign outspent his competitor five to one. There were TV ads. There were radio ads. There were newspaper ads. Big firms had given to his campaign. A few corporations had given to his campaign. Wealthy people had given to his campaign.

Money was outcome determinative at the end. Hans Linde won, and he should have won. And the reason he won, or at least one reason is because with that money we were able to go to TV, to radio. We were able to say, this is who Hans Linde is, and this fellow running against him is no match for him and should not be any match for him, and but for that money, that message would have never gotten out. It was five to one, the money, and his opponent complained that he was the small guy and could not compete. At the end of the day, I think the people made the right decision, and I also think the money made a difference.

Lisa Danetz: I am not suggesting that money has no place in the system. You may remember that I started my talk by saying I think there

are a lot of constitutional values in campaign finance regulation. For instance, Professor Redish's hypothetical about the law that nobody can spend anything would not accomplish my purposes either, because I am not somebody who thinks that one constitutional value should trump all. I also think there is a certain amount of money that is required to communicate in the modern era. Here is my problem with that. I think this is actually a logical fallacy in *Buckley*[58] and, with all respect, in Professor Redish's discussion.

Martin Redish: I will defend to the death your right to say that.

Lisa Danetz: Simply because communication depends on the expenditure of money, not all expenditure of money in the political realm is communication. The logical fallacy is called "affirming the consequent." There are certainly campaign expenses that do not relate to communication. More money does not always equal more speech, and better and more useful speech. Campaign expenses include staff, office space, consulting, polling. None of those relate directly to communication, and that is not to say they are not necessary, but there is no reason why the concept of budgeting cannot enter into the campaign calculus.

That said, I will also say that an expert associated with anti-reform advocates, Dr. John Lott, specifically said that increased campaign spending in state and federal elections in recent years is not the result of an increase in the cost of getting the candidate's message out to voters, but instead is a function of the growing size of government.[59] So, in other words, campaign spending is a function of increased funding from interests determined to secure favorable government policies, rather than a function of increased communication and debate.

So I guess the answer to your question is, yes, there is a certain amount of money that is necessary. However, that does not mean that money should always dictate the outcome.

Audience Participant: As a follow-up to that question, and maybe to bring this issue a little bit closer to home, we are still in the midst of a sort of brutal Supreme Court election process here in Washington. Subsequent to the last election, the legislature passed a bill last year to limit campaign contributions to judges,[60] and there will probably be some further legislation to try to go to public financing for the judicial system.

And as I was listening to you speak, I was thinking, at least for elected representatives and senators and the governor, they go out and they say they stand for something, but we sort of do not want judges to

58. Buckley v. Valeo, 424 U.S. 1 (1976).

59. *See* Landell v. Sorrell, 118 F. Supp. 2d 459, 469–70 (D. Vt. 2000).

60. An Act Relating to Campaign Contribution Limits, ch. 348, 2006 Wash. Sess. Laws 1695–96, § 2 (codified as amended at WASH. REV. CODE § 42.17).

do that. The same principles are not involved. So my question is whether there is any legal distinction in campaign reform in the judiciary as compared to other types of elected representatives.

Scott Thomas: So far the Court is saying there is not really a difference. Even judges have to have the opportunity to state what their positions are. There is some latitude to restrict the ability of judges to basically indicate their commitment on a particular issue that is very likely to come before them in the courts. There may be a little bit of leeway there.

Martin Redish: Although when Ron Collins mentioned law firms contributing to Justice Linde's campaign, I think of the story of the plaintiff giving the judge $10,000, the defendant giving him $5,000; the judge calls them in and says, I am giving the plaintiff back $5,000 and deciding the case on the merits.

I think there is an enormous difference because of the due process element. Adjudicators are supposed to be providing due process to the litigants before them, which doesn't apply to the other candidates; therefore elected judges should be deemed unconstitutional. Logically, the inherent notion that people could influence judges through their support is a due process problem.

Audience Participant: I wanted to follow-up on something Scott Thomas was saying about uncoordinated campaigns being used to get a message out. Certainly we saw that with our judicial campaigns here, where we had all these "527 groups"[61] pushing things out. The current system that we have encourages having uncoordinated campaigns and having things come from different voices. But that does not fix the corruption problems. Just as a candidate knows who contributes to her, she also knows who is contributing to the 527 groups. So is there some intrinsic benefit to society to try to have the money go through these other organizations rather than just go through the candidate?

Scott Thomas: Traditionally, the Court has distinguished between coordinated speech, which can be treated like a contribution, versus independent speech, where very few restrictions can be imposed. Now, for corporations, the Court does state that even non-coordinated speech that rises to the level of express advocacy can be prohibited.

