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Elections as a Distinct Sphere Under the First Amendment

Richard H. Pildes¹

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The strongest legal argument, in my view, for justifying regulations of election financing, such as electioneering paid for out of a corporation's or union's general treasury funds, is the view that elections should be considered a distinct sphere of political activity. Elections are distinct from the more general arena of democratic debate, both because elections serve a specific set of purposes and because those purposes can, arguably, be undermined or corrupted by actions such as the willingness of candidates or officeholders to trade their votes on issues for campaign contributions or spending. Given this risk of corruption of the political judgment of officeholders, regulations of the electoral sphere—including how elections are financed—might be constitutionally permissible that would not otherwise be permissible outside the sphere of elections. This is the form of argument that must be accepted to justify measures such as ceilings on campaign contributions, disclosure of campaign spending, and limits on the role of corporate and union electioneering.

To begin to reveal the structure of this argument and to justify it, I want to start with a recent U.S. Supreme Court decision. A few years back, in *Arkansas Educational Television Commission v. Forbes*,¹ the Court held that at least one phase of the electoral process, a candidate debate, is special for First Amendment purposes. At issue was the decision of a state-owned television station to exclude from the congressional candidate debate it was sponsoring an independent candidate who

¹ Sections I-III and V of this essay are abridged from Frederick Schauer and Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 Tex. L. Rev. 1803 (1999). For assistance with this article, I thank Alex Mindlin.

had qualified for the ballot; the station included only the Democratic and Republican candidates. In essence, the case required the Court to decide whether state journalism was best characterized as the state or as private journalism. In the Court's view, the journalism categorization was more apt.² As a consequence of this characterization decision, the constraints of content and viewpoint neutrality that might otherwise bind agencies of the state were held not to apply to a public television station.

Yet the Court went on to add an intriguing qualification. According to *Forbes*, candidate debates play a special role in democratic politics.³ Therefore, the Court decided, state-sponsored debates *are* subject to the requirement of viewpoint neutrality, even though the Court recognized that other public television programming, including political programming, could be as viewpoint-skewed as the station's management desired. The Court held that the First Amendment applied in one way to general activities of the state, another way to activities of state-owned media, and yet another way when state-owned media sponsored candidate debates as part of the electoral process.

My goal here is to explore the implications of the Court's holding that the First Amendment requires unique treatment of candidate debates because such debates play a special role in democratic politics. More broadly, I want to explore a possible extension of this principle: Is it possible that other aspects of electoral politics could also be the subject of special election-specific First Amendment principles because of their special role in democracy? Even if the current Court would not accept this extension of *Forbes*, is it nonetheless a consistent direction along which constitutional oversight of politics might logically proceed?

The Rhetoric of Exceptionalism

The position is one that Frederick Schauer and I have labeled “electoral exceptionalism.” According to electoral exceptionalism, elections should be constitutionally understood as (relatively) bounded domains of communicative activity. Because of the defined scope of this activity, it would be possible to prescribe or apply First Amendment principles to electoral processes that do not necessarily apply through the full reach of the First Amendment. If electoral exceptionalism prevails, courts evaluating restrictions on speech that are part of the process of nominating and electing candidates would employ a different standard from what we might otherwise characterize as the normal, or baseline, degree of First Amendment scrutiny.

What Schauer and I call electoral exceptionalism surfaced in public debate and in First Amendment literature in the 1990s. Typically, it has been the foundation for an argument against *Buckley v. Valeo*.⁴ This contra-*Buckley* argument asserts that, even though the principle that one may spend personal money to promote a cause is good First Amendment law in general, it does not apply when one is not advocating particular ideas or issues but instead seeking to elect a candidate to public office. Operationally, therefore, the most common version of electoral exceptionalism would permit restrictions on communicative activity in the context of elections that would not be permitted in other contexts.

Those with a penchant for oversimplification might say that electoral exceptionalism is an argument for weaker First Amendment protection in the context of elections. I describe this as an oversimplification, however, because in the context of arguments that campaign finance regulation would increase voter and candidate participation, decrease the influence of money compared to other sources of influence, or enhance voter confidence in democratic institutions, it is hardly clear that the values underlying the First Amendment would be more supportive of speaker (or candidate) immunity than they are of speaker (or candidate) participation. It is not self-evident that the values

of democratic deliberation, collective self-determination, guarding against the abuse of power, searching for truth, and even self-expression are better served by treating government intervention as the unqualified enemy than by allowing the state a limited role in fostering the proliferation of voices in the public sphere,⁵ or of increasing the importance of message and effort by decreasing the importance of wealth. Although it is plainly true that a negative conception of the First Amendment generally, and freedom of speech in particular, have held sway, both in the literature and in the case law, over the past several decades, it may still be too early in the First Amendment day to assume that the possibility of a positive conception of the First Amendment, and thus of a positive but limited role for the state, have no claim to recognition as the legitimate carrier of the free speech banner.

Moreover, although the position we label electoral exceptionalism would ordinarily be associated with greater state intervention, and thus with what some commentators might characterize as weaker First Amendment protection with respect to elections, electoral exceptionalism could logically support the opposite result. Critics of campaign finance regulation might argue that state restrictions on communicative activity in the electoral process are especially risky, largely because the self-interest of potential governmental regulators would be greatest in precisely this sphere.⁶ Consequently, this argument would continue, permissible restrictions in other or more “normal” contexts should be impermissible in the electoral context; if anything, the First Amendment ought to be even more absolute in this domain precisely because of its special characteristics.⁷

In sum, concluding that elections constitute a distinct domain for First Amendment purposes does not dictate what we would do within that domain. The primary goal of this essay is to explore

the possibility of electoral exceptionalism, rather than to evaluate any particular laws or policies that could be applied to elections as a result.

