

# “ELECTORAL EXCEPTIONALISM” AND THE FIRST AMENDMENT:

## A ROAD PAVED WITH GOOD INTENTIONS

GEOFFREY R. STONE\*

The Supreme Court’s recent decision in *Citizens United v. FEC*<sup>1</sup> reignited debate over whether the First Amendment should be understood as incorporating a principle of “electoral exceptionalism.”<sup>2</sup> Before considering that question, we need some sense of what might be meant by such a principle.

First Amendment jurisprudence comprises many different doctrines, concepts, and standards, such as content-neutrality, low value speech, clear and present danger, prior restraint, incidental effects, strict scrutiny, balancing, public forum, least restrictive alternative, and so on. In the usual First Amendment case, it is necessary to (1) determine what type of issue is presented, (2) decide what standard governs that particular issue, and (3) apply that standard to the facts to determine whether the challenged restriction of speech is constitutional.

For example, suppose a law prohibits the use of any loudspeaker in a residential neighborhood after 8:00 p.m. This is a content-neutral regulation of speech. It is therefore constitutional if the state interest is sufficient to outweigh the restrictive effect of the law. Because the law has a relatively modest impact on speech and a reasonable justification, the law will be upheld.<sup>3</sup>

Or, suppose a law prohibits the use of any loudspeaker in any place at any time. This, too, is a content-neutral regulation of speech, so the same standard will apply. But because this law has a more significant impact on speech and applies in circumstances in which the justification is more attenuated, this law will be invalidated.

Finally, suppose a law prohibits the use of any loudspeaker by anti-war

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\*Edward H. Levi Distinguished Service Professor of Law, University of Chicago. I would like to thank the University of Chicago Law School’s Leonard Sorkin Law Faculty Fund for its generous support of my work.

1. *Citizens United v. Fed. Elections Comm’n*, 130 S. Ct. 876 (2010).

2. See Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1805–06 (1999).

3. See generally John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975) (analyzing the categorical and balancing approaches to the First Amendment in the context of flag-burning cases); Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 446–63 (1996) (arguing that the doctrine’s focus on the effects of a challenged law amounts to an attempt to ferret out improper governmental motives in passing that law); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987) (examining the nature of content-neutral review).

speakers in a residential neighborhood after 8:00 p.m. This is a viewpoint-based restriction, which triggers a very different standard. Because viewpoint-based laws are thought to threaten core First Amendment values, this law is presumptively unconstitutional and will be upheld only if it is necessary to serve a compelling state interest, a test that clearly cannot be satisfied in this situation.<sup>4</sup>

The point of all this is simple. As a general rule, the task of a court is to determine what standard applies in any given situation, and then to apply that standard fairly and consistently to the facts. I don't mean to suggest, by the way, that this is like "call[ing] balls and strikes."<sup>5</sup> Deciding what the appropriate standard should be is often quite complex, knowing how to classify particular situations can be maddeningly difficult, and applying the appropriate standard to particular circumstances often demands considerable judgment. What is clear in principle, however, is that this general approach ordinarily applies to all First Amendment issues.

What, then, is electoral exceptionalism? Suppose a law prohibits the use of any loudspeaker in a residential neighborhood after 8:00 p.m., except that candidates for public office are permitted to use a loudspeaker until 10:00 p.m. within thirty days of an election. This is a content-based, but not viewpoint-based, law that provides a special dispensation for electoral speech. One way to understand electoral exceptionalism is to ask whether the First Amendment *allows* government to give special benefits to electoral speech. At least as a first cut, this seems quite sensible.

Alternatively, suppose a law prohibits the use of any loudspeaker in a residential neighborhood after 8:00 p.m., and this law is challenged by a political candidate on the ground that even though the law is generally constitutional, it should be held unconstitutional as applied to political candidates within thirty days of an election. Here, the claim of electoral exceptionalism is not that the First Amendment allows the government to give special benefits to electoral speech, but that it *requires* the government to do so. Although both of these positions seem plausible because electoral speech is at the very heart of the First Amendment and therefore might well merit special benefits, neither of these situations implicates what the proponents of electoral exceptionalism mean by the term.

What advocates of the term mean by electoral exceptionalism is illustrated

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4. See generally Kagan, *supra* note 3, at 444–45 (discussing the relation between content-based and viewpoint-based laws and noting the latter are “almost always” invalidated); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982) (exploring the development and application of the presumption against content-based laws); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983) (explaining the dichotomy between content-neutral laws and content- and viewpoint-based laws).

5. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts).

by the following situation: Suppose a law prohibits the use of any loudspeaker in a residential neighborhood after 8:00 p.m., except that political candidates may not use a loudspeaker at all in a residential neighborhood within thirty days of an election. Here, the law restricts electoral speech *more* than other speech. This might seem perverse because, as the Court has observed, the First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office,”<sup>6</sup> but that is precisely what the proponents of electoral exceptionalism mean by the term. It is not about giving electoral speech *more* protection than other expression, but about giving it *less* protection. As Frederick Schauer and Richard Pildes have argued, 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.”<sup>7</sup>

Now, in the hypothetical I just posited, there are two possible arguments for the constitutionality of the law. First, the government might argue that electoral speech in this context poses special harms that justify the restriction of electoral but not other kinds of speech, even though the same constitutional standard applies. For example, the government might argue that political candidates often run amuck in the days leading up to an election, and that to ensure reasonable peace and quiet in residential neighborhoods it is necessary to exclude them entirely from using loudspeakers during those thirty days. If this is the government’s argument, then it is simply asserting that, applying the ordinary standards of First Amendment review, it has a legitimate interest in banning electoral loudspeakers within thirty days of an election that is more weighty than its interest in banning other uses of loudspeakers, and that the restriction is constitutional for that reason. That is not what the proponents of electoral exceptionalism mean by the term.

Second, the government might argue that elections are such a distinctive context for speech that the same First Amendment standards that govern other types of speech should not apply to electoral speech. That is, the government might insist that it should have special leeway to regulate electoral speech, in ways it could not restrict other speech, in order to promote the electoral process. On this view, the loudspeaker ban would be permissible, not because the government can satisfy the ordinary standards of First Amendment review, but because a more deferential standard of review is appropriate when the government regulates electoral speech than when it regulates other forms of expression. This is what the proponents of electoral exceptionalism mean by the term. Does this make any sense?

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There are several “exceptionalism” situations in First Amendment doctrine

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6. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

7. Schauer & Pildes, *supra* note 2, at 1806.

in which a particular restriction of speech would be unconstitutional under ordinary First Amendment standards but is constitutional because the Court applies a different standard in response to the distinct circumstances of the situation. For example, the government ordinarily cannot constitutionally prohibit individuals from discussing politics, but a public high school can discipline a student who insists on discussing politics instead of mathematics in class. In light of “the special characteristics of the school environment,” the Court has held that freedom of speech in that setting can be restricted if it would “materially and substantially interfere” with the operation of the school.<sup>8</sup>

The argument for electoral exceptionalism proceeds along similar lines. That is, the argument posits that, although the government generally cannot constitutionally prohibit speakers from expressing their views, it should be able to do so when the speech takes place in the context of an election.<sup>9</sup> To test this proposition, we must assume that, under ordinary standards of First Amendment jurisprudence, a particular restriction of speech would be unconstitutional, and then ask whether the fact that the speech takes place in the context of an election justifies applying a less stringent standard of review. To reiterate, the claim of electoral exceptionalism is not that the government interests in the electoral context are sufficiently weighty to justify otherwise unconstitutional restrictions of speech. Instead, it is that the fact that the speech takes place in the context of an election warrants diluting the standard of review.

At first blush, of course, one might reasonably think that the electoral setting would, if anything, justify even *greater* protection for speech. After all, such speech is most fundamentally what the First Amendment is about. But the electoral exceptionalism argument is precisely the opposite—that the government should have greater authority to *restrict* speech in the electoral context than otherwise. This seems to stand the First Amendment on its head. But it is not so simple. In the mathematics class hypothetical, for example, the school could constitutionally discipline the student for talking politics, even though that speech lies at the very heart of the First Amendment.

In the context of a case like *Citizens United*, then, the issue may be posed as follows: Assuming *arguendo* that under generally applicable First Amendment standards the government could not constitutionally forbid corporations and labor unions from endorsing or opposing policy positions as part of general public debate, can it nonetheless forbid them from endorsing or opposing political candidates during the course of an election? And, again, for the sake of clarity, I must emphasize that the question is not whether the government’s interests in the electoral situation are more weighty than in the general public debate situation, so that its electoral restrictions would pass muster under generally applicable First Amendment standards. The question instead is

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8. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 509 (1969) (quoting *Burnside v. Byars*, 363 F. 2d 744, 749 (5th Cir. 1966)).