Many of the 527 groups are chomping at the bit to get a case into court because the issue is going to be that these groups are spending

61. This term refers to groups that are organized under § 527 of the Internal Revenue Code and that operate largely outside the Federal Election Commission's jurisdiction. Allison R. Hayward & Bradley A. Smith, *Don't Shoot the Messenger: The FEC, 527 Groups, and the Scope of Administrative Authority*, 4 Election L.J. 82, 82 (2005). Since the Bipartisan Campaign Reform Act of 2002, 116 Stat. 81 (2002), restricted the ability of state and local political parties to raise and spend non-federally regulated funds, 527 groups, which face fewer "soft-money" restrictions, have become more visible in the election landscape. *See id.* at 82–83.

money independently. There is no coordination on the end with the candidates; therefore, they will argue that there should be no restraint on how much an individual can give a group like this. That would be the case even if this group's major purpose is influencing elections, such that it could be what the Supreme Court has indicated is a "political committee," making it subject to regulation.

The *California Medical Association* decision stated that limits on giving to the California Medical Political Action Committee could be sustained.[62] That opinion and, subsequently, *McConnell*,[63] suggest that it does not make a difference whether the group in question is making independent expenditures. You can still put a limit on how much is given to that group.

In the next Supreme Court term, the FEC is probably going to try to go after some of the 527 groups that made so much news in the '04 cycle. Those groups are going to fight back by arguing that the First Amendment is violated by efforts to treat them as political committees and to attach limits on how much they can receive. Now, in terms of values and whether the system is running amok, I think there is a distinction that if you do something in coordination with a candidate, it should be treated as an in-kind contribution, and I am happy to regulate that as contribution activity. I am also happy to limit contributions given to these independent spending groups as well.

If you think about it, and this goes way back to the Supreme Court analysis in *Buckley*,[64] is it really likely that someone who has given a truckload of money to one of these independent expenditure groups is not going to expect to get that visitation with the successful candidate down the road, regardless of how independent the message was during the election? I mean, that is the reality of independent expending. There is a fairly good argument, and this will come out in all this litigation, that you are entitled to limit contributions to those kinds of groups for that very reason. You have the same kind of problem, whether they are an independent expending group or not.

Audience Participant **Charlie Cray**: Recently in the *Washington Monthly*, *Washington Post* reporter Jeff Birnbaum wrote an interesting article stating that following the Abramoff scandal, federal prosecutors will be developing a bribery attack on lobbyist gifts and campaign contributions based on the timing of the contributions in relation to legisla-

62. Cal. Med. Ass'n v. FEC, 453 U.S. 182, 201 (1981).
63. McConnell v. FEC, 540 U.S. 93 (2003).
64. Buckley v. Valeo, 424 U.S. 1 (1976).

tive actions that are related to the lobbyist's interests.[65] I wonder how the panel might view that and how successful it will be.

Also, it seems to me that it is a very limited assertion to suggest that unions or others can equally enter the marketplace of ideas and buy time on television because there are many values in society that are not organized by money that cannot get represented on the airwaves. Is the most effective means of systemic democracy to return the federal airwaves to a system where you do not have to pay to get access, limiting the need for candidates to raise so much money to advertise over the airwaves?

David Skover: Let me address your second point. You are suggesting that a strategy for effective reform may be essentially to eliminate the economic market for speech that has come with the government's relinquishment of its property—the airwaves—to for-profit corporations.

Excellent question. Assuming that no such action is forthcoming—we can imagine how difficult that might be to ram through Congress, not to mention the possible Fifth Amendment[66] takings implications—your question is addressing the reality that there is an economic scarcity in the political speech marketplace. I think a false assumption of many political speech libertarians, perhaps including Professor Redish, is that more speech is always better, and more speech is always available to those who can pay. But that is a false assumption. Not only is time on the airwaves very expensive and scarce, but we have also seen clear private censorship. For example, the corporate-run media often will select out opinions of peoples who are willing to pay for airtime and often will call that editorial judgment. Countless additional examples are covered by my coauthor in an excellent work called *Dictating Content*,[67] which deals with the private censorship of the media, totally uncontrolled by the First Amendment, in not accepting well-heeled critique of positions they do not want communicated.

A fantasy land that more speech is better underlies the view of the libertarian speech theorists in this regard—a fantasy land that does not exist. The fantasy holds that there is not a limited pie, and we do not need governmental interference because all ideas well up as long as there is money to pay for them. I find that assumption highly questionable.

Martin Redish: There are qualitatively different issues here. On the one hand, shutting down the speech of the spenders—the speech of

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65. *See* Jeffrey Birnbaum, *The End of Legal Bribery*, WASH. MONTHLY, June 2006, *available at* http://www.washingtonmonthly.com/features/2006/0606.birnbaum.html (last visited May 17, 2007).

