



# Personhood and the Law of Corruption in Federal Courts

## Citation

Eisler, Jacob Morse. 2016. Personhood and the Law of Corruption in Federal Courts. Doctoral dissertation, Harvard University, Graduate School of Arts & Sciences.

## Permanent link

<http://nrs.harvard.edu/urn-3:HUL.InstRepos:33493326>

## Terms of Use

This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Other Posted Material, as set forth at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#LAA>

## Share Your Story

The Harvard community has made this article openly available.  
Please share how this access benefits you. [Submit a story](#).

[Accessibility](#)

Personhood and the Law of Corruption in Federal Courts

A dissertation presented

by

Jacob Morse Eisler

to

The Department of Government

in partial fulfillment of the requirements

for the degree of

Doctor of Philosophy

in the subject of

Political Science

Harvard University

Cambridge, Massachusetts

April 2016

© 2016 Jacob Morse Eisler

All rights reserved.

Dissertation Advisor: Professor Nancy Rosenblum  
Professor Eric Beerbohm

Jacob Morse Eisler

Personhood and the Law of Corruption in Federal Courts

**Abstract**

The treatment of corruption in US federal law has evolved in an inconsistent manner and endured repeated seemingly erratic shifts. This dissertation considers the treatment of political and electoral corruption both comparatively between institutions and internally within institutions, using the political philosophy of Plato as a theoretical foundation. It thus offers three essays: one that examines Plato's treatment of corruption in his seminal political works (*The Republic*, *The Statesman*, and *The Laws*); a second that considers the comparative treatment of corruption by Congress and the Supreme Court in the context of both electoral and official corruption; and a third that considers the internal partisan dispute within the Supreme Court over the proper treatment of campaign finance.

This dissertation takes as its methodology close analysis of text, whether Supreme Court opinions, the Congressional legislative record, or Platonic dialogues; and it takes as its subject matter the character of persons who participate in the political process. Its essential observation is that the US conception of law does not give credence to the character (in the deep sense) of participants in the political process, even as such questions of character overdetermines legal debates, as present in the materials that shape corruption law itself. By careful analysis of these texts, the unspoken but critical role of character in election law can be understood.

The fruit of this analysis that US election law is riven by debates over the proper contours of anti-corruption regulation that reside upon the character of those it regulates. Within the Court this has produced partisan conflict; between the Court and Congress it has produced two differing views of how the anti-corruption regime should be constructed.

## Table of Contents

|   |     |
|---|-----|
| Introduction:   | 1   |
| Chapter 1: Property, Greed, and Control in Plato's Political Theory   | 10  |
| Chapter 2: The Unspoken Institutional Battle over Anti-Corruption:<br><i>Citizens United</i> , Honest Services, and the Legislative-Judicial Divide | 54  |
| Chapter 3: Judicial Perceptions of Electoral Psychology and the Deep<br>Patterns of Campaign Finance Law  | 130 |

## Acknowledgements

This dissertation was only possible due to the generosity of a number of people over many years, both professional and personal. The faculty at Harvard, both in the Government Department and the Law School, has provided support, guidance, and advice for the past decade. I would like to thank in particular my committee of Nancy Rosenblum, Eric Beerbohm, and Jim Alt; Richard Tuck and Eric Nelson in the Government Department, as well as Thom Wall for his extensive administrative support; and Adriaan Lanni, Bruce Mann, Carol Steiker, and Lawrence Lessig from the Law School. Michael Kang of Emory University was a valuable mentor in learning election law when he visited Harvard, and George Brown of Boston College and Zephyr Teachout of Fordham University have been significant advocates and supporters. The Honorable Judge Gerard Lynch provided significant encouragement to finish the PhD while I was clerking with him on the Second Circuit Court of Appeals, as well as offering the finest training for which a young lawyer could hope. At the University of Cambridge, John Dunn has been a longtime mentor and supporter. Since I arrived to assume my fellowship at Jesus College, Cambridge, the other law fellows at Jesus – Michael Waibel, Findlay Stark, and Claire Fenton-Glynn – have been extremely supportive, as have Simon Deakin, Jon Morgan, Antje du Bois – Pedain, and Nick McBride in the Law Faculty. At Williams College, I received remarkable support from Darel Paul, Michael McDonald, and Nicole Mellow since the start of my career, and encouragement and training from Alan DeGooyer and Steven Tifft.

A network of friends and colleagues has supported me since this project had its vaguest inceptions, and to mention their names can only be a faint shadow of the gratitude I owe them. Michael Eros, Noam Yuchtman, Alexis Medina, Billy Magnuson, Evan Miller, Tom Wolf, Teddy McGehee, Eileen Bevis, Richard Rodriguez, Chris Douglas, Emily Bryk, Gabriel Katsh, Si Rutherford, Peter Leek, Tim Taylor, Vanessa Badino, Katherine Vinicombe, Rich Hewitt, Ben Hope, Lucy Cundliffe, Claire Day, Ulrich Paquette, Katrina Robinson, Pete Deutsch, Jeff Garland, Adam Kinon, Tommy Hutton, Joel Fleming, Heather Casteel, Ben Weiner, Scott Caplan, Ani Ravi, Julian Feldman, Chad Priest, Samuli Seppanen, Elaine and Arie Hochberg, Cesar and Luann Medina, Aidan Finley and Neal Hannan have seen me through times thick and thin. Jen Page, Graham Clure, Tom Hopkins, Adam Lebowitz, Serene Hung, Bernardo Zacka, Sabeel Rahman, and Will Selinger have been valued companions through graduate school.

Chapter 2 has been published in the *First Amendment Law Review*, citation Jacob Eisler, *The Unspoken Institutional Battle over Anti-Corruption: Citizens United, Honest Services, and the Legislative-Judicial Divide*, 9 *First Amend. L. Rev.* 363, 390-91 (2011). Any citations to that chapter should refer to the published article.

Chapter 3 is forthcoming in the *Connecticut Law Review*, November 2016. Any citations to that chapter should refer to the latest available version of the published article.

The journal versions of Chapter 2 and 3 should be treated as the authoritative and used for reference purposes. The articles are available on SSRN and HeinOnline, as applicable. Many thanks to the journals.

They say family is where they have to take you in. Wherever Susan Eisler, David Eisler, or Jonathan Betyak-Eisler (and his family) have been, I have had a place to stay. I love you.

## Introduction

The social sciences typically describe corruption as illegitimate abuse or neglect of public duty in favor of private gain.<sup>1</sup> Scholars emphasize different aspects of this conduct. It may be characterized as inefficient, it may be seen as collapse of the principal-agent relationship, or it may be identified as a normative violation. Yet if corruption is an act of individual wrongdoing—that is, if the category of corrupt acts is a subset of immoral act by persons – then a consideration of corruption is incomplete without a consideration of the nature of personhood in politics.

These linked essays examine this high-level problem by considering the treatment of corruption by the US federal courts (with a strong emphasis on the Supreme Court), using as an inspiration the concept of selfhood and political disinterest presented in the political works of Plato. The seminal observation of the essays is that the Court has failed to adequately define the social and psychological characteristics of persons in its consideration of corruption. Its jurisprudence on corruption implies that individuals are rational, detached, self-interested participants in politics who weigh political and personal values like fungible units. How the Court has realized this view is riven by a partisan divide, and at times that partisan divide inflects particular justices' or factions' treatment of corruption; but the core assertion regarding the character of political participants remains.

Such an assertion that the status of corruption is fully exhausted by its characterization as a utilitarian weighing ignores that a decision to behave corruptly is normatively nuanced – it is not merely the selection of one bundle of goods over another, but rather the elevation of one type

---

<sup>1</sup> The classic expression of this may be in Nye (1967). For somewhat more multifaceted considerations of the problem and a review of the approaches that have dominated the concept of corruption in the social sciences, see Scott (1972), Ackerman (2001), and Underkuffler (2005).

of value. The richness of this act of value-selection is often marginalized in the literature by classifying a corrupt act as one that defies public duty in favor of private interest. Yet this definition ignores that categories of public and private are ultimately artificial. The corrupt elevation of the private over the public (or the dutiful elevation of public good over private interest) is an act with a unified and inescapable political valence. That valence depends upon, *inter alia*, the conceptualization of persons as political beings.

Plato provides critical entry into this point –in the view of these essays, Plato’s understanding offers the purest view of what *corruption must mean if abstracted away from the placeholder concepts of public and private*. In the context of the idealism of the *Republic*, a truly virtuous political figure unreservedly abnegates the self in order to serve the political collective (whose benefit is analogous to the moral good). In this vision, the categories of ‘public’ and ‘private’ become superfluous. Good political conduct means not the elevation of one bundle of goods or adequate performance of a duty, but rather the total elimination of self-interest from *any* conduct. Good political conduct is coterminous with morally right action, and morally right action is a totalizing category. This understanding of right political action explains certain policy proposals from the *Republic* – the life of the guardians in common, the elimination of family or ownership – but more importantly it provides a truly foundational definition of corruption. Because right political conduct requires total elevation of the good of the polity (that is, the ‘public’ interest) over personal desire (‘appetite’ in Plato’s terminology, ‘private’ or ‘self’ interest in modern lingo), political conduct is not corrupt only when, at a level of personal constitution, benefit to self is completely excluded from consideration. The result is a political system that implements anticorruption measures (that is to say, that ensures good politics) by ensuring those with political power are *exclusively* concerned with the collective good. This



implies that the persons who have political power have the capacity to be reduced to pure servants of the public good, but that this commitment is so delicate it must be protected by totalizing structural means.

Were Plato's commentary on corruption to end with the *Republic*, he would offer a useful point at the most extreme end of the spectrum. However, with the treatment of corruption described in the *Laws* – and Plato's own implication that the *Laws* offers a less 'pure' approach – he indicates how corruption might look when the raw material of politics (persons themselves) has a different quality. The *Laws* does not demand absolute separation of self-interest and political obligation and thereby rely on an absolute caste system, but rather indicates corruption occurs when excessive self-interest within the individual induces a deviation from the good. Each citizen has conflicting impulses to both seek self-interest and to serve the polity; the key to anti-corruption is ensuring that self-interest does not excessively dominate. Subsequently in the *Laws* anti-corruption measures operate through restrictions that apply to each citizen at an individual level, rather than in the overarching societal organization. Certain aspects of corruption remain the same – it still has the form of self-interest disrupting the shared political project – but the shift in the potentialities of person dramatically changes when corruption occurs, and how it must be prevented.

The relationship between the *Republic* and the *Laws* presents a more general point: the nature of corruption, and the measures that are implemented to prevent it, are dependent upon the character of the persons in the polity. The *Republic* imagines a society that has a caste of leaders that can be 'purified'; the *Laws* does not. Thus the *Republic* pitches its absolutist approach to corruption, and its policies, to ensuring the purity of those leaders, whereas the *Laws* tries merely to ensure that all citizens obey certain types of propriety through a far more quotidian series of

measures. Both works see corruption as having a shared quality in the infiltration of self-interest into political decision-making (a quality that can be seen as analogous to the public/private divide by which corruption is traditionally identified); for both corruption is a profound normative failing that sets the personal above the good (which is identified with right political interest). But how this principle is translated into the *practice* of corruption varies dramatically due to differing assumptions regarding the human character. A corrupt act cannot merely be assumed to be a maximizing decision between competing types of goods. It must also be understood as founded in the basic psychological potentiality of political actors.

It is, of course, practice with which the judiciary is concerned; and it is this observation regarding the practice of corruption by which Plato can inform the deficiencies of the Courts in addressing corrupt conduct. As the latter two essays demonstrate, the Court has skirted the issue regarding the foundational and philosophical characteristics of corruption, but the statements it has made, and the positions it has expressed to reach relevant holdings, reveal that it has de facto adopted what might be called a troubling position regarding the nature of persons. On its face, the jurisprudence attempts to merely resolve a set of disputes that necessitate considering the weight and character of corruption. Yet as Plato demonstrates, the consideration of corruption is inseparable from the consideration of persons as political actors. With this in mind, it becomes clear that the Court has – with a partisan twist that has become of increasing salience with the passage of time, yet produces confusion rather than clarity – adopted a view of corruption that necessitates a view of persons as calculating, rational actors. Yet nowhere does the Court justify, or even explicitly articulate, this vision. Yet if the Court does *not* hold this position, the Platonic approach suggests that it should be far more permissive regarding the measures that regulate

private-regarding behavior in the performance of public roles (or, at the least, the Court should be far more sympathetic in the weighing of such measures).

The essay on deliberative and competitive democracy addresses these characteristics through a systemic, comparative lens. It first observes a trend – that when Congress passes an anticorruption measure that, through either the substance of a measure or its interpretive flexibility, promotes a holistic, discourse-encouraging consideration of politics (a ‘deliberative’ anti-corruption measure, an approach with some kinship to the internalization of political values that Plato advances to two different degrees), the Court strikes it down. Over time, repetition of this pattern has resulted in the Court advancing a ‘competitive’ view of corruption – one that implicitly characterizes the political process as allocation of goods by competing political groups, and parsimoniously defines corruption as no more than violation of the rules by which this allocation process operates (a view that can be associated with the political philosophies of Dahl and Schumpeter, as well as interest group pluralism more generally).

Underlying the Court’s competitive vision of democratic governance and corruption, however, is an implicit view of the sorts of persons who populate it. The Court suggests that political behavior is, generally speaking, transactional: when public officials, and, indeed, voters themselves, engage in political conduct, they do so through a weighing of competing interests best understood as participation in a marketplace of power. A political decision is ultimately a decision of expediency; thus when public officials favor donors or constituents in a manner that is by the letter of the law (even if it seems to violate some spirit of public-regardingness), the decision cannot be condemned as corrupt. While the legal principles by which such a narrow view of corruption is vindicated may be free speech rights or interpretive canons of vagueness and lenity, the application of these principles only has conceptual coherence in a political

environment populated by certain types of persons: those who are calculating rational actors attempting to maximize their political leverage. The Court's rejection of deliberative anticorruption measures demonstrates its skepticism towards the idea that political preferences may be shaped by dialogue or engagement.

The essay on the judicial perceptions of electoral psychology sharpens this observation by a closer consideration of the Court's treatment of actors in the campaign finance context. It reveals a partisan split in the Court's treatment of the psychology of participants in electoral politics, but nowhere does the Court articulate a theory of human fragility that informs a robust account of corruption. With the narrow conservative majority guiding the Court, a strong affiliation with the 'competitive' idea of democracy has remained ascendant, and emphasized the detached rationality of (most) participants in politics. The resulting treatment of corruption remains narrowly procedural, with little richness regarding how the character of persons should inflect the treatment of politics. Yet the liberal wing's dissenting treatment has done little to more fully inform an alternate treatment of political actors. While it has voiced doubts regarding the accuracy of the conservative account, it has failed to articulate a viable alternative. Thus, even if the partisan divide regarding the law is taken into account, there appear to be two alternative conceptions of political personhood: that of the idealized rational actor, and a theoretically underinformed one that suggests, but does not elaborate upon, a more fragile psychology. The former view vindicates a narrow conception of corruption; the latter might, if more robust, support a broader conception, but cannot bear such weight without further elaboration.

At a practical level, the Court's view of corruption has certain characteristics: it emphasizes *quid pro quo* exchanges, it conceives of excessive private-regardingness in the

narrow terms of receipt of personal gain, and it rejects the possibility that failure to serve the public interest might involve a more fundamental deviation from service to the right reasons (that is, the shared good). Underlying this is a general commitment to a view of what persons are like as political actors – their characters, as it were. The good of individual enrichment and the political good are interchangeable entities, and any particular decision to benefit the public or private is merely a decision to select the more rewarding option. In this view, political participation has no particular richness or distinctive quality. Politics is merely another venue by which individuals engage in competition for scarce goods; anticorruption measures merely attempt to impose basic rules upon how public offices may be manipulated to obtain such individual goods. Persons in this view have a certain transparency and simplicity regarding their own character. Corruption does not intrinsically involve a deformation of the self (or soul), it merely involves a transaction that violates the rules of when office may be abused.

The failure to found this position in a clear theory of the psychological and social attributes of such persons is a profound deficiency in the jurisprudence. For as Plato reveals, a differing set of psychological and social assertions about the inhabitants of a polity produces dramatically different postures towards anti-corruption. The Court's apparent commitment to the character of persons in political life thus has wide-ranging ramifications beyond the seeming arbitrariness of the Court's position. If the commitment to a theory of rational, interest-weighting personhood should prove descriptively false or internally inconsistent (as the partisan divide, particularly with Scalia's death, suggests that it easily might), then the Court should logically swing towards a much more expansive vision of what comprises corruption, and subsequently what types of anti-corruption measures might be permitted. If persons are seen as psychologically fragile and potentially tractable to serving private interest at the cost of proper

discharge of public duty because they can suffer a more intrinsic moral collapse, then anticorruption measures would need to not merely interdict explicit ‘sales’ of public power (ie, *quid pro quo* corruption) but generally encourage the right type of mindset among political actors.

The Court’s current posture does little to accommodate such a broader view of corruption; nor does it provide a psychological equation that informs how a shift in the view of persons would have subsequent implications for the law of corruption. The failure, in short, is not merely a theoretical lacunae consisting of the Court’s unwillingness to provide a justification for a rational view of the person. It is also a failure to anticipate how the law might change should new evidence regarding the character of persons emerge – precisely the type of problem that is deeply troubling for the common law. Again, as Plato so elegantly demonstrates with two different conceptualizations of the person, a theory of corruption must track a theory of character. By implying – but not explicitly describing – a theory of character throughout its jurisprudence, and failing to link its theory of corruption to such a theory of character, the Court has left the state of the jurisprudence profoundly vulnerable.

This project therefore relies on a subtle interrogation of the relationship between human character and political behavior in Plato to explore how the Court has failed to offer a rich enough account of the foundations of corruption. Plato observes that corruption can only be understood in the context of how the character of actors itself is understood. The Court has evaded this problem, yet its jurisprudence reveals it has through the totality of its decisions on corruption advanced a distinctive view regarding such characters. Yet this view requires such specific assertions, it may not be able to bear the weight the Court has placed upon it. If the

Court's jurisprudence is to shift, it may produce deeply troubling inconsistencies in the expectations facing political actors.

## Chapter 1: Property, Greed, and Control in Plato's Political Theory

In his two systemic political works, the *Republic* and the *Laws*, Plato offers dramatic proposals for the reconfiguration of society. Yet despite their epochal importance and broad scope, there has been surprisingly little investigation of Plato's theory of property. This may be attributed in part to the initial appearance of property as a secondary concern for Plato. His seminal topics are more elevated and abstract—justice and the foundations of ideal human organization—and any attention devoted to property appears derivative of these concerns. While a theory of property may be necessary for the comprehensive description of the just man or best state, it ostensibly does not underlie the political order as it does for a theorist such as Marx or Locke.

However, an analysis of Plato's theory of property proves both a useful lens for interpreting his political theory and a compelling topic in its own right, particularly in the context of its peculiar evolution. The central problem posed by property remains consistent: given the strength of human appetites, in particular greed, a society will be disrupted gravely if rulers are preoccupied by the pursuit of wealth. Conversely, Plato's solution dramatically changes between the *Republic* and the *Laws*. Plato initially suggests that properly situated human reason, if properly cultivated and placed in a position of political power, may resist the depredations of appetite. However, he later rejects this solution and concludes only rigid formal restrictions (exactly enumerated by Plato himself) can prevent acquisitiveness from wrecking the political order. This interplay of continuity and change can be traced to a re-assessment of the human capacity for self-control and political organization.

### I. Purified Metals and Purified Men: Property Management in the *Republic*



In the *Republic*, property plays a central role in both the genesis of the state and its optimal configuration. Its most important effect is pervasive and noxious: wealth and the possibility of its accumulation inflame the appetites and engenders greed. If these forces influence politics, they ineluctably corrupt it, as rulers prioritize their own gratification over good rule. The *Republic*, however, offers a unique solution: on the premise the end of politics is the good of the entire city rather than any individual citizen, Plato prohibits the rulers and military from enjoying the material fruits earned by and available to the laboring class. Instead these two specialized groups must live a communal, ascetic life without *any* private property, and thus any opportunities to be distracted by greed. The threat is resolved on absolute terms.

The *Republic*'s general consideration of property anticipates and supports this injunction. From the beginning, Plato populates the text with suspicious and often downright pejorative references to wealth accumulation and greed. Socrates's first interlocutor, Cephalus, provides conspicuously perfunctory and inadequate response to Socrates's queries and then departs rapidly from the dialogue. He is characterized as a self-admitted "money-maker" with a complacent appreciation for the easy life guaranteed by financial security (330d-331d);<sup>1</sup> his presentation acerbically prefigures the economic classes of the ideal city (and demonstrates his lack of suitability for political rule). Furthermore, some of Socrates' earliest analogies derive the character of just rulers by contrasting true doctors (341c) and shepherds (345d), who pursue their trades for their own beneficial ends, with those who only exploit the trades to obtain wealth. Socrates quickly makes the analogies' central insinuations explicit, indicating a good ruler will not be willing to rule "for the sake of money or honor" (347b), but rather only for the end of good rule itself.

---

<sup>1</sup> References to works by Plato are to Edith Hamilton and Huntington Cairns eds., *The Collected Dialogues of Plato*. Princeton: Princeton University Press, 1987.

That those overly concerned with money will prove poor rulers (at least in Socrates's eyes) is further accentuated by the oratory of Socrates's challengers. Thrasymachus relies heavily on the language of profit and wealth to argue the unjust man is ultimately happier and stronger than the just man—he indicates real rulers seek “their own profit”, that an unjust man thrives by avoiding taxes while receiving the fruits of public goods, and indicates the most honored citizens are essentially the most egregious thieves (“when in addition to the property of the citizens men kidnap and enslave the citizens themselves...they are pronounced happy and blessed”) (343b-344a). Likewise, Glaucon's rendition of the Gyges fable describes that the first use of his newfound godlike powers was to “with impunity take what he wished even from the market place” (360c).

The narrative of Gyges, of course, introduces the problematic moral status of the unjust but materially (and spiritually) successful individual (358e-367e). Refuting this argument (and with it the claim that predacious property accumulation could be an inherent good) and concomitantly demonstrating that “justice is the greatest good” (367a) drive the remainder of the *Republic*. As part of this endeavor Socrates introduces the ideal city, and Plato's truly political (and radical) claims regarding property emerge.

Property (or, perhaps, more accurately, proto-property) appears to be introduced humbly enough. Material well-being itself is the inspiration for the city: “The origin of the city...is to be found in the fact that we do not severally suffice for our own needs, but each of us lacks many things” (369b). Tallying these needs—food, housing, and clothing—Plato notes that different men are fitted for different tasks (370b; the specialization theme surfaces repeatedly in Plato's work), and that citizens must be assigned to different professions. Some citizens produce necessary staples (for example, farmers grow food), some provide the implements to perform the

tasks (craftsmen create tools), and some facilitate exchanges so that the material products are properly distributed (shopkeepers and traders) (370d-371d); unskilled laborers round out the population (371e). Socrates characterizes the life of this city as one of rustic simplicity in terms of both material goods and human behavior, with its citizens “living in peace and health” until they die of old age and pass on an identical life to their offspring (372d).

At this point, property appears to have a minimal impact on political life. There is “buying and selling” (371d) and wage-earning (371e), but they are limited to barter to achieve beneficial distribution of goods. More importantly, the configuration of the society includes no motivations for material gain, as the simplicity and communality of citizens’ lives (they live in “pleasant fellowship”, 372c) eliminates any incentive for wealth accumulation. However, Glaucon protests that the citizens in this city live too simply (“They must recline on couches, I presume, if they are not to be uncomfortable, and dine from tables and have dishes and sweetmeats such as are now in use”, 372d), calling Socrates’s state a “city of pigs” (372d; this may be a direct response to his characterization of the citizens’ diet). Socrates acquiesces with uncharacteristic tractability and goes on to describe a city on Glaucon’s terms, only noting that such a state will be “fevered” (372e) and that it is not merely a city but a “luxurious city” that Glaucon desires<sup>2</sup>. To support the luxurious city, opulent goods and originally superfluous professions are required (373a-c). These in turn require more resources, which shall in turn demand infringing on the territory of other states (373d-e). This in turn produces war, and to protect “all our wealth and the luxuries we have just described”, a specialized class of guardians must now be included in the state.

---

<sup>2</sup> Socrates’s degree of approval for this shift is ambiguous; he notes that considering the origins of the luxurious city “isn’t such a bad suggestion, either” (372e); yet it is unclear if Socrates may approve of the luxurious city *itself*, or merely the *analysis* of the luxurious city