

potter

RISA GOLUBOFF: Good evening. It's wonderful to see you all here, and I'm delighted to be part of this year's Ele(Q)t Project Symposium. I want to thank Lambda Law Alliance for inviting me to be part of this event, and Chance McCraw, and the entire outgoing Lambda board for putting on this symposium, and for your service to and leadership of the law school and the larger community. And I want to say congratulations to Chloe, who I just saw who I know is not here, for her-- Chloe Fife for her new and pioneering leadership of Lambda that is just beginning.

So this symposium feels particularly important right at this moment for a few reasons. One, and most obviously, we are in the midst of an election cycle, one that has featured the first openly gay person to launch a major presidential bid and to win a presidential primary. So there are big electoral stakes at play here. And second, the work that you're doing here today feels particularly important given not only the election that we're in, but the current political climate, which often feels hyper-partisan and often counterproductive.

But you are approaching politics not from a partisan place, but from a place of encouraging ambition and engagement of LGBTQ leaders to join all levels of government and to run for political office, it feels like such a crucial way of counterbalancing that climate. We are in very much need of diverse voices from across the political spectrum, steering the political conversation and working in government at all levels and in all respects.

And so I'm really glad that you all-- that we here are taking action to help LGBTQ people, people of color, women, people with disabilities, members of religious minorities, and many more folks whose voices are not always the dominant ones in our political sphere to become our next generation of lawyers and judges, of political appointees and political operatives, of mayors and senators and presidents. And that is why I am delighted to introduce the keynote speaker this evening, Trevor Potter of the Class of 1982.

He is one of this nation's most experienced campaign and election lawyers. He is currently co leader of Caplin & Drysdale's political law group where he counsels political candidates for profit and nonprofit organizations on lobbying, regulation, government ethics, campaign finance, and a host of other issues. Mr. Potter graduated from Harvard College in 1978, joining the UVA law class of 1982. He graduated Order of the Coif and Editor-in-Chief of the Virginia Journal of International Law.

After graduation, he worked as an attorney for the Department of Justice, and then as Assistant General Counsel at the Federal Communications Commission. He then moved to private practice and later served as Deputy General Counsel to George HW Bush's 1988 presidential campaign. He was later appointed by the first President Bush to the Federal Election Commission, confirmed by the Senate in 1991, where he served as Vice Chair of the FEC's Finance Committee, Chair of its Regulations Task Force, and ultimately, as Chair of the Commission itself.

After leaving the FEC, Mr. Potter worked as general counsel to Senator John McCain's 2000 and 2008 presidential campaigns. He advised the drafters of the McCain-Feingold Act, the Campaign

Finance Reform bill that was passed in 2002, and he has served as a nonresident senior fellow in governance studies at the Brookings Institution.

In 2002, Mr. Potter founded the Campaign Legal Center, a nonpartisan, nonprofit organization that works through litigation, policy analysis, and public education to protect and strengthen the US democratic process across all levels of government. Now he's probably most famous for his pop culture moment, which came in 2012, when he served as Stephen Colbert's attorney and shepherded Stephen Colbert's Super PAC into existence-- you may be familiar with it-- it is called Americans for a Better Tomorrow Tomorrow.

Now that's the funny part. I will say on a more serious note that 200 years ago-- we're celebrating our bicentennial this year-- this law school was founded with the mission of training generations of citizen-leaders for service to our democracy and our nation. And so much has changed over the last 200 years, in particular, the very definition of who can become a lawyer and who attends this law school, but some things have remained constant, and that is that we continue to train lawyers and leaders for our democracy.

Mr. Potter is a remarkable example of such lawyers, lawyers in general, and UVA lawyers in particular who continue to shape and uphold our democracy in critically important ways. I'll be honest, not every legal career will involve regular appearances on late night television, but I do hope that every career includes something of what Mr. Potter represents-- lawyers who serve as educators, listeners, servant-leaders, and change-makers in service of our democracy.

The American Bar Association Journal has called Mr. Potter, quote, "Hands down one of the top lawyers in the country on the delicate intersection of politics, law, and money." We are just glad to call him one of our own. I'm pleased to welcome Trevor Potter back to the law school, and thankful that you will all get to hear from him and learn from him this evening. Please join me in welcoming him.

[APPLAUSE]

TREVOR POTTER: Thank you, dean, for that very, very generous introduction. If you wouldn't mind sending it on to me, I'll have it framed. [LAUGHS] On those down days I'll think, at least at UVA they appreciate me.

[LAUGHTER]

I also want to thank Chance and Alex and the team for everything you have done to put today together. I had a chance to hear this afternoon's panels and found them really interesting and engaging, and some of it gave me thoughts for my remarks tonight. I have been asked if I would start off in a little bit of a personal vein with my journey from UVA, and then I'm going to turn to some of the campaign finance and election legal issues that we have, and then with luck, I will do that in a short enough period of time that we can have a conversation and ask some questions.

I should note in passing that I'm standing in the Caplin Pavilion next to the nice plaque in honor of Mortimer Caplin, he was one of the people who has enabled my career when I joined Caplin

& Drysdale now 20 plus years ago. Mort was very welcoming, and Virginia meant a huge amount to him, as it did to me as a law student. So it's special to me in this space, which, of course, did not exist when I was here.