Competing Conceptions of Rights

That there is some “normal” or “standard” conception of what First Amendment doctrine does is widely believed. This off-the-rack understanding of the doctrine, centrally informed by such icons of the First Amendment tradition as *Brandenburg v. Ohio*,⁸ *New York Times Co. v. Sullivan*, *New York Times Co. v. United States*⁹ (The Pentagon Papers case), *Cohen v. California*,¹⁰ and *Texas v. Johnson*¹¹ is thought to represent the essential form of First Amendment protection. Departures, generally in the direction of less rather than more stringent protection, are routinely denigrated as exceptions.¹² We often hear the argument from the Supreme Court and others that these and other cases establish something like a compelling interest standard for any regulation of speech,¹³ that the compelling interest standard is practically unattainable,¹⁴ and thus that any proposal for regulation of campaign-related speech or expenditures would be tantamount to carving out an exception from the First Amendment.

This view tends to be associated with an individualist conception of the purposes of the First Amendment. If the First Amendment protects rights intrinsic to essential attributes of individual personhood, autonomy, or dignity, such as the right to self-expression, it is easy to see how one might conclude that First Amendment “rights” should not depend in significant ways on the particular contexts in which they are asserted.

That many might think the First Amendment should be understood in this way comes as no surprise. Much of American constitutional law, not just the First Amendment, is cast in the

language of protecting individual rights: rights to democratic participation, rights to equality, or rights to freedom of belief. Indeed, the most influential metaphor for the way constitutional rights are often thought to work is the imagery that legal philosopher Ronald Dworkin conjured up of rights as “trumps.”¹⁵ Dworkin argued that rights protect individual interests by excluding majoritarian preferences or judgments about the common good as a justification for limiting rights.¹⁶ As Dworkin put it, “If someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so.”¹⁷ This perspective is easily read to portray constitutional cases as entailing direct conflicts between individualistic interests (in liberty, autonomy, personhood, or dignity) and majority judgments about the common good—with constitutional rights trumping the latter to secure the former.¹⁸

There is, however, an alternative “structural conception of rights.”¹⁹ On this view, rights are a means of realizing various common goods, rather than being protections for individualist interests against collective judgments about those common goods. Rights do protect the interests of the rights holders, but not only those interests; the protections that rights bestow are not justified because they protect these individualistic interests, but because rights protect various spheres or domains from governmental intrusion on the basis of constitutionally impermissible reasons. Rights are not general trumps against appeals to the common good; instead, they are better understood as channeling the kinds of reasons that government can invoke when it acts in certain areas.

In this structural conception, rights function as linguistic tools that the law invokes in the pragmatic task of bringing certain issues before the courts for judicial resolution. Rights exclude government action within certain contexts in order to preserve the normative integrity of various domains, as constitutionally delineated. So, rights protect a certain conception of public education;²⁰ they protect a certain conception of religion and the boundary between religion and the state;²¹ they

protect a civil-service bureaucracy from the intrusions of partisan politics;²² they define the appropriate structure of the sphere of democratic politics;²³ and they protect other spheres from state intrusion on the basis of impermissible purposes. Far from standing opposed to the pursuit of various common goods, rights are the tool through which constitutional law creates and preserves common goods, such as democratic education, politics, religion, public service, and other domains that help realize various social values. In other words, rights help create a constitutional culture by differentiating various domains from each other and precluding the state from acting on certain reasons in some of these domains, even if those same reasons could properly form the basis for state action in other domains.

This structural conception of rights is deeply rooted in the American idea of constitutionalism itself. This idea did not begin with philosophical conceptions of the person and reason out from there to rights. It was rooted in the experience of government, both English colonial administration and state governments after the Revolution.²⁴ American constitutional rights are better pictured, at least in origin, as reasoning “in” from judgments about government to constitutional barriers erected to avoid what past practice had made all too visible: the corrosive potential of government.²⁵ Rights were not designed to protect individuals in their atomistic interests in, for example, self-expressiveness;²⁶ rather, rights were designed to sustain a political culture in which “public liberty”²⁷ was enhanced by recognizing certain domains as relatively autonomous. This conception meant defining certain domains as off-limits to state action that rested on particular, impermissible purposes.²⁸

Domains for First Amendment purposes are not empirical facts, nor brute conventions, that require no further acts of legal interpretation. Instead, they are ongoing social practices, constituted in part by past legal understandings, whose meaning consists of critical reflection on those practices

on the basis of standards that are at least partly internal to the practice itself.²⁹ Even when the claim is that a new domain ought to be recognized under the First Amendment, that claim is likely to be made on the basis of analogizing from existing legal understandings or from interpretations of the practice as it currently exists.

The critique of the individualist account of First Amendment rights offered here is one of existing practice that conceptualizes the First Amendment at too abstract a level of generality in relation to the social and economic practices the First Amendment seeks to regulate and evaluate. There is no general right of free speech.³⁰ There is no one general value or interest that free speech protects.³¹ There is no realm of action of undifferentiated liberty called freedom of speech. When the Supreme Court, commentators, or participants in public discourse suggest otherwise, they are reifying free speech into an overly abstract conception. First Amendment public discourse has drifted toward too high a level of abstraction and generality—a level that cannot make sense of the actual cases themselves. Actual First Amendment practice depends upon a considerably more embedded understanding of speech, one that recognizes speech interests to be contingent upon the specific social context.