66. U.S. CONST. amend. V.

67. RONALD K.L. COLLINS, DICTATING CONTENT: HOW ADVERTISING PRESSURE CAN CORRUPT A FREE PRESS (1992).

those with money—reduces everyone to the lowest common denominator. On the other hand, increasing the access of those who do not have money raises all voices. While there are unique questions surrounding the latter issue, the key problem with the former is that suppressing the expression of those with money does nothing to increase the exposure of those without money. All it does is produce an equality of ignorance.

In response to David's point that more speech is not always good, that may be true. But do we want the government deciding where to draw that line? I just think of the Clint Eastwood line, "Feeling lucky, punk?"[68]

Audience Participant **Jeff Chester**: Political candidates are spending $1.6 billion this year on local television. The overwhelming majority of that expense is, in fact, for advertising, which is pervasive throughout both the digital media and broadcast environments.

But the fact of the matter is that the stations are able to charge the highest rate. No one buys the cheapest airtime because that airtime reaches fewer viewers. The airtime that offers the maximum demographic targeting is sold to the highest bidder at a very high rate. Consequently, even those people who have great resources cannot compete because the station only has one ad to sell that will have the most impact. The major problem is that we have allowed broadcasters to determine based on their bottom line how to charge political candidates and decide who gets access.

Martin Redish: While you raise a very important issue, it's an issue that is separate from keeping the state from limiting expenditures by private parties.

Audience Participant: I would like to go back to that example where people with money have more access, and your assumption is that they are going to give the voters more information. The problem with that assumption is that they are just shouting the same message louder. I disagree both with the assumption that more communication makes for a better informed voter and with *Virginia Pharmacy*'s[69] premise that more communication makes for a better informed consumer. Both of these assumptions are false at some point because there is only so much information that can be taken in and heard. At some point, it becomes just a bunch of people babbling and shouting at each other.

Martin Redish: How do we know where that point is?

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68. DIRTY HARRY (The Malapaso Company & Warner Brothers Pictures 1971).

69. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

Audience Participant: What is the impediment to limiting everyone, including corporations, in regards to the amount of money they can put in?

Martin Redish: But how do you know they are not limiting it at a point before the babble starts?

Audience Participant: Well, but then you are getting into a viewpoint thing.

Martin Redish: No, that is not a viewpoint issue.

Audience Participant: Yes, it would be. If you did not apply it across the board . . . .

Martin Redish: No, a law that said no one can say anything is across the board. That does not make it constitutional.

Audience Participant: But we are not necessarily saying that no one can say anything, and that is not a question to be answered right here and right now, that's a question to be litigated. The point is that your assumption is false that voters become more informed when the people with money have even more money to get their messages out. That is not necessarily true. They are just shouting louder.

Martin Redish: Well, that is an empirical assertion for which you have no empirical basis. But regardless, I am not going to allow the government to draw the line.

Audience Participant: What is the empirical basis for the assertion that voters are better informed when expenditures are virtually unlimited?

Martin Redish: The issue is where the default lies, and the default lies with the First Amendment. We should not allow government to draw some artificial line and paternalistically say, at this point, people are going to get confused, or they have already heard enough.

Audience Participant: But in reality, we have limited resources. Only so much speech can be communicated and heard.

Martin Redish: But who knows how much? Like I say, half of advertising expenditures are wasted. They just do not know which half.

Audience Participant: I find it really frustrating in all of this that millions of dollars are spent on advertising, and the voters do not learn anything new; almost everybody is suspicious about what they hear. I think another problem is that part of the marketplace of ideas is discussion, discussion like we're having here today that is missing in the electorate. Our two party system has deprived us of debate. We have candidates who want the job, but who also dictate the job interview. As a result, we are a society that stays polarized. I think we could probably check a lot of this spending by making people publicly stand up and defend their ads if those ads are a distortion of the truth.

I think there is something missing from the discussion, and I do not know how to get it back. I think it is more noticeable in the high profile races, but Americans need to realize that life is not black and white. I think these polarizing ads on both sides are really keeping us from seeing the grey and getting to the common good.

Martin Redish: Sometimes things are black and white. I saw an ad in Illinois that said, "my opponent supports George Bush." That's good enough for me.