Lots of things have changed since I was here. As I thought about what I wanted to say tonight, I thought I would start by saying that I have been married for five years to a wonderful husband who I regret cannot be here tonight because he is off working hard elsewhere, and that we've lived together for many years. And I thought I'd say that because that is not a statement I ever dreamt I would make when I left Virginia in 1982 to become a government lawyer and then work in Republican political campaigns and eventually democracy work. I did not expect that I would ever be asked back at Virginia law for a discussion such as the one we've had today.

The existence of this conference is pretty remarkable to me as a 1982 graduate because I think it's safe to say that when I attended law school in Virginia, I did not know or meet a single openly gay law student during my three years here. So there have been enormous changes obviously in our world legally and socially. I would note-- and this is not my theme, so I'm not going to elaborate on it, but I think it's important to note that change is not irreversible, that some of the great changes in the world over the last 100 or 200 years have then been followed by great and unthinkable reverses. So complacency about where we are is not appropriate. Conferences like this I think help fight complacency.

But it's certainly true that we have seen a remarkable transformation of law in our immediate lifetimes. I count myself incredibly fortunate to have come to Washington in 1982 to be part of those changes, rather than, say, having arrived a few years earlier in the 1950s when the hunting and rooting out of homosexuals in government was becoming routine under the pressure of Joe McCarthy and his aide Roy Cohn and J. Edgar Hoover and his FBI. Given what we know and suspect about those people and their lives, the ironies are pretty awful, but so was the result of ruined lives and ruined careers.

If you haven't read the new book, *Ike's Mystery Man-- The Secret Lives of Robert Cutler*, I commend it to you. It is a thoroughly depressing read. But it captures a very depressing time in Washington. I actually arrived in Washington when some of the conflicted figures in that book, such as Joe Alsop, were still there, a neighbor of mine in Georgetown. He had survived famous blackmail attempts and was still publicly hiding his essential person.

My husband and I knew a top personal aide to Lyndon Johnson who was hounded out of government in the 1960s for being gay, Bob Waldron, a wonderful man who I think never recovered from that disgrace, though the Johnson family remained loyal and close to him to his death. I'm sure most 20th century presidencies had similar figures, and most congressional offices and most campaigns. It was the unquestioned spirit of the times.

I can recall Defense Secretary Dick Cheney being asked during the first Iran war in the first Bush administration whether a top civilian Pentagon aide of his-- a friend of mine-- was a security risk because he was rumored to be gay. This was a question on a Sunday morning national television show. Cheney's reply, which was, oh, I think that's a bit of an old chestnut, was a shock. You could hear hell freezing over all over Washington, that somebody-- a senior figure in the

government and in the Defense Department was questioning the orthodoxy that had excluded gay people from security clearances and senior levels in government.

After I had been out-- had been in Washington a few years and eventually had a coming out conversation with my mother, she reacted as many veterans of 1950s Washington would. She had had a short but serious career in the CIA during the Korean War, and she knew all about security checks and what being gay could do to a government career. She advised me, it will be OK as long as you never tell anyone and no one ever knows.

[LAUGHTER]

I knew that was not how I was going to lead my life, but I had no idea what being more open than that would mean for my career. It was unclear. Washington law firms I knew in the 1980s did not have gay lawyers that they acknowledged. And as any gay person who lived through those days knows, transitioning amongst colleagues from being single and apparently straight to being partnered and gay was not an easy thing to do.

But when I entered government in 1991 at the FEC where no one really knew me personally, I had the chance to start with a clean slate. So when I arrived at the FEC, I made it clear to my fellow commissioners and staff that I had a partner and introduced him to them. The sky did not fall. However, when I tentatively selected a young commission lawyer, who I did not know except for one job interview, as my legal assistant, a staffer for another commissioner took me aside to say that I was making a mistake, because I did not want to be known as, quote, the gay office. I was truly offended, not least of all because this professional advice came from someone I knew to be gay himself.

But those were complicated times to navigate with the world changing but not yet changed. When I was asked in 1999 to become the general counsel to Senator John McCain's first presidential campaign, I faced an awkward question-- what, if anything, did I say about being gay? By 1999, there was an obvious divide between the parties on legal rights for gay Americans. Much of the Republican Party was on the wrong side of that divide. I knew John McCain well enough by then to be pretty sure that he was not, but would he be comfortable if the press and his primary opponents pointed out that his top lawyer was openly gay?

I didn't want to become an unexploded or an exploded landmine on his political path. So I set the campaign manager down and asked him if McCain knew. He said he'd ask. A few days later, after I had waited on tenter hooks, he reported back with a smile on his face that John McCain had said, in the language he was famous for in Washington and military service, that he didn't give a F who anyone F'd as long as they did their F'ing job.

[LAUGHTER]

Another reason I love the man. I have been fortunate over the last 25 years to live through the great change of federal constitutional jurisprudence of the 1990s and 2000s. Just running down that list, I still find it extraordinary. *Romer v. Evans*, the decision out of Colorado where Justice Kennedy said, a state cannot so deem a class of persons a stranger to its laws.