Elections as Bounded Spheres

With respect to elections and regulation of campaign finance, then, the question is not whether such regulation intrudes on some abstractly conceived individualistic interest in liberty or self-expression. It is whether the domain of electoral politics should be recognized as a domain distinct, for First Amendment purposes, from other domains, such as the general sphere of public discourse. Elections are already highly structured spheres, including regulations that would be impermissible

in the general domain of public discourse. There are limits on what voters are permitted to express at the ballot box;³² mandatory disclosure obligations on the identity of political speakers;³³ content-based regulations of electoral speech, ranging from mundane constraints such as electioneering near polling places³⁴ to more dramatic ones, such as selective bans on contributions from some speakers (for example, corporations³⁵); and a series of other constraints.³⁶ Moreover, elections are already structured in many ways that could be conceived as impinging upon constitutional rights other than those in the First Amendment. For example, what considerations justify requiring that voting be viva voce, as in the late-eighteenth century, or by open balloting, as it was through much of the nineteenth century, or by the secret balloting process that did not become widespread in America until the late-nineteenth century? Any of these choices prefer some modes of electoral practices over others on the basis of judgments about “better” forms of democracy. Are the rights of self-expression, free speech, or the right to vote, violated by any of these choices? We do not stop to consider that a serious question, though it could be. The justification of these structures is that they promote a “fairer” mode of representation, that they enhance the deliberative quality of choosing candidates and making policy, or that they improve the quality of voter decision-making. These are precisely the kinds of justifications that would be offered for some types of campaign finance reform.

The question of how to finance elections currently looms large as a unique problem in constitutional theory partly because we have come to suppress awareness of many background decisions previously made about other crucial elements of the electoral structure. In other words, elections are already extensively regulated, state-structured processes; this structuring is designed to achieve specific instrumental purposes. From a constitutional perspective, decisions about whether to structure the financing of elections are not so obviously different from other decisions that are

currently far less controversial about how to structure elections. The argument from electoral exceptionalism would draw upon the understandings already embedded in the way elections are legally constructed.

Arguments that the First Amendment should recognize a distinct set of principles to evaluate speech regulations in the electoral context would draw upon the understandings already embedded in the way elections are legally constructed. To the extent values of individual self-expression play a role in the best constitutional understanding of various domains, they are one factor in the legal analysis, but always in relation to the social values that are argued to constitute distinct institutional domains.

The First Amendment as Unitary or as an Exception

In the First Amendment context, the argument that there is a general, “normal” conception of free speech rights that applies the same way in nearly all contexts—an argument associated with the individualist justification of constitutional rights—is long on rhetoric and short on substance. Even if we accept the claim that money is speech,³⁷ it does not follow that identifying a restriction as a restriction of speech necessarily puts us within the domain of the First Amendment. Almost all the law of contracts, warranties, labels, wills, deeds, trusts, fraud, and perjury, as well as much of antitrust law, securities law, and consumer law, is accurately seen as a regulation of speech in the literal sense of that word, yet exists without even a glimmer of First Amendment scrutiny. In most of these instances, the claim that the First Amendment is even relevant would generate little more than quizzical judicial disbelief.³⁸ Once we see that the overwhelming proportion of speech is not covered by the First Amendment, and the overwhelming proportion of speech regulation not

touched by the First Amendment, we can see the rhetorical sleight-of-hand implicit in the standard talk of “exceptions” to the First Amendment.³⁹ In reality, the First Amendment itself might better be seen as an exception to the prevailing principle that speech may be regulated in the normal course of governmental business.

A more plausible but still unsound argument would recognize that, although the First Amendment does not cover all speech, subdivision within what the First Amendment does cover remains highly disfavored.⁴⁰ The argument for a unitary First Amendment within its otherwise circumscribed coverage appears to have a sound foundation in the modern American First Amendment tradition and in much of American legal theory generally.⁴¹ Indeed, this argument could be put in a particularly strong form when applied to campaign finance regulation. This is political speech—the paradigm case for the First Amendment,⁴² so the argument goes, and at least with respect to political speech we should not go down the road of subdividing types of communicative activity.⁴³

Yet, even here the argument against exceptionalism is fragile. For even with respect to political speech, the degree of that protection is more institution-dependent than many recognize. There is one form of protection for political speech on government property,⁴⁴ another for political speech on the broadcast media,⁴⁵ another for political speech in the public schools,⁴⁶ another for political speech by government employees,⁴⁷ and so on. What this suggests, therefore, is that the idea of a standard, normal, or off-the-rack conception of even political speech is an egregious oversimplification. Rather, the context of elections, like the contexts of billboards,⁴⁸ posters,⁴⁹ signs in windows,⁵⁰ schools,⁵¹ colleges,⁵² government employment,⁵³ polling places,⁵⁴ and so on, is just one of numerous settings in which political speech occurs. All regulations of political speech thus already are measured by domain-specific, institution-specific, sometimes media-specific, and

generally context-specific First Amendment principles—rather than some undifferentiated, “general” First Amendment rule.