9. Schauer & Pildes, *supra* note 2, at 1806.

whether there is something unique about the electoral context that justifies the application of a *less speech-protective* standard of First Amendment review.

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In fact, the Supreme Court has recognized a number of “exceptional” speech environments in which generally applicable First Amendment principles do not apply. I have already noted one of them: public schools. Another is the courtroom. We accept all sorts of limitations on free speech in the courtroom that we would never accept in general public discourse. For example, in the courtroom the government bars speech that consists of hearsay, that it deems unduly “prejudicial,” and that it judges to be “irrelevant.”<sup>10</sup> We would scoff at the suggestion that such limitations would be appropriate in general public debate.

In such “exceptional” environments, the Court has concluded that the ordinary assumptions of the First Amendment are inapplicable. Both the classroom and the courtroom have distinctive purposes. If the generally free-wheeling principles of public discourse governed these environments, they would not be able to serve their basic purposes. Imagine the educational process if students could talk in class about whatever topic happens to interest them, as they can do in a park or in a car or online. Or, imagine the judicial process if lawyers and witness enjoyed the same degree of free expression that they have in general public discourse. Evidentiary rules governing hearsay, privilege, relevancy and the like would all go by the boards. Thus, in these “exceptional” environments, the Court has recognized that the fundamental assumptions of free speech are inapplicable—not because the government interests in regulating the speech satisfy the ordinary standards of First Amendment review, but because these environments simply could not function in if the usual rules of free speech applied. Thus, the law recognizes what we might call educational and judicial “exceptionalism.”

This concept is not limited to schools and courtrooms. The Court has extended the same basic idea, for example, to prisons<sup>11</sup> and the military.<sup>12</sup> In these environments, too, the Court has recognized that the basic assumptions of First Amendment theory cannot apply if prisons and the military are to function as intended. The Court has therefore held that the government can exercise greater authority to regulate speech in these settings than it can in general public discourse. The Court has recognized, for example, that “the military is, by necessity, a specialized society separate from civilian society,” and that a military unit “is not a deliberative body.”<sup>13</sup> Thus, although “members of the

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10. See Geoffrey R. Stone, *The Rules of Evidence and the Rules of Public Debate*, 1993 U. CHI. LEGAL F. 127 (1993).

11. *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 125–26 (1977).

12. *Parker v. Levy*, 417 U.S. 733, 743–44 (1974).

13. *Id.*

military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.”<sup>14</sup> As in the education and judicial contexts, the Court gives the government a relatively high degree of deference when reviewing speech restrictions governing soldiers and prisoners. There is therefore military and prison “exceptionalism.”

One characteristic that classrooms, courtrooms, the military, and prisons have in common is that they are traditionally and functionally so lacking in the essential prerequisites for free expression that it would make no sense to apply the same First Amendment rules that protect general public discourse to them. Put simply, prisons, the military, classrooms, and courtrooms do not, by their very nature, reflect or embody the fundamental premises of free expression, nor could they realistically serve their intended functions if they were subsumed within the general marketplace of ideas. Indeed, there is a real danger that if we insisted on applying the ordinary standards of the First Amendment to such settings, we would ultimately wind up *diluting* the protection the First Amendment offers speech in general public debate. So there is even a good First Amendment reason for recognizing school, prison, military, and courtroom “exceptionalism.”

But the principle goes much further. The Court, for example, applies this approach to regulations governing the speech of public employees.<sup>15</sup> For example, although a newspaper or blogger has a constitutional right to disseminate information obtained from leaked classified documents (at least in the absence of a clear and present danger of grave harm to the national security),<sup>16</sup> the public employee who leaked the information can be punished under a much more lenient standard.<sup>17</sup> The general standards of First Amendment review do not apply to public employees, because the government could not perform its basic functions if its employees had the same free speech rights relative to their employment that they and other citizens enjoy in general public discourse.<sup>18</sup> The Court, in other words, has recognized what we might call public employee “exceptionalism.”

There are still other examples, more closely tied to the electoral process. In town hall meetings and legislative sessions, the government can constitutionally impose more restrictive regulations of speech than in general public discourse.

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14. *Id.* at 758.

15. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

16. *Cf. N.Y. Times v. United States*, 403 U.S. 713, 714 (1971) (refusing to enjoin two newspapers from publishing the Pentagon Papers).

17. See GEOFFREY R. STONE, *TOP SECRET: WHEN OUR GOVERNMENT KEEPS US IN THE DARK* 5–17 (2007) (detailing the circumstances in which government employees can be held liable for leaking information to the press).

18. *Pickering*, 391 U.S. at 568 (“[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”)

The number of speakers, the order of speakers, eligibility to participate, the topics to be discussed, and the length of time one may speak are all subject to restriction in ways that would never be permissible in a public park or in newspapers or online. Here, too, the Court has recognized that even though the activity in such settings is at the core of the First Amendment, the need to enable these entities to achieve their essential functions justifies a significant departure from general free speech standards.

Similarly, electoral ballots, polling places, and candidate debates all can be regulated in ways that would clearly be unconstitutional in general public discourse.<sup>19</sup> No one has a First Amendment right to cast a ballot for someone who is not on the ballot, candidates can be required to comply with time limits and to stick to the topic in government-sponsored candidate debates, and government can constitutionally restrict speech near polling places. In all of these situations, the Court recognizes that applying general First Amendment standards would wreak havoc on the ability of these institutions to serve their most essential functions. These are all settings in which the very principle of free speech, as ordinarily understood and applied, is incompatible with the underlying assumptions and realities of the institution. First Amendment “exceptionalism,” in other words, is commonplace.

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Of course, there must be a limit to these exceptions, or they would swamp the First Amendment. But focusing on these examples should not lead to the erroneous conclusion that general First Amendment principles are themselves the exception rather than the rule. In fact, these exceptions constitute only a small fraction of the overall free speech regime. They are, indeed, exceptions.

If the First Amendment is to remain robust, it is important for these exceptions to be well-founded and carefully bounded. Each exception should be based on a clear and convincing understanding both of its rationale and its boundaries. The question, then, is whether elections are more analogous to general public discourse or to speech in schools, courtrooms, the military, candidate-debates, and legislative proceedings. My law school professor Harry Kalven, one of the most influential First Amendment thinkers of the twentieth century, used to tell his students that “law is the process of choosing among competing analogies.” That is a good description of what is called for here, if we are to determine in a principled and persuasive manner whether there should be an electoral exception to the general First Amendment standards of review.

Viewed from this perspective, the two closest analogies to elections (by which I mean not just the process of voting, but the much larger process by which we deliberate about who our elected officials should be) would seem to be

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19. See, e.g., *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 669 (1998) (candidate debates); *Burdick v. Takushi*, 504 U.S. 428, 439 (1992) (election ballots); *Burson v. Freeman*, 504 U.S. 191, 195 (1992) (polling places).

ballots and candidate debates. In deciding which candidates and which issues will be on the ballot, the government is not bound by the same standards that apply in general public discourse.<sup>20</sup> Everyone seems to agree that, subject to certain important limitations, the government can determine by reasonable means eligibility for being on the ballot.<sup>21</sup> But the First Amendment does not cede to the government any similar authority to determine the issues or candidates we may discuss in general public discourse. Why doesn't the First Amendment give anyone the right to put his favored candidate or issues on the ballot with the same freedom with which we can decide what candidates or issues to discuss in public debate? The answer is clear. What works in public debate would produce utter chaos on a ballot. If the ballot is to serve its essential function, it must be reasonably uncluttered, coherently organized, and limited in length. If people want to promote certain candidates and issues for inclusion on the ballot, there are procedures to achieve that goal, and so long as they do not unreasonably or discriminatorily block access to the ballot, the ballot itself can be deemed outside the ordinary marketplace of ideas. The ballot, in other words, is like the classroom or the courtroom.<sup>22</sup>

Government-sponsored candidate debates are similar. One could, of course, imagine such debates following the ordinary rules of public discourse, in which there are no time limits on how long or how much individuals may speak, no equal time requirements, no moderator to keep speakers focused on particular issues, and no limit on the number of participants. But, of course, a candidate debate following such procedures would not be what anyone would recognize today as a candidate debate. Although there is plenty of room for such a free-for-all in the marketplace of ideas, for a candidate debate to achieve its essential purpose it must be much more closely regulated. Indeed, it is precisely those regulations, which would otherwise violate the First Amendment, that make candidate debates useful.

Is an election similar to a ballot, a candidate debate, a courtroom, a classroom, or a prison, for these purposes? I see several difficulties with the argument for electoral exceptionalism. First, the other exceptions I have identified all have relatively clear boundaries. For the most part, it is possible to recognize exceptions for schools, prisons, public employees, courtrooms, ballots, and candidate debates without running the risk of spilling over in dangerous ways to more general public discourse. Of course, there are always issues of

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20. See *supra* note 19 and accompanying text.

21. For an example of an unreasonable restriction the Court invalidated, see *Anderson v. Celebrezze*, 460 U.S. 780, 785–86, 788 (1983) (invalidating an early filing deadline for ballot access but noting that states can generally enact “reasonable, nondiscriminatory restrictions” in the context of elections).

22. See *Clingman v. Beaver*, 544 U.S. 581, 584 (2005) (upholding a state law prohibiting a political party from inviting registered members of other political parties to vote in its primary); *Burdick*, 504 U.S. at 430 (upholding a statute prohibiting write-in voting); *Anderson*, 460 U.S. at 786–86.

ambiguity at the margin, but in most situations it is not all that difficult to tell the difference between a courtroom and a blog, or a candidate debate and a newspaper editorial, or a prison and a public park. But what is the boundary between free speech about public issues and free speech in the context of elections? Is criticism of an officeholder's policy during the course of an election part of public debate or is it electoral speech? As demonstrated by the McCain-Feingold legislation<sup>23</sup> and the Court's decisions in *McConnell v. FEC*<sup>24</sup> and *FEC v. Wisconsin Right to Life (WRTL)*,<sup>25</sup> it is exceedingly difficult to draw a line between election speech and public issue speech.

It is possible to define electoral speech as speech about issues relevant to a pending election, or speech about issues relevant to a pending election within a certain defined period of time before the final vote, but those definitions clearly bleed over into general public discourse. It is also possible to define electoral speech as speech that expressly endorses or opposes a clearly-identified candidate or that expressly mentions any candidate by name, but even these definitions create serious concerns about both line-drawing and stifling important public discourse.<sup>26</sup> Although laws defining the boundaries of electoral speech are not impossible to draw, they are inevitably much less well-defined than speech in courtrooms, in prisons, in the military, or in town hall meetings.

Second, in the other contexts, the "exceptional" institutions—schools, trials, prisons, legislative bodies, public employment, the military, and so on—exist independently of any desire of government to regulate speech. That is, we did not create such institutions in order to regulate speech. Schools, prisons, trials, and the military have long existed as institutions without regard to any desire to restrict free expression. Significant restrictions on speech in such settings were built into the very fabric of their structure and have always been assumed to be essential to the existence of such institutions.

Elections are more complicated. Although elections have existed for a long time, and there have always been laws governing such matters as eligibility to vote, the timing of elections, and eligibility for inclusion on the ballot, speech about the merits of competing candidates and policies has not traditionally been regulated any more than public discourse generally. Indeed, although the basic ground rules of elections have long been established by law, electoral speech has historically been regarded as largely indistinguishable from general public discourse. Unlike the situation with respect to courtrooms, schools, prisons, public employees, candidate debate, and the military, we have not historically thought of elections as institutions in which extensive government regulated of

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

24. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).

25. *Fed. Election Comm'n v. Wis. Right to Life*, 551 U.S. 449 (2007).

26. For an excellent analysis of these issues, see generally Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751 (1999).

speech is either natural or inevitable.

This is relevant in several ways. Tradition often plays an important role in First Amendment doctrine, especially when it comes to upholding speech restrictions that have traditionally stood the test of time. This is perhaps most evident when it comes to recognizing categories of low value speech, where the Court has been quite reluctant to recognize new categories of low value speech that have not traditionally been regulated.<sup>27</sup>

Tradition is also relevant in the other direction. When government has traditionally tolerated free speech, the Court has been especially reluctant to allow the government to change the rules. This is illustrated by the public forum doctrine<sup>28</sup> and by the insistence that criminal trials generally remain open to the public.<sup>29</sup> This cuts against recognizing a new category of “exceptional” speech that would empower the government to restrict free expression in the electoral context, where it has traditionally been allowed to flourish largely free of government intervention.

Moreover, the very fact that government suddenly wants to regulate speech that has traditionally been left to the marketplace of ideas inevitably gives rise to suspicion that the reason for suddenly seeking to regulate speech that historically was unregulated derives not from anything inherent in the electoral process, but instead from a desire to manipulate that process for political gain. After all, if there is any arena in which the risk of government manipulation of free expression is at its peak, it must be in the regulation of electoral speech. In such circumstances, it is hard not to wonder why a process that worked well enough in the past without regulation suddenly demands government control. Of course, there may be a good answer to that question. It is possible that circumstances have changed, and that the enormous influx of money into the political process has profoundly altered the continued vitality of past processes. But in the absence of a tradition of extensive regulation of political speech in the electoral process, the risk of partisan manipulation cannot be ignored.

Third, in the contexts in which the Court has recognized exceptions to general First Amendment standards, the exceptions are usually thought justified, not only by tradition, but also by considerations that are inherent in the effective functioning of the institution. It is hard to imagine town meetings, candidate debates, classrooms and courtrooms without limitations on who may speak about what subjects, in what manner, for how long, and in what order. Because these settings are time-constrained, it is necessary to have some mechanism to allocate out the opportunity to speak in a manner that serves the central mission of the

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27. See Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 283–85 (2009); Geoffrey R. Stone, *Sex, Violence, and the First Amendment*, 74 U. CHI. L. REV. 1857, 1866–67 (2007); *United States v. Stevens*, 130 S. Ct. 1577 (2010) (emphasizing the importance of history in defining low value speech).

28. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939).

29. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 564–69 (1980).

institution. If one speaker could use up all or a disproportionate share of the available time the very purpose of the institution could not be achieved. There is no similar rationale for constraining speech in the electoral context. As a practical matter, there is limitless opportunity for free expression in the electoral process, just as there is in public debate generally, so there is no resource constraint that would justify government interference with the right of all speakers to speak to their hearts' content.

Another consideration that is inherent in most of the traditional exceptions to general First Amendment standards is the need to maintain order, without which the institution could not function. A classroom, a courtroom, a candidate debate, a legislative session, and a ballot could not serve their essential functions if people could speak in those settings as much as they want, whenever they want, without some sort of regulatory control on their expression. Indeed, without such control, chaos would reign. There is no similar rationale for restricting speech in the context of election campaigns. As a general rule, election campaigns are no different from ordinary public discourse in this regard. In these settings, there may be some measure of chaos, but that sort of chaos is inherent in the very idea of a free market in ideas.

Fourth, all of the recognized "exceptional" situations involve speech that is closely allied to government activity. That is, all of these institutions are deeply embedded in government action. Schools, trials, candidate debates, prisons, the military, public employees, and election ballots are all government functions. The government always has greater control over its functions than over private activities. Thus, although the government has special authority to regulate speech in public schools, government-sponsored candidate debates, government courtrooms, and on government election ballots, it has no similar authority to interfere with free speech in private school classrooms, privately-sponsored candidate debates, private arbitrations, or ballots in privately-run elections.

The government cannot constitutionally discipline a student in a private school for discussing politics rather than mathematics; it cannot constitutionally require equal time for all candidates in a privately-run candidate debate; it cannot constitutionally forbid the lawyers in a private arbitration from invoking hearsay in their closing arguments; and it cannot constitutionally dictate the content of a ballot in an election to choose the officers of a private organization. In other words, a common feature of all of the recognized "exceptional" situations is that they involve activities run by the government itself. This is not, and has never been, the case with elections. Government determines the basic framework for elections, including time, place, and manner, but it has never (until recently) claimed the right to structure private speech in an election campaign the way it structures speech in a public school, a government-sponsored candidate debate, or a courtroom. Traditionally, the public discourse in a political campaign has been thought to be as much a part of the marketplace of ideas as public discourse generally.

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Now, having said all this, I want to recognize the argument that the exceptions I have discussed should properly be understood in terms of a much broader and more open-ended judgment that these speech-restrictions are constitutional, even though they do not satisfy the ordinary standards of First Amendment review, because they enable these institutions to function effectively. On this view, the justifications for such restrictions need not be couched specifically in terms of tradition, time constraints, maintaining order, or the connection of the institution to the government's "ownership" of the institution. Rather, an exception to general First Amendment standards might be thought warranted *whenever* an exception would improve the functioning of a particular activity or institution.

Under this approach, an exception for regulations of speech in the electoral context might be thought warranted as long as the government asserts that its regulations will improve the operation of the electoral process. It is easy to see, however, that this argument proves too much. If the government can regulate speech in the electoral context without meeting the ordinary requirements of the First Amendment merely because it maintains that such restrictions will improve the process, then there is nothing to prevent it from demanding a similar exception for speech restrictions that it claims would improve public debate more generally. That claim quickly collapses into the notion that a regulated marketplace of ideas is better than a free marketplace of ideas. That may or may not be right, but it is surely incompatible with well-established First Amendment jurisprudence.

A somewhat narrower argument, put forth by Frederick Schauer and Richard Pildes, is that the First Amendment should not be understood as a negative constraint on government interference with speech, but as a positive premise for government regulation designed to enhance "the values of democratic deliberation, collective self-determination, guarding against the abuse of power, searching for truth, and even self-expression."<sup>30</sup> In their view, "it is not self-evident" that these values "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" or otherwise improving the quality of electoral discourse.<sup>31</sup>

This is a perfectly plausible position, but it has never commanded much support in the judicial understanding of the First Amendment, and with good reason. As Schauer and Pildes concede, critics of this position maintain that, if anything, we should be especially wary of government restrictions in the electoral context, "because the self-interest of potential government regulators

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30. Schauer & Pildes, *supra* note 2, at 1806.

31. *Id.*

would be greatest precisely in this sphere.”<sup>32</sup> Although Schauer and Pildes dismiss this argument, in my judgment the critics of electoral exceptionalism are quite right to emphasize this concern.

This is not say, of course, that government regulation of electoral speech is per se impermissible. It is, rather, to say that such regulation must stand up to the ordinary standards of First Amendment review. A variety of speech-regulations of electoral speech have satisfied those standards, including, for example, limitations on political contributions, disclosure requirements, government subsidies of political speech, restrictions on ballot access, regulation of speech near polling places, and rules governing candidate debates.<sup>33</sup> But the idea that the government should be able to restrict speech in order to improve speech—without meeting the ordinary standards of First Amendment review—is and should be foreign to the basic premise of the First Amendment, at least in the absence of a compelling justification for recognizing an exception to those general standards.

In this respect, it is worth comparing government regulation of a government-sponsored candidate debate to government regulation of electoral speech more generally. In the candidate debate, the government can constitutionally decide how many and which candidates may participate (as long as it does so in a reasonable manner that is not designed to favor or disfavor particular candidates because of the government’s approval or disapproval of their views); it can insist that all candidates have equal time; it can select the moderator; and it can determine the subjects to be addressed, the order in which the candidates will speak, the amount of time available to answer each question, whether questions will be taken from the audience, and so on.<sup>34</sup> All this is permissible for the reasons suggested above, and such rules make perfect sense, given the realities of candidate debates.

Under the approach advocated by the proponents of electoral exceptionalism, analogous rules should be constitutional in the much broader context of electoral speech, and courts should accord the government a similar degree of deference when it regulates general electoral speech as when it regulates government-sponsored candidate debates. There is certainly some appeal to this argument, *if* one assumes that government officials have the wisdom, integrity, and impartiality to structure electoral discourse on our behalf and that the need for government intervention and structuring in the debate context carries over to the much larger and traditionally more free-wheeling context of electoral discourse—but presumably not to public discourse more

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32. *Id.* at 1808.

33. See e.g., *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 669 (1998) (candidate debates); *Burdick v. Takushi*, 504 U.S. 428, 439 (1992) (election ballots); *Burson v. Freeman*, 504 U.S. 191, 195 (1992) (polling places); *Buckley v. Valeo*, 424 U.S. 1, 20, 60–61, 85–86 (1976) (contributions, disclosure, and subsidies).

34. See *Forbes*, 523 U.S. at 676.

generally. This, in my view, is a very hard sell. It invites an analogical stampede that could well enable a narrow doctrine of “exceptionalism” to swallow the First Amendment.

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For the sake of argument, though, let us briefly consider the questions that might arise if we were to accept the logic of electoral exceptionalism. It was, of course, the Court’s decision in *Citizens United* that ignited the current interest in this question. This is ironic, because only seven years earlier, in *McConnell*,<sup>35</sup> the Court—*without any reliance on any notion of electoral exceptionalism*—upheld the very restrictions on corporate and union speech that it later invalidated in *Citizens United*. The only thing that had changed in the intervening years was the makeup of the Court—Justice Alito, who joined the majority in *Citizens United*, had replaced Justice O’Connor, who had joined the majority in *McConnell*. Moreover, there is no reason whatsoever to believe that the justices in the majority in *Citizens United* would have reached a different result in a legal domain that included a concept of electoral exceptionalism. What was “wrong” with *Citizens United*—assuming the decision was “wrong”—was not the Court’s failure to invoke electoral exceptionalism, but its failure to uphold the law even under the generally applicable standards of First Amendment review.

Let us consider, though, how we might think of possible regulations of speech in the electoral realm if we accepted the proposition that elections are analogous to classrooms, trials, candidate debates, and town meetings. Suppose, for example, Congress enacted legislation making it a crime for any individual independently to spend more than \$1,000 of his own money in an effort to elect a political candidate. In *Buckley*, the Court held that such a restriction violated the First Amendment.<sup>36</sup> But in *Buckley* the Court applied the ordinary standards of First Amendment review, and thus concluded that the government’s interest in equalizing speech was not sufficiently important to justify the infringement of individual freedom. Would electoral exceptionalism lead to a different outcome?

If we think of candidate debates or town meetings as appropriate analogies, then the law invalidated in *Buckley* might well be upheld. At least two principles govern speech in candidate debates and town meetings that would seem to support this outcome. First, we accept “equal time” regulations in those settings for reasons that are similar to the reasons offered in defense of legislation in *Buckley*. That is, we want a “fair” contest, in which each side has an equal opportunity to make its case, and if this is appropriate in town meetings and candidate debates, why not in electoral speech more generally? Second, we would be appalled at the suggestion that we should sell time to the highest bidder

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35. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003).

36. *Buckley*, 424 U.S. at 23.

in a government-sponsored candidate debate or a town meeting. Such a practice would undermine our deepest assumptions about a “fair” discussion of the issues. Why, then, shouldn’t the government take the same approach in its regulation of general electoral speech? On this view, accepting the premise of electoral exceptionalism might, for better or worse, lead to a different result than the one reached in *Buckley*.<sup>37</sup>

Many other questions would logically arise if we embraced the idea of electoral exceptionalism. For example:

- Can the government constitutionally make it a crime for any person knowingly to make a false statement in the electoral context (as it does in trials)?
- Can the government constitutionally prohibit any person from making any statement based on hearsay in the electoral context (as it does in trials)?
- Can the government constitutionally prohibit any person from making any unduly prejudicial statement that might inflame or mislead voters (by analogy to trials)?
- Can the government constitutionally require the media to provide equal time to all political candidates (by analogy to candidate debates)?
- Can the government constitutionally limit each person to one “unit” of speaking in the electoral context (by analogy to one person/one vote)?
- Can the government constitutionally forbid convicted felons to speak in the electoral process (by analogy to voting)?
- Can the government constitutionally forbid candidates without a certain level of support to participate in the electoral process (by analogy to ballots and candidate debates).
- Can the government constitutionally forbid candidates and their supporters from airing more than a fixed number of minutes of campaign ads (by analogy to candidate debates and town meetings).
- Can the government constitutionally forbid candidates from discussing issues other than those specified by the Federal Election Commission (by analogy to classrooms, town hall meetings, and candidate debates).

These are just a few of the issues that would naturally arise in a realm of electoral exceptionalism. Each of these restrictions would clearly be unconstitutional under the ordinary standards of First Amendment review because the First Amendment, as interpreted and understood, demands a high level of skepticism about supposedly well-intentioned government efforts to restrict free speech. But each of these restrictions would arguably improve the overall quality of deliberative democracy. Should we lower the general standards

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37. Consider the view stated by the Canadian Supreme Court in the landmark decision in *Libman v. Quebec*, [1997] 3 S.C.R. 569, ¶ 47 (Can.) (“If the principle of fairness in the political sphere is to be preserved, . . . laws limiting spending are needed to preserve the equality of democratic rights . . .”). See also Samuel Issacharoff, *The Constitutional Logic of Campaign Finance Regulation*, 36 PEPP. L. REV. 373, 389–91 (2009) (contrasting Canadian and American campaign finance regulations).

of First Amendment review in order to cede the government that power? This is an important question. But the implications need to be understood much more fully before we embrace that conclusion.