Lawrence v. Texas, the Texas sodomy case, and other Justice Kennedy opinion, argued by my colleague at the Campaign Legal Center, Paul Smith, who was a former Supreme Court clerk, was then heading the Supreme Court practice at Jenner & Block, is now Vice President for Litigation and Strategy at CLC, and in that case, of course, the Court held by Justice Kennedy that it was unconstitutional to prohibit private acts-- homosexual activity. United States v. Windsor, which is the Defense of Marriage case, where the Court says that the federal government can't overrule state definitions, including same-sex marriage, and then finally, the marriage case itself in 2015.

These change the legal conversation that all of us had been having about-- and changed it at a much more rapid rate than I think anyone expected-- had been having about equal civil rights, and it left questions of balancing those rights against claims of religious freedom. But I think all of those cases and a couple others that I can think of-- and all you good law students know by heart-- the civil rights cases Brown v. Board and the One Person, One Vote case are important examples of the Supreme Court fulfilling a key role it has in our system-- and has adopted in our system-- of protecting the minority, whichever minority that is, from majority oppression.

It doesn't do this all the time and not every court takes that as its mission depending who's on it, but these cases in the gay area and civil rights, and again, the basic One Person, One Vote case are all instances where the Court intervened to protect rights against a majority that was imposing their view improperly, their personal views or their political preferences on their fellow citizens.

So for all of these reasons, I admire Justice Kennedy and his role on the Court greatly, but this is an election conference, not only an LGBTQ one, and I've got to admit that I have very mixed feelings about Justice Kennedy's time on the Court because to me, he's a hero in the cases I have mentioned, and he has had at best a tin ear, and in some cases, I think a really harmful effect on the country in his campaign finance and his election law cases. He was, of course, the key vote not only in the marriage case, but also in Citizens United, and a number of other election law cases.

I think, it appears-- and I'm not a Kennedy scholar, but it appears that he saw a connection between defending the rights of minorities to equal participation and what he viewed as the First Amendment rights of all Americans to spend as much as they had in elections under the First Amendment, that he appears to have seen both of these as instances of defending equal rights. They have a very different outcome in our system, obviously, because billionaires and corporations already had lots of power before Citizens United and related cases gave them greater opportunities to buy office holders and public policy.

So I worry about where we are from an election perspective in this country where I think we are becoming-- this year is a prime example-- really significantly less equal, and the First Amendment is being seen as a way for one billionaire to talk to another billionaire, leaving out much of the rest of the country in the process.

So let me just enumerate a couple the changes we have seen in the campaign finance area, say, in the last 20 years, the years I've been active in presidential politics and democracy, life in

Washington. We have lost the entire presidential public funding system. We had a system in which candidates received matching funds in the primary, full funding in the general. When Ronald Reagan ran for re-election in 1984, he attended four fundraising events for party committees because he didn't need any money, he had it coming from the treasury. Barack Obama attended 226 fundraising events in his re-election year because this system-- he wasn't participating in the system, and now nobody is participating in that system.

At the same time, we've seen an extraordinary increase in so-called independent political spending by billionaires and business interests. We went from about zero independent spending 20 years ago to the billions we see today. This is not limited to the presidency. Candidates running for positions across the country at all levels who are not personally wealthy are having to spend an unprecedented amount of time fundraising.

You heard that on one of this afternoon's panel where the speakers were asked why they didn't become candidates, and a constant theme was, I'd have to spend all that time fundraising. One of the speakers said he thought that they spent five to eight hours a day fundraising as a candidate. I asked afterwards what he thought they spent once they got to Congress, and he said, well, if you're in a competitive seat, you might spend five hours a day fundraising. So this has changed not only the nature of campaigns, but it changed the nature of government.

Furthermore, the people who are spending the money in the Super PACs or raising it have the ability to buy access to candidates in a way that ordinary Americans cannot. There are huge amounts spent on outside political advertising, much of it from hidden sources. We've seen hard evidence of past and present foreign interference in our elections. Political gerrymandering continues to make a mockery of the American promise of equal representation and impartial government action.

So how did we get to this point in our democracy? Among a whole range of factors, there are two things that stand out to me, and I'll talk about both of them. The first is the recent changes in the Supreme Court's jurisprudence, and the second is the simultaneous failure of the Federal Election Commission. So in terms of jurisprudence, you go back-- and Professor Ortiz and I had fun a couple of years ago teaching a election seminar, campaign finance seminar here and looking at the Buckley case, and when I described the Buckley case to people and say, well the Court ended up saying that the only reason that government can regulate money in politics is to prevent corruption and the appearance of corruption, and that nothing else is a legitimate government goal in regulating money in politics, they sort of look at you and then they say, well, I mean-- or to make sure that all the candidates have equal resources or that people get to hear all the candidates, and I say, no, that's not part of the corruption and appearance of corruption rationale, and in fact, the Court has in recent cases with some glee pointed out that a level playing field is a concept that is foreign to the Constitution.

So I think the public is in a different place than the Buckley Court was, but Buckley's thinking was if you can regulate corruption and the appearance of corruption, then you can regulate contributions to candidates and party committees, what you can't regulate is direct independent spending by individuals, because if it's not corrupt, then you can't limit it. And they said there's no evidence that independent spending is going to corrupt a candidate.

Now that assumption that a multi-million dollar independent ad campaign to elect someone to office will not corrupt the office holder or influence-- unduly influenced their actions in office or make them unduly grateful when you want something is more than an untested assumption. It runs against common sense, I think, but that's where the court came out and it's become the bedrock of our campaign finance jurisprudence, that independent spending won't corrupt.