Instead, the argument against electoral exceptionalism must rely on the normative view that elections ought not to be treated differently from the larger and election-independent domains of First Amendment protected communication. Thus, it might be argued, as the Supreme Court assumed in *Buckley* itself and numerous other cases,⁵⁵ that the form of advocacy that urges the election of one candidate over another is indistinguishable in First Amendment terms from the form of advocacy that advocates the round-earth over the flat-earth position, flat taxation over progressive taxation, pro-choice over pro-life, or socialism over social Darwinism.

The question, then, is whether some degree of government regulation in the service of enhancing the electoral process, based on the diverse justifications that have been offered for doing so, ought to be permissible. More particularly, the question is whether regulation should be permissible to remedy various perceived pathologies of current electoral discourse, even if that same degree of government intervention would be impermissible to remedy the parallel pathologies of non-electoral discourse in roughly comparable situations. Even more specifically, the question is whether such regulation ought to be permissible against the perceived distortions resulting from the undue influence of wealth, even if doing so would leave an imbalance in other sources of political influence. Accepting that position would require accepting the idea that elections can be demarcated, for First Amendment purposes, from the general domain of public discourse. This is both a normative question in First Amendment theory and a functional question of whether any regulatory approach can enforce this boundary with sufficient integrity.

Oddly, the Court in *Buckley* never confronted this issue in either of these terms.⁵⁶ There had been little academic development or sustained public debate of the First Amendment perspectives

surrounding regulation of elections at the moment of the Court’s momentous and baptismal engagement with these issues in *Buckley*. Thus, the Court assessed the Federal Election Campaign Act of 1974 by assimilating general principles of First Amendment adjudication that apply in the broad domain of public discourse without considering in any depth whether the kind of domain-specific analysis it applies in other areas of speech—including political speech—should apply to regulation of election-related spending.

Congress and the Court on Electoral Exceptionalism

In the Bipartisan Campaign Finance Reform Act of 2002 (BCRA), colloquially known as the McCain-Feingold Law, Congress essentially endorsed the concept of electoral exceptionalism. Title II of the act barred corporations and unions from using general treasury funds for broadcast communications that, in Congress’s judgment, were intended to, or had the effect of, influencing the outcome of federal elections. More specifically, Congress defined a specific window of time it treated as, in effect, “the election period,” and then adopted special rules for corporate and union electioneering that applied only during that period. Thus, Congress defined as an “electioneering communication” any “broadcast, cable, or satellite communication” that

(I) refers to a clearly identified candidate for Federal office; (II) is made within—(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (III) in the case of a communication which refers to a

candidate other than President or Vice President, is targeted to the relevant electorate.⁵⁷

Corporate or union general treasury fund spending on these ads, in this period, was prohibited.

Although Congress did not use the language of electoral exceptionalism, it clearly acted on the basis of the principles and understandings that inform the concept of electoral exceptionalism. Congress created a bright-line rule that defined a unique period of time as the election period. Such a period is a familiar concept in English and European democracies.⁵⁸ In many of these systems, elections do not take place at previously established times; instead, the government in power calls for an election at a specified date in the future. At times, only a month transpires between the calling of the election and the election itself. During this election period, the processes of electoral competition are highly regulated. Candidates, for example, might have access to a certain amount of state-specified free media time, but not to additional access.

The United States has no natural election period, in a comparable sense, because it is known years in advance that the next election will take place on a specific date in the future. Nonetheless, Congress identified unique considerations that justified, in Congress's judgment, unique treatment of corporate and union electioneering in a period of time close to the actual election. Congress did not seek to ban or regulate corporate and union general treasury spending on political matters in general, or even with respect to candidates or potential candidates for office outside the sixty-day window (for general elections) and the thirty-day window (for primary elections).⁵⁹ Instead, Congress defined an election period and concluded that special considerations justified unique regulatory restrictions on corporate and union spending during that period. In particular, Congress concluded that such spending in the election period generated unique risks of corruption (or

perhaps, the appearance of corruption) of those who would wield public power; as a result, unique restrictions on spending during the electoral period were appropriate and, in Congress’s view, consistent with the First Amendment. This is precisely the set of understandings reflected in the idea of electoral exceptionalism.

The Court too—initially—accepted and endorsed this notion of electoral exceptionalism. In *McConnell v. Federal Election Commission*,⁶⁰ the Court upheld the constitutionality of these provisions in BCRA. Although the Court did not directly use the language of electoral exceptionalism, the Court upheld the ban on corporate and union electioneering on precisely the understandings and principles that underlie the concept of legitimately distinct First Amendment understandings properly applying to the distinct spheres of elections. The Court held that a “compelling governmental interest” justified regulations of speech in the electoral sphere that would not be justified if the regulations applied to speech outside the electoral sphere.⁶¹ Among the justifications that made for a compelling interest in regulating corporate and union electioneering communications were preserving the integrity of the electoral process, preventing corruption, and preserving confidence of citizens in government.⁶² The Court did not develop these principles at great length, which might not be surprising, given the overall massive length of the *McConnell* opinions. But there is no question that in *McConnell* the willingness to recognize that First Amendment principles could properly be applied and understood differently in the context of elections than in the context of more general public debate rested on the Court’s willingness to endorse, in essence, the concept of electoral exceptionalism.