Lisa Danetz: I think you raise several good points. They represent the crux of why a lot of people are in favor of campaign finance reform: voters no longer feel like they have any meaningful part in the political process. And I can tell you that in the *Randall*[70] case in Vermont, the reason why the specific campaign finance law, enacted in the late 1990s, included both public funding and mandatory spending limits is because Vermont had a real culture and history of the kind of New England town meeting that everybody here thinks no longer exists. It did exist in Vermont. The people in Vermont were also worried about losing that history to the modern form of campaigning. At that time in Vermont, a house campaign could be run for approximately $2,000. Candidates in each district would knock on every door and speak to every voter, a tradition that Vermont's constituents wanted to preserve.

Audience Participant **Erik Jaffe**: I find much of this discussion interesting because it assumes that voters are cheap. It assumes that voters are ignorant creatures who need our protection. When you talk about the political process being completely captured by 1%, you never mention that the other 99%, or at least the voting eligible percentage, can still vote, and that populist campaigns are often quite successful.

I find odd the notion that the ability to engage in extended speech in the market is the only means of exercising political power. The Vermont legislation is a wonderful example of that notion. Knocking on every door is a quaint way of communicating with voters. As it turns out it's not the most effective way because the candidates in Vermont were more successful when they bought newspaper ads for $4,000 instead of knocking on doors for $2,000. (TV ads are largely pointless in these campaigns.) The newspaper ads reached a bigger audience. People perused them at their leisure. Whatever it was, candidates who bought newspaper ads ended up getting their message out better, or at least they thought they did, which is all that matters.

Lisa Danetz: A couple of things in response to that. First, just as a factual matter, most candidates in Vermont actually did not buy $4,000

70. Randall v. Sorrell, 126 S. Ct. 2479 (2006).

ads in newspapers, but rather put essentially free ads in newspaper circulars. But the question about whether voters are ignorant suggests that you think that 1% can determine the candidates and policy and the other 99% can pull the lever. The problem is that I don't think that equates to full and meaningful political participation.

As far as what a candidate considers effective, I think it depends on the definition of effective. A candidate wants to win. That does not mean that the candidate necessarily wins by having a full and meaningful debate of issues with other candidates. For example, look at current campaign techniques. When there is a clear frontrunner, the common strategy right now is to not agree to debate. That strategy does not serve the First Amendment. It does not serve democracy, and I think that simply because a candidate decides that expensive communication will be more effective, that doesn't mean constitutional interests are being served.

Audience Participant **Mark Lopez**: The most compelling issue here is the question Professor Redish posed at the outset. I cannot figure out what is wrong with an advocacy group, for example NARAL or a teachers union, raising as much money as they can and using that money to achieve their advocacy agenda? To me, this is the most compelling issue in the campaign finance discussion.

Martin Redish: Actually, I think I was making a slightly different point. I was saying that instead of raising money, what if advocacy groups agree to volunteer their time and effort to a candidate who agrees to support their position? Logically, such volunteering would seem to be as much bribery as saying, "If you come out against the ERA, I will contribute." If it's a quid pro quo—whether it's money or time and effort—it is bribery.

Scott Thomas: I think it is a timely topic, and it goes to the question this gentleman asked: what is going on with Washington, D.C.? Is the concept of bribery suddenly getting expanded to take into account somebody providing political support to someone? And I think the answer is maybe it is. You look at some of the Department of Justice prosecutions recently; they are going beyond what traditionally had been done, by looking at the wire mail fraud statutes.

The Department of Justice is asserting that if someone commits to helping with political support and then in the next conversation discusses the legislation they want, the Department of Justice is now thinking about weaving those kinds of situations into what they call deprivation of honest services of that public official. They are prosecuting people on that legal theory. This may not be the greatest opinion to hear for those of us who believe in open government and the right to petition legislators on legislation in progress.

It is a little scary for a lot of people in Washington. I spend a fair amount of my time now attempting to advise people in the business community or other communities, such as the labor community, regarding where the lines are going to be in terms of prosecutions for these new theories of law.

But to come back just a tiny bit, even under the wildest of Department of Justice theories, I think there is a distinction between bribery and legal campaign contributions, and campaign finance laws are designed to fit in that niche. A bribe is where someone has an outright agreement to help with a campaign in return for favors in the legislature. An illegal gratuity is where it is clear that there was an effort to reward someone for a particular legislative effort they undertook or they will undertake. Legal campaign contributions stop short of bribes or illegal gratuities.

These campaign contribution situations, as I said earlier, are very subtle. There is a commitment to help somebody raise money, and there's an expression of gratitude. Then, there is a separate meeting, and there is a discussion about what is needed in Washington. That is what campaign finance restrictions are designed to regulate. They exist to prevent somebody from walking into a situation with so many financial resources at their disposal that they will be able to get whatever they want because that amount of money will, the legislator knows, virtually guarantee winning the race.

David Skover: Thank you, panelists. This was a wonderful discussion.