So independent spending is fine without limit for individuals. We had a whole series of campaign finance cases leading to the McCain-Feingold Reform Act, and the Supreme Court again steps in and says, you can, Congress has a legitimate interest in preventing not just -- and I'm quoting-- "simple cash for votes corruption, but an interest in curbing undue influence on an office holder's judgment and the appearance of such influence." So the Court in the *McConnell v. FEC* case was willing to uphold almost all of the McCain-Feingold law, conscious that people thought that our system was corrupt or appeared corrupt and that people could buy influence and access.

But *McConnell* was a 5-4 decision of the Court. Justice Kennedy was in the minority. Justice O'Connor was the affirmative fifth vote. She was the only justice on the court to have ever run, at that time, to have ever run for public office, served in elected office, raised money, and I think she understood, in a way very different than her colleagues, what actual politics and fundraising was about, and was therefore inclined to defer to Congress when they thought it needed to be regulated. Her perspective was missing when the Court heard the *Citizens United* case in 2010 and extended that right to make unlimited independent expenditures from individuals to corporations as well.

Now I could spend a long time on *Citizens United*, I'm going to cut it down but just say-- one reason I'll cut it down is because I get-- my blood pressure goes so high at the many gymnastics the Court undertook to hear that case, ignoring the standing issues, creating a whole argument that hadn't been made by the plaintiffs, et cetera. That Court was hellbent on that decision. And they did so with a couple of-- now quite obvious-- erroneous assumptions. And each of those has created enormous problems for us.

The first is Justice Kennedy's thesis, which is, quote, "The appearance of influence or access will not cause the electorate to lose faith in this democracy." It's a complete reversal of where the Court was only a few years before. That statement has, of course, no footnote. It's a personal philosophy, not a statement of empirical fact. I can tell you having looked at it that every single national poll since then shows the electorate, in fact, losing faith in this democracy because of what they perceive as the power of money and special interests. So you have this Kennedy view that having access will not bother people. That's one.

The second is the theory that this independent spending will not be corrupting because it will be wholly an independent-- wholly and completely independent of candidates and parties. That's that Buckley theory. That it's not a problem because it's not in any way coordinated with the candidates, so when you give to these-- or make these independent expenditures, the candidate may not be grateful.

Now the problem with that-- first of all, that was followed by a decision by the DC Circuit called SpeechNOW, and the DC Circuit took it to the next step. The Court says, you can make independent expenditures. At the end of Citizens United, that means that Trevor Potter could go out and spend a million dollars on an ad, and under federal law, it would say "paid for by Trevor Potter." After Citizens United, it meant a corporation could go out and take out an ad and it would say paid for by United Airlines.

So the DC Circuit steps in and has a challenge before it to the \$5,000 contribution limit to a federal PAC, which the Court has upheld, contributions can corrupt, but this plaintiff says, I'm only going to make independent expenditures. And the Supreme Court has just said independent expenditures can't corrupt, so how can you limit the money I can take in if what I'm going to do with it is never going to be corrupting? You can't regulate it. DC Circuit buys it, and the DC Circuit says, you're right, as long as it's an independent expenditure-only PAC, what we now call a Super PAC, then it can take unlimited contributions from individuals and, thanks to Citizens United, from corporations.

That changes the world for another reason, which is, you now have these large sums of money that can be raised-- and they don't have to say paid for by United or Trevor Potter, they say paid for by Americans for a better country, whoever that is. And this pot of money is not subject to all those other campaign finance rules. So as long as it's wholly independent. So you all know those Super PACs, you know going back to 2012 the first big election after Citizens United, there was the Obama Super PAC. There was the Romney Super PAC. Wholly independent of the candidates, except President Obama announced his in the Rose Garden of the White House, Romney attended fundraisers for his, thanked the donors.

You move to 2016, Jeb Bush set up his Super PAC before he became a candidate, raised \$100 million for the Super PAC, then hand it to his designated campaign agent-- manager and went off to be an independent candidate while the Super PAC spent all that money wholly independent of the Bush campaign. Most recently, the Campaign Legal Center that I head, I will say, it turned out a great deal of fun with two people who we didn't know we're going to become famous. We noticed a large contribution from a corporation, a couple thousand dollars, to the Trump Super PAC. That would be the wholly independent entity that is headed by former Trump aides and campaign officials which has been officially endorsed by the White House in a statement that says, that's our official Super PAC.

So that group accepted a couple thousand-dollar contribution from a corporation. And one of the things the Campaign Legal Center does is look at that to say, so which corporation is this? What are their legislative interests? Is it yet another prison corporation giving to the Trump machine? What's up? This corporation doesn't have a website, it doesn't have any visible business activity, internet search tells us it was created a couple of weeks before the contribution in Delaware, looking more interesting, because there's a provision of the federal law that says you have to disclose the donor to a Super PAC and it has to be the true donor. And so if it's a shell corporation and someone has put the money in it to give the contribution, they are hiding the true donor and that's a violation of federal election law, and we can file a complaint with the Federal Election Commission, which we did.

And we said, here's what we found, we don't know who this is, but it isn't the corporation's money because it doesn't have any business. And we have discovered through web search and looking at addresses and so forth that there are two Ukrainian Americans who are involved with it-- actually, we don't know they're Ukrainian Americans, but they're two people who are involved, Lev Parnas and his associate Igor Fruman, and they've given the money.

So we filed the complaint. We get a call from a lawyer in Long Island who says, I've seen the press report of your complaint, did you say they gave several thousand dollars or had anything to do with several thousand dollars? Because my clients have a judgment against them in Florida court for fraud in a movie deal, and they say they're judgment-proof. They don't have any assets. So we file that with the Federal Election Commission and say, well, we don't know whose money it is, but these people have said they don't have any assets at all.

The Florida court then subpoenas the wire transfers to the Super PAC, and that means the wire transfers in and out of the stated company that gave it, and it turns out, of course it wasn't the company's money, it's not quite clear whose money it was, some of it came from overseas, and this is all looking a lot more interesting. These turned out, after the US Attorney in the Southern District of New York got a hold of it and indicted them, to be what we now know as the Giuliani impeachment Ukrainian Americans who had tape recorded their conversation with President Trump at dinner at the wholly independent Super PAC dinner that the president went to for large Super PAC donors.

So what do we take out of an example like that? It wasn't illegal according to the Supreme Court that they bought influence. It wasn't illegal that the independent PAC introduced them to the president at dinner. What turned out to be illegal is they hid the source of the money from their contribution. But if you read the US Attorney's indictment of them, it's clear that this group of lawyers in New York thinks the whole thing ought to be illegal, that the corruption involved in giving hundreds of thousands of dollars to a supposedly independent group to get a meeting with the president to urge him to fire the US ambassador, all of which is laid out in the indictment, is the underlying problem with our current campaign finance system.

Now the final piece of Citizens United that I think was mistaken, was erroneous was Justice Kennedy's notion, don't worry about it, because all of this will be fully disclosed. And his words were, corporate shareholders will know how their money is being spent, and citizens will know who was attempting to influence them. Well, I referred to dark money-- that is, money that is not disclosed but used for campaign ads, and that has become a particular feature of our campaign finance system. Justice Kennedy was asked about this at Harvard Law a couple of years ago and why this was happening, and he said, I don't know, but it's not working the way it should.

So in a moment I'll tell you one reason it's not working, which is the FEC. The other is that the Supreme Court didn't envision in their decision that there would be Super PACs with names other than the corporation on it or the individual. Nobody understood, I think, that you could have groups that didn't report their donors at all, because they were 501(c)(4)s, other nonprofits, even corporations created for political spending.

So we have ended up in a world where all this money is being raised and spent, and it is perfectly possible to decide to spend a billion dollars without anyone knowing where it came from and who you are. I would say parenthetically that this, of course, presents an enormous problem in terms of policing the ban on foreign money in US elections because you can't trace it, it's not public. And some of the money from the Ukrainian Americans turns out to have been foreign money. So those are the couple areas, complete lack of independence, and serious non-disclosure that Citizens United has created for us contrary to what the Court thought was going to happen.

One other area where the Court I think has badly got it wrong is in the gerrymandering decision, and I won't go into great detail on this. I think you're all aware that the Court held last June that claims of excessive partisan gerrymandering were non-justiciable, that the federal courts would not hear them, the courthouse doors are closed to complaints that somebody has violated the Constitution by stacking a state legislature or a congressional delegation with one party or the other. It's an odd case, because the Court had deadlocked for some years.

They had apparently agreed 9-0 in the Vieth case going back 15 years that it was unconstitutional to have excessive partisan gerrymandering, but they deadlocked over what excessive was, how to judge it. Justice Kennedy had been the swing justice saying that he didn't know what the right test was, but if there was one, then he would agree that that was the standard.

So Campaign Legal Center argued the Wisconsin case now two years ago where we thought we had strong proof that this was an excessive partisan gerrymander. The Democrats won the election, the Republicans won 60% of the seats after the gerrymander, and there was a lot of evidence in the record of how that had been done, but Justice Kennedy was still not convinced that the tests used by the court in Wisconsin were sufficient, so it was sent back for further argument and questions on standing. A couple of days after that decision by Justice Kennedy, he resigned from the court.

So last June, we faced a different Court with Justice Kavanaugh there, and you had two cases before the Court-- a Democratic gerrymander in Maryland, a Republican gerrymander in North Carolina. Essentially no dispute that these were partisan gerrymanders, partly because in North Carolina, they were afraid that they would be found to have racially gerrymandered the state, and they thought their defense was to say, no, no, it wasn't racial, it was purely partisan. We were not trying to harm minority voters, we were only trying to harm Democrats. And that's pretty much on the public record and sworn statements in the case.

So the court could have stepped in and said, it's undisputed, they were extreme partisan gerrymanders, both parties do it. The Court has in both states come up with tests, and so when it's this extreme, we're going to prohibit it or allow the test to go forward in court. Instead, five justices took the view that these are cases that should never be heard in federal court.

So where does that leave us on the gerrymandering side? If you're in a state that has citizen initiatives, you can get one on the ballot. If you're in a state that has citizen initiatives and doesn't already-- hasn't already use them to get an independent redistricting commission, then go home and file a petition, because they always pass. It's really interesting. Citizens do not like gerrymandering, they can smell it, and they will vote for these things. And my example is, the

state of Utah just approved an independent commission by ballot initiative even though it is heavily Republican and it's the Republican legislature that's doing the gerrymandering. The party opposed the initiative, it's still passed.

So great if you have ballot initiatives, but much of the country doesn't. Instead, you have to amend the state constitution or you have to make an argument in state court that the gerrymandering violates the state constitution, which, of course, is not governed by the Supreme Court decision. I would note, since we're standing in Virginia and not too far from the capital, that this is the last week for the Virginia legislature to approve a constitutional amendment which would put an independent redistricting commission on the ballot this year for voters to vote on. Virginia's one of the old line states-- big surprise-- and they don't much like a popular democracy in old line constitutions.

So in order to get a amendment to the state constitution on the ballot in Virginia, it has to pass the legislature twice in two-- once in two consecutive sessions. And it did last time. This time it's gone through the Senate, it's before the House, it passed the Committee I think yesterday or the day before. Tomorrow is the last day of the session, it has to pass the House, and as I was sitting here before speaking, I got the email that there is going to be a vote on an alternative proposed by the speaker. If the alternative passes, there will be no amendment on the ballot this fall because it won't have passed two consecutive sessions. So the only thing I would draw from that is incumbents don't like giving up their power to gerrymander. That's why we made the argument in the Supreme Court that the courts ought to step in. We'll see what happens in Virginia, but it's difficult if the federal courts are not going to get involved.

Now what I noted was that in addition to problems at the Supreme Court and the federal court level, we have had problems with the Federal Election Commission. The FEC was one of the cornerstones of the post-Watergate reforms. It was actually Republicans who pushed for it because there was a Democratic Congress and Republicans didn't trust a Democratic president and a Democratic Congress. It's a rare structure. There's one other commission in Washington like it in that it has six commissioners-- not exactly an odd number-- and four votes are required to take any action. So 3-3 is a deadlock, nothing happens. You have to have four votes. And the final piece of it, of course, is not more than three members from any one party. So in effect, you have three Republicans, three Democrats, and they have to agree in order to take any action.

Now when I was there, we would have lots of disputes and arguments, but they went along the lines of, I'm going to vote for you and your belief that that person violated the law, but he's a Democrat. And the next time when someone violates the law and they're a Republican, you damn well better vote with me. So it was a partisan parity, the commissioners on both sides felt the law ought to be enforced, but it ought to be enforced equally against both parties. And I think that's what Congress had in mind when it created a 3-3 commission and said you had to have four votes.

What I do not believe Congress ever thought would happen is that three commissioners who were ideologically opposed to the role of the commission-- the existence of the commission-- would be appointed commissioners and would publicly and shamelessly go in and vote again and again and again and again to deadlock the commission, which is what's happened for roughly the

last 10 years. So you have politically-appointed commissioners, each party more or less gets their three, and the Republican commissioners have simply prevented the place from working. They deadlocked for two years after Citizens United over whether to open a rulemaking to incorporate the Citizens United decision into the FEC regulations.

Sounds odd. The reason was that the Democrats said, well if we're going to have a rulemaking, we ought to ask how we're going to enforce the disclosure of the spending that Justice Kennedy said is our job to disclose. The Republicans refused to put the word disclosure in the making. So finally after two years, the Democrats caved, and there was a rulemaking with no disclosure.

So when I said that I thought the FEC was responsible for some of the failures of Citizens United, the disclosure is the obvious one, where the commission has deadlocked, saying groups don't have to report, spending is not political, spending-- (c)(4)s aren't political committees, they can spend millions of dollars on political ads, and the commission won't do anything about it. That has been the case whether it's opening new rulemakings, issuing advisory opinions, or enforcing the law.

Today, as in right now in the middle of March, there actually aren't any 3-3 ties. That the world has changed. There are not four commissioners, so they're-- well, whatever that'd be. 2-1 ties if there were a vote. There is no vote. The last commissioner constituting a quorum left six months ago, and the commission has been sitting there unable to meet ever since in a conceivably somewhat consequential election year where there might actually be questions for the commission to answer

So there are ways to fix the FEC dysfunction. There are bills that have passed the House to make it an odd number, to give the general counsel the final say on his recommendations or her recommendations if the commission deadlocks, to provide for more court review, but none of those are going anywhere in the Senate at the moment. So we have these two pieces of our system, the Supreme Court jurisprudence by a Court that I think really fundamentally doesn't understand how politics works, or doesn't care at this stage, I'm not sure which, and an FEC which is now legally incapable of functioning, and normally practically incapable of functioning.

All of this is hard to explain to non-lawyers who look at this and say, why isn't the system working the way it should and how have we ended up with all of this money when, if I read the law, it doesn't say that, or I read Citizens United and it says it's not going to come out that way, but that's why we go to law school, right? So we can explain the mysteries of the world to everybody else.

It's really a great privilege to be here tonight to talk about these issues. I love my work at the Campaign Legal Center and I'm lucky to be able to do it, and I'm lucky to do so in 2020 where my civil rights are not where they were when I started on this path. So with all of that, thank you, and I'm happy to take questions and talk for a few minutes before the wine bar opens.

[APPLAUSE]

AUDIENCE: Sure. Hey, thanks, for coming Trevor-- Mr. Potter.

TREVOR POTTER: Trevor's fine.

AUDIENCE: Trevor. Awesome. So we're pretty aligned on LGBT issues and gerrymandering, but we're very not aligned on campaign finance.

TREVOR POTTER: I figured there was at least one person in the crowd who would be that way.

AUDIENCE: I actually used to work for the guy behind SpeechNOW, David Keating.

TREVOR POTTER: Sure.

AUDIENCE: So I got a little bit of a chuckle there.

TREVOR POTTER: Mm-hmm.

AUDIENCE: So I want to see if you agree with me descriptively on something, even if you don't agree with my solution. Pre-Citizens United, isn't it right that like one person could spend, say, \$100,000 on an ad just themselves, like self-funded, you could have 100 people give to a PAC, \$2,500, fund the same ad, but if you had, what, 10 people each give \$10,000, that would be a violation under McCain-Feingold. And it's of arbitrary.

So either I think that-- either you like lifting the limits on everyone or you'd rather see caps on everyone, even the self-funder, but either way, it's kind of an arbitrary system of caps. Do you agree with that descriptively?

TREVOR POTTER: I don't agree it was arbitrary and therefore implicitly wrong and indefensible. You're absolutely right, that an individual could spend \$100,000 for the ad, individuals gathered together in a group should only give \$5,000 each for the ad, that's correct. The effect of that was that it was harder for groups to raise huge sums of money and spend in elections, although some did, but it was harder because of the limit, I agree.

If an individual did it, their name went on the ad so people knew who the individual was. And I think that is significantly different than having 10 individuals each give their \$100,000 or their \$1 million or their \$10 million where-- let's assume it were disclosed, let's assume we didn't have a disclosure problem. Where still, you don't really know-- for the average citizen, I mean, you call it Americans for a Better Country, whatever you call it, people are not going to know who those people are or what their interests are. A good reporter can go do the research if it's disclosed and figure it out, but to me, there is something fundamentally different between a group operating behind a committee name spending money and an individual standing up and doing it-- or even a single corporation standing up.

And so to me, the SpeechNOW case was about that line being drawn, and in terms of whether it's arbitrary, any line can be called arbitrary. Why should it be a \$10,000 contribution and not a \$10,001 contribution? There's a line. So I didn't think the \$5,000 was any more arbitrary than other lines.

AUDIENCE: I had a question about-- you we were talking a lot about the consequences of increased independent expenditure spending, and I'm wondering if you've noticed anything specifically with the rise in digital ads and seeing how that has changed sort of the political spending landscape, especially because like reporting isn't always up to par on those.

TREVOR POTTER: I love that understatement. Reporting is not always up to par--

AUDIENCE: That's a mild statement. I also work in campaign finance and digital reporting is the nightmare on the client side, so yeah.

TREVOR POTTER: Yeah, I mean, digital is-- we're dealing with a law that was written before digital. Part of the Russian expenditures in the last election was for paid advertising, paid digital advertising. There is no requirement in the law that those ads say who paid for them, because what we're used to is radio and TV and newspapers, and the law is clear-- the box has to say paid for by and whether it's authorized by a candidate or not. There is no such requirement for digital.

So one aspect is, we don't have a regulatory requirement for that sort of disclosure. What we're seeing after 2016 is a patchwork of responses by private corporations under pressure or conceivably competing with others for a market advantage over what they're going to disclose. So now everybody has different policies about what you have to tell the corporation-- in the case of Facebook, because they don't want you to be a Russian. That doesn't mean they're going to make it public. So you may not know who paid for the ad, but they will know at least you're a US citizen, something like that.

There's a proposal before Congress called the Honest Ads Act which would essentially just import in do digital regulation the rules for radio, TV, et cetera. But digital is morphing. I'm in the middle of several conversations now with people who are in the business who are telling me, oh, 2016 and those Russians, that's so passe. That's not what's happening now. And you see some of it in the stuff that Bloomberg was doing where he's paying people to mention him on their blog. It's not at all clear whether the disclosure rules cover any of that, and even though limits on foreign nationals are there, if you don't have disclosure, it's hard to find them.

So I do think we're seeing a big move into digital, and we saw it with Trump last time, you're seeing it with Bloomberg now, but it's-- some of it's paid advertising, a lot of it will be shared communications. The microtargeting is another really interesting area. If you think about our-- looking around the room, I think it's still our common shared experience, for those people who see a television ad on whatever, you know that thousands, tens of thousands of people are seeing that television ad. It's public in that sense, the press can see it. There are actually files that are required to be maintained by law-- they're not always easily accessible, but you can go to the station and get a copy of the ad and know what was communicated.

So if it's absolutely false or it's libelous, you have the ad and you can do something about it. If your opponent is saying something about your record that's completely untrue, you can go look at the ad and you can tell people why it's untrue. That doesn't happen with digital microtargeting. There is no public record of what's being said. And so you can go into a tiny group of voters and tell them the sun rose in the west yesterday, and if those are people who are susceptible to that

argument and there's a picture of the sun rising in the west on their screen, nobody knows it's happening. The candidate is a-- whatever you want to do to say something awful about the candidate-- it can't be rebutted if you don't know it's not being said-- if you don't know what's being said, and that's what we're getting with microtargeting.

So should there be publicly available databanks of ads that are run? I think so. Should they be done by the corporations themselves? I think so. Is that something the government can mandate? I don't know. So those are going to be very interesting questions, and I think really potentially dangerous for our public discourse.

CREW: All right. I think we have time for one more question.

AUDIENCE: Yes. I just wanted to kind of ask where you think we're going just generally how elections and campaigns finance themselves. So we're seeing like a big proliferation of self-funding. Of course, it's happening for two candidates on the Democratic side this year, it's happened in Illinois in 2018, on both sides of that gubernatorial election, but we're also seeing something kind of special where we're seeing a lot more grassroots fundraising at pretty huge levels, especially in the presidential campaign and for House and Senate races across the country.

And I'm kind of wondering, is it just going to be that kind of bifurcating of how we fund ourselves? And is there any room for maybe kind of like a more populous way of us funding ourselves? Like is it going to be possible for these big deal national campaigns to fund themselves completely off people, and is that maybe even how we get out of the rut of being super financed on some sides?

TREVOR POTTER: Yeah. Great series of questions. A couple of years ago I was asked to do a debate on-- the title was, which system is better, the American or the British political election system? And I was asked to do it with a member of the House of Lords. This is going to be fun! So I get up there and they trot out the member of the House of Lords, and I'm a little nervous because you're not supposed to pick on little old ladies and this was the archetype, I would have guessed 79-year-old little old lady with gray hair and sort of look like Jane Marple for those of you who ever saw those television shows. And I thought, well I'll be polite and I won't hit below the belt, and I'll talk about democracy and equality and she'll talk about the House of Lords and this will be good.

So she gets up there and she says, I'm so looking forward to hearing Mr. Potter speak, because I really don't understand the American system. In my country, we believe that everyone has an equal right to participate in politics, and we have people from all walks of life who are in Parliament, and in your country, you seem to believe that only the very rich should be in government. And how do you justify that? I'm like, oh, I'm really in trouble. Nobody told me she'd been an actress before she was put in the House of Lords, so she knew what she was doing.

But that, I mean, it is not commonly known that when Congress reform the election laws and the campaign finance laws after Watergate, they not only limited contributions and expenditures, but they included in that limit the amount that a candidate could spend of their own funds, because they didn't think that a millionaire should be able to buy a seat with their own money. And that

was thrown out by the Supreme Court under the "you can't corrupt yourself" rationale. You can only limit money if it's corrupting; if it's your own money, how can you corrupt yourself?

And you could see the political world change almost overnight. I actually know someone who was running for the Senate that year against John Danforth in Missouri, former Congressman Symington. And he said, we were even in the polls, the decision came out in June, John Danforth was the Ralston Purina heir, and the next thing I knew, he was spending millions of dollars that I didn't have and had no way of raising, and he cleaned my clock in the fall.

So I think we sort of accepted the idea that you can't limit candidate spending, but most democracies do. Most democracies have free speech as we would see it, and yet still say there can be limits on candidate spending, what you can spend on your own race. So that's not though the world we have at the moment in terms of how the Supreme Court reads the First Amendment, but that's a piece of your question, is you have this whole pile over here that cannot be disturbed, and of course it's true. You look around the country, who's in Congress now? Who's in the Senate? Who's in the governorships? A far higher percentage of those offices are held by people who are immensely wealthy than would otherwise be the case. So you've got that.

Then you have all this so-called independent spending in the Super PACs, which is another very large amount of money which we either can't limit or aren't limiting. We could say, if it's coordinated with a candidate the way I've described, then it doesn't fit within the ability to raise unlimited amounts, but that would require an enforcement agency. So you've got all that big money, we don't have a public funding system either at the presidential level or congressional-- some states do, some cities do-- that would be an alternative way to finance elections.

And let me be clear-- I think the only realistic approach is to have public funding available to compete with all the private money we're going to have. I do not think you will, quote, "get money out of politics," I don't know how you would, I don't think constitutionally at this stage you can, at least provide alternative sources of funding so that candidates who didn't have all that money or didn't want to rely on a billionaire could still run and still have a path to have enough money to be heard and compete. It may not keep up with spending, but you have to still be heard.

So the third piece you asked about was, so what about the sort of populist approach that we're seeing where some candidates are able to do very well over the internet-- and Sanders being an obvious one, Trump being the other-- mobilize their very passionate bases and raise money? There's an interesting piece in the Post by a political scientist a couple of weeks ago who pointed out that the characteristic of that system is that really passionate people give money, and they give small amounts and they keep giving and there are a lot of really passionate people, but my hands are out here because they tend, said the article, to be on the right wing of the Republican Party and the left wing of the Democratic Party.

And so that political scientists, lawyer Rick Pildes says, is that really the way we want to finance our elections where the people who have resources are at the extremes of their two parties? And doesn't that lead to polarization-- greater polarization? So that's a question, and also that works for really well-known people running for president, it can work for one or two people who have become media darlings of the right and the left and are often highly controversial in order to

become media darlings, but what about the average congressional race? I mean, whoever's running in this district is not going to raise much money on the internet in either party. They're not known, that's not how it works.

So I think we've really got some challenges there, and one of them would be trying to come up with resources available to candidates and the parties without having to rely on the very wealthy or the very extreme passionate donors. Thanks.

CREW: All right, everyone. Thank you for coming out tonight. Really appreciate you coming out. If you would, please join me in giving a round of applause to our keynote, Mr. Potter.

[APPLAUSE]