In *Citizens United v. Federal Election Commission*,⁶³ however, the Court overturned this portion of *McConnell* (as well as part of the Court’s earlier decision in *Austin v. Michigan Chamber of Commerce*⁶⁴). In doing so, the *Citizens United* Court necessarily rejected the concept of electoral

exceptionalism. Moreover, the Court came closer to engaging directly with that concept than it had in any of its previous cases, perhaps in part because the idea of electoral exceptionalism, endorsed in both BCRA and *McConnell*, had become a more explicitly recognized one by the time of *Citizens United*. Thus, the Court felt obligated to recognize that it had previously endorsed the principle that the First Amendment applied differently in a number of specific institutional contexts than it did in the general sphere of public debate. Citing the kinds of decisions discussed throughout this article, the Court acknowledged that it had applied the First Amendment differently in the context of public schools, prisons, the military, and the civil service. The Court recognized that otherwise impermissible speech restrictions could be justified when the government had a sufficiently strong “interest in allowing governmental entities to perform their functions.” But the Court then rejected the argument that this same principle applied in what we might consider the distinct sphere of elections. The Court concluded that corporate electioneering “would not interfere with governmental functions”; it held that these other cases stood only for the principle that when government “cannot operate” without some restrictions on particular kinds of speech, then those restrictions are permissible. Thus, the Court directly rejected the idea of electoral exceptionalism and, in doing so, held unconstitutional BCRA’s ban on corporate and union electioneering.

The argument for electoral exceptionalism, of course, has the same form as the argument for the speech restrictions that the Court has permitted in the other institutional contexts the Court identified. While *Citizens United* stated that the government simply could not operate in these other spheres without the speech restrictions, this is an overstatement. More accurately put, the Court had concluded that these other institutional environments would function better—would better serve the purposes for which we create these institutional structures, such as schools, prisons, the civil service, and the like—if the relevant speech restrictions were permitted. That is the same form of

argument made for electoral exceptionalism: elections would better serve the purposes for which they exist if certain kinds of restrictions, such as those on corporate and union electioneering, were permitted. Elections are designed to empower a government that is generally accepted as legitimate and is motivated to act for the common good. If corporate and union electioneering undermine those purposes, is banning that electioneering justified in light of the accepted aims of elections? To take an extreme example, if so many citizens lost confidence in government, because they believed their votes made no difference and officeholders were effectively bought by massive corporate and union electioneering spending, that voter turnout dropped to 25 percent, would regulation of such electioneering then be justified in order to preserve the purpose of elections—including the purpose of enabling a government that was generally perceived to be legitimate?

Thus, the idea of electoral exceptionalism was accepted by a 5–4 Court in *McConnell*, then rejected by a 5–4 Court in *Citizens United*. But even if *Citizens United* remains stable law, the idea of electoral exceptionalism is not going away, for many of the proposed responses to *Citizens United* continue to be based on this idea. In Congress, the major response to date, the Disclose Act,⁶⁵ was an effort to require full disclosure of the sources of funding for corporate electioneering communications. But Congress did not seek to require disclosure of these sources for all corporate political spending; Congress limited the proposed law to spending in the electoral sphere, where candidate elections are involved.⁶⁶ Similarly, some have proposed a constitutional amendment to overturn the result in *Citizens United*. But some of these proposals, such as that put forward by scholar and political activist Lawrence Lessig, do not seek to regulate all corporate spending on political speech.⁶⁷ Instead, they limit their reach to spending in the sixty days before an election. Thus, the idea that elections themselves implicate distinct concerns, and should be regulated differently than the general sphere of public debate, persists even after *Citizens United*.

Finally, for reformers who seek to limit the influence of corporate or union money on government, there are only four directions the legal argument to justify limits like those in BCRA can take. Yet, each of the available alternatives has much more sweeping implications than the electoral exceptionalism argument. First, one can argue that corporations should not have First Amendment rights at all. Second, one can argue that “money is not speech,” or more precisely, that the spending of money to communicate political ideas is not the kind of activity to which the First Amendment ought to apply. Third, one could argue, as Ronald Dworkin has, that political equality supports the principle that government can act to ensure that differential levels of wealth are not translated into differential levels of political influence.⁶⁸ But each of these arguments would require a far more dramatic transformation in First Amendment understandings than electoral exceptionalism; moreover each of these arguments would have significantly broader implications for speech outside of the electoral context. The argument from electoral exceptionalism is thus the narrowest argument that can be made to support regulations of corporate and/or union spending in the specific and limited context of elections.

Electoral Exceptionalism Revisited

That American free speech doctrine is unique is not controversial. Even after decades of American influence on the development of free speech principles throughout the world, no country has come close to following the American model to the full extent of its free speech libertarianism. Nations that few would be inclined to brand as totalitarian today—Canada, New Zealand, Germany, France, and contemporary South Africa, to name just a few—have free speech and free press principles less

speaker-protective on important issues than those in the United States. In the libertarian extent to which it immunizes speakers and speeches from state regulation, the United States stands alone.

Americans debate whether this state of affairs is to be applauded or condemned, but there is little likelihood it will change. As long as American free speech doctrine and culture remain so intolerant of the regulation of speech, attempts to permit the regulation of electoral speech must confront the question of whether a distinct domain of electoral speech can be distinguished from the broader domain of public discourse.⁶⁹ If not, regulation of electoral speech would be constitutionally doomed even if *Buckley* were no longer the law. But if electoral speech can be seen as a relatively distinct domain, then it would be intellectually plausible to press for its regulation with less threat to the uniqueness of American free speech culture. The justification of a separate domain for electoral speech is thus a necessary task for any potential regulator of campaign speech who recognizes the futility of wholesale changes in the American approach to freedom of speech and freedom of the press.

As I have argued here, justifying this special domain seems to me a less daunting task than it has to many others. First Amendment doctrine is not a monolith to which the separate treatment of electoral speech would be a dangerous exception. Rather, recognition of the multifariousness of speech and of the multifariousness of the regulatory environments in which it exists points the way to seeing that developing distinct principles for electoral speech would not be appreciably different from the structure of existing First Amendment doctrine. If there are arguments against electoral exceptionalism, they cannot be arguments against exceptionalism per se, because exceptionalism in the First Amendment is the rule and not the exception.

The task here has thus been narrow but necessary. I have not undertaken the task of asking whether any particular regulation of campaign finance would be a good idea. But if such regulation

would be desirable as a policy matter, its permissibility would depend on the ability to develop First Amendment principles permitting such regulation while still prohibiting regulations that some would see as somewhat similar in non-electoral environments. Even this narrower agenda was not the project here, for the positive case for election-specific principles would again require recourse to numerous institutional and empirical features of campaigns and elections that I have not taken up in this context.

Yet even if I have avoided the issue of the desirability of campaign finance reform as a policy question, and avoided the issue of the positive case for election-specific First Amendment principles, I have confronted directly the primary impediment to both of those tasks: the argument that election-specific First Amendment principles are inconsistent with essential features of the First Amendment itself. Most forms of regulating our privately financed electoral system ultimately rest, explicitly or implicitly, on the argument that certain threats to democracy arise in unique form in the electoral sphere—particularly the risk that the judgment of candidates and officeholders will be corrupted by the role of money in their attainment and maintenance of office—and that these risks justify regulation of the electoral sphere that would not be permitted in the more general sphere of public debate over issues and policy. Because that idea is central to any regulatory effort in this area, I have tried to draw that idea out clearly and show the kind of justifications on which it rests. None of the argument is meant to endorse any specific form of regulation. But acceptance of the idea of electoral exceptionalism is a necessary predicate to most forms of regulation of election financing.

¹ 523 U.S. 666 (1998).

² See *id.* at 678–82 (holding that the debate in Arkansas Educational Television Commission was a nonpublic forum rather than a designated public forum).

³ *Forbes*, 523 U.S. at 675–76.

⁴ 424 U.S. 1 (1976). Among other things, *Buckley* held that campaign contributions and expenditures were both a form of political speech for First Amendment purposes. See *id.* at 14–23. However, no governmental interest was deemed sufficient to justify state-imposed caps on expenditures, though the state interest in preventing “corruption and the appearance of corruption” was sufficient to justify contribution limitations. *Id.* at 33, 45. See C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 Harv. C.R.-C.L. L. Rev. 1, 2 (1998) (asserting that *Buckley v. Valeo* was “wrong both in a normative or theoretical sense and . . . wrong given the Court’s own precedents”); Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 Tex. L. Rev. 1751 (1999); Ronald Dworkin, *Campaign Finance Reform: The Jurisprudential Background* (March 19, 1998) (unpublished manuscript) (on file with author).

⁵ See generally Alvin I. Goldman and James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 Legal Theory 1 (1996) (criticizing the “market for speech approach” to the First Amendment for failing to account for certain inadequacies in the regulatory power of markets).

⁶ For an account of counteracting the tendency towards governmental self-preservation as an argument for freedom of speech, see Frederick Schauer, *Free Speech: A Philosophical Enquiry*, 73–86 (1982). For an explanation of the general tendency of political insiders to manipulate the ground rules of electoral politics for self-interested reasons, see Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643, 651 (1998)

(explaining the second form of political locking as incumbents using state authority to control challengers).

⁷ For example, the Supreme Court held in *Brown v. Hartlage*, 456 U.S. 45 (1982), that regulation of campaign promises and statements must meet the stringent standards of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). But it is not inconceivable that the Court could have said that campaign promises and statements are never regulable (except by the voters in casting their ballots), even if the same statements made with the same intentions would have been regulable outside of the electoral process so long as the standards of *New York Times v. Sullivan* had been met.

⁸ 395 U.S. 444 (1969).

⁹ 403 U.S. 713 (1971).

¹⁰ 403 U.S. 15 (1971).

¹¹ 491 U.S. 397 (1989).

¹² See generally Frederick Schauer, *Exceptions*, 58 U. Chi. L. Rev. 871, 880-86 (1991) (characterizing “exceptions” proposed in the free speech context as debates over the definition or scope of the relevant speech protections).

¹³ See *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976); Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 Cal. L. Rev. 1045, 1089 (1985) (concluding that “strict means scrutiny” is the better test for political speech cases); Daniel Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 Sup. Ct. Rev. 1, 16 (stating that the Court applies strict scrutiny in First Amendment cases).

¹⁴ See Richard H. Fallon, Jr., Foreward, *Implementing the Constitution*, 111 Harv. L. Rev. 56, 79 (1997) (recognizing as “commonplace” the idea that strict scrutiny tests are fatal to government regulation); but see *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (“We wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’”). For an older version of this argument in the equal protection context, see Gerald Gunther, Foreword, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972) (coining the phrase “strict in theory, fatal in fact”).

¹⁵ Ronald Dworkin, *Taking Rights Seriously* 184–205 (1977).

¹⁶ *Id.* at 193.

¹⁷ *Id.* at 269.

¹⁸ See Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms and Constitutionalism*, 27 J. Legal Stud. 725, 727–29 (1998).

¹⁹ For a fuller elaboration of these views, see Richard H. Pildes, *Two Conceptions of Rights in Cases Involving Political “Rights,”* 34 Hous. L. Rev. 323 (1997); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 Hastings L.J. 711 (1994); Frederick Schauer, *A Comment on the Structure of Rights*, 27 Ga. L. Rev. 415 (1993); see also Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 Mich. L. Rev. 1, 3 (1998) (“A constitutional right protects the rights-holder from a particular rule (a rule with the wrong predicate or history); it does not protect a particular action of hers from all the rules under which the action falls.”). In the First Amendment context itself, this view of rights has been developed in detail by Robert Post. See generally Robert C. Post, *Constitutional Domains:*

Democracy, Community, Management (1995) (reconceptualizing First Amendment protections as reflections of different forms of social orders).

²⁰ See, e.g., *Board of Educ. v. Pico*, 457 U.S. 853, 870 (1982) (holding that public officials cannot remove books from the school library based on the purpose of expressing disapproval of the ideas those books present).

²¹ See, e.g., *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760–61 (1995) (analogizing the protection of free speech without including religious speech to “Hamlet without the Prince,” but at the same time explaining that not all speech is guaranteed a forum on all state property); *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (espousing the principle that the government’s accommodation of the free exercise of religion does not supersede the fundamental limitation imposed by the establishment clause); *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985) (explaining that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all).

²² See, e.g., *Rutan v. Republican Party*, 497 U.S. 62, 75 (1990) (holding that “promotions, transfers and recalls after layoffs based on political affiliation or support are an impermissible infringement on First Amendment rights of public employees”); *Branti v. Finkel*, 445 U.S. 507, 520 (1980) (holding that a public employee can obtain an injunction against his termination if the termination was based on purely political grounds); *Elrod v. Burns*, 427 U.S. 347, 357 (1976) (arguing that patronage dismissals are “at war with the deeper traditions of democracy embodied in the First Amendment”).

²³ Compare *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 688 (1966) (rejecting the idea that voting may be conditioned on payment of poll taxes), with *Lassiter v. Northampton*

County Bd. of Elections, 360 U.S. 45, 53 (1959) (permitting voting to be conditioned on establishing literacy).

²⁴ For an example of this interpretation of the original purposes of the First Amendment, see Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum L. Rev. 449, 463 (1985).

²⁵ For this view of the original purposes of the Bill of Rights as a whole, which argues that they were designed to protect structures of self-governance, rather than atomistic rights of individuals, see Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* at xiii (1998) (arguing that the central concern in the minds of those who framed the Bill of Rights was to protect the ability of local governments to monitor and deter federal government officials who might try to rule in their own self interest).

²⁶ *Id.* at 21–25.

²⁷ For the emphasis on the language and concept of “public liberty” in the constitutional period, see Gordon S. Wood, *The Creation of the American Republic: 1776–1787*, at 536–67 (1969) (articulating the antifederalist view that experience throughout time confirmed that rulers were always eager to enlarge their powers and infringe upon the essential rights of the people).

²⁸ *Id.* at 537 (quoting Whig politician and antifederalist Robert Yates who argued that the eagerness of rulers to abridge public liberty ““has induced the people . . . to fix barriers against the encroachments of their rulers””).

²⁹ For pragmatic accounts of justification along these lines, see, e.g., Elizabeth Anderson, *Value in Ethics and Economics* 91–116 (1993); Don Herzog, *Without Foundations* 218–44 (1985).

³⁰ See Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249, 1271 (1995) (“There is in fact no general free speech principle. . .”).

³¹ See generally, Schauer, *supra* note 6.

³² See *Burdick v. Takushi*, 504 U.S. 428 (1992).

³³ See *Buckley v. Valeo*, 424 U.S. 1, 64–74 (1976) (upholding financial disclosure obligations for election-related “speech” while distinguishing constitutional protections against mandatory identity disclosure in other domains of political speech).

³⁴ See *Burson v. Freeman*, 504 U.S. 191 (1992).

³⁵ See *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990).

³⁶ For general accounts of the structural features of elections as a distinct domain already recognized in constitutional law, see Baker, *supra* note 4, at 24–33; Briffault, *supra* note 6, at 1753–55.

³⁷ This claim is famously challenged in J. Skelly Wright, *Politics and the Constitution: Is Money Speech?* 85 Yale L.J. 1001, 1018–19 (1976) but defended in Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 University of California, Davis Law Review 663–90 (1997). For a related inquiry, see J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?* 82 Colum. L. Rev. 609 (1982) (insisting that the Court’s decision to protect money in election campaigns restricts our political system’s most powerful defenses against electoral inequalities).

³⁸ See Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand. L. Rev. 265, 270 (1981) (explaining that although several areas of the law are affected by the First

Amendment, courts have had no trouble finding, in some cases, that speech in those contexts is not protected).

³⁹ See Schauer, *supra* note 12, at 880 (insisting that however useful it may be to consider specific exceptions in particular doctrinal realms, ideas about exceptions are not very useful in analyzing the First Amendment).

⁴⁰ See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189, 198, 197–200 (1983) (arguing that “excising a specific message from public debate” results in a distortion of that debate); see also Marjorie Heins, *Viewpoint Discrimination*, 24 Hastings Const. L.Q. 99, 103 (1996) (criticizing as viewpoint-based the obscenity exception to the First Amendment, which allows prohibition of some sexually explicit speech).

⁴¹ See Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 Harv. L. Rev. 84, 84–85 (1998) (noting that institutions such as the press and universities have failed to gain special status under the First Amendment).

⁴² See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346 (1995) (describing advocacy of a politically controversial viewpoint as “the essence of First Amendment expression”).

⁴³ See *City of Ladue v. Gilleo*, 512 U.S. 43, 48–49 (1994) (striking down a yard sign ban as a nearly complete repression of a “venerable means of communication”); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265–66 (1964) (rejecting the characterization of a paid editorial as “commercial” and holding that statements do not lose protection simply because they were paid for); William J. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1, 5–6 (1965) (mentioning that one view is that only speech that has “redeeming social importance” is fully protected); Daniel A. Farber, *Free Speech without Romance:*

Public Choice and the First Amendment, 105 Harv. L. Rev. 554, 555 (1991) (utilizing public choice theory to characterize speech as an undervalued public good).

⁴⁴ See *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 792–93 (1984) (involving political signs on public property).

⁴⁵ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 370–71 (1969) (concerning the application of the fairness doctrine in broadcasting).

⁴⁶ See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 504 (1969) (regarding a school district’s prohibition of wearing arm bands to protest the Vietnam War).

⁴⁷ See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990) (finding that denials of “promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees”); *Connick v. Myers*, 461 U.S. 138, 147, 146–47 (1983) (holding that the decision of a government employer to discharge an employee based on the employee’s speech regarding a “personal interest” rather than a “public concern” is not subject to judicial review).

⁴⁸ See *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 493, 496, 521 (1981) (permitting some restrictions and noting that the restricted billboards have been used for political speech).

⁴⁹ See *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (approving municipal restrictions on the posting of signs and posters, including those with political content).

⁵⁰ See *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (noting that “residential signs play an important part in political campaigns”).

⁵¹ See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (noting that children’s rights of political expression in public school “are not automatically coextensive with the rights of adults in other settings”).

⁵² See *Papish v. Board of Curators of Univ. of Mo.*, 410 U.S. 667, 670-71 (1973) (noting that “the mere dissemination of ideas . . . on a state university campus may not be shut off in the name alone of ‘conventions of decency’”).

⁵³ See *Connick v. Myers*, 461 U.S. 138, 146–47 (1983) (juxtaposing the courts’ role in protecting government employees’ speech in matters of public concern and private concern).

⁵⁴ See *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (permitting restrictions on speech within one hundred feet of a polling place).

⁵⁵ See, e.g., *Federal Election Comm’n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (striking down a federal law prohibiting a pro-life organization from identifying and supporting pro-life candidates in a newsletter).

⁵⁶ *Buckley*, 424 U.S. at 15 (considering instead the larger question of whether campaign contributions and expenditures can best be characterized as conduct or political speech). The Court in *Buckley* moved freely, even on the same page of the opinion, between precedents involving the domain of general public discourse, such as *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (cited in *Buckley*, 424 U.S. at 14) and precedents tied to the specific structural issues concerning elections, such as *Mills v. Alabama*, 384 U.S. 214 (1966) (cited in *Buckley*, 424 U.S. at 14). The Court did not undertake any discussion of whether principles and precedents applicable to public discourse should be modified in the context of elections. See *Baker*, *supra* note 4, at 29 (“*Buckley*

did not even take up the possibility of viewing electoral speech as part of an institutionally bound governing process.”).

⁵⁷ 2 U.S.C.A. § 434(f)(3)(A)(i) (Supp. 203). The act also provided a backup definition of electioneering communication, in case this primary definition ran into constitutional problems.

⁵⁸ For a comparison between BCRA and the concept of an “election period” in other democracies, see Samuel Issacharoff, *The Constitutional Logic of Campaign Finance Regulation*, 36 Pepp. L. Rev. 373 (2009) (discussing campaign finance regulations in other democracies).

⁵⁹ Under preexisting federal law, however, corporations and unions were barred from engaging in express advocacy in support of federal candidates without regard to the “election period” restrictions established by BCRA. 2 U.S.C. s 441(b).

⁶⁰ 540 U.S. 93 (2003).

⁶¹ *Id.* at 205.

⁶² *Id.* at 206 n.88 (internal quotation marks omitted).

⁶³ 130 S. Ct. 876 (2010).

⁶⁴ 494 U.S. 652 (1990).

⁶⁵ H.R. 5175, 111th Cong. (2010); S. 3295, 11th Cong. (2010).

⁶⁶ Of course, there are disputes about whether Congress has drawn the boundaries on the “electoral sphere” in an appropriate way. For the ACLU’s objections along these lines to the legislation, see

http://www.aclu.org/files/assets/Ltr_to_Senate_re_ACLU_opposes_DISCLOSE_Act.pdf.

⁶⁷ The specific language of Lessig’s proposed amendment is: “Nothing in this Constitution shall be construed to restrict the power to limit, though not to ban, campaign expenditures of non-citizens

of the United States during the last 60 days before an election.” See Lawrence Lessig, *Citizens Unite: The Constitutional Amendment America Needs*, New Republic, March 16, 2010, <http://www.tnr.com/article/politics/citizens-unite>.

⁶⁸ Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. Rev. Books, April 15, 2010, available at <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy/>.

⁶⁹ Critics of campaign-finance reform sometimes recognize this point as well. See, e.g., Sullivan, *supra* note 37, at 675 (“Campaign finance reform may not be predicated on equality of citizen participation in elections unless electoral speech can be conceptually severed from informal political discourse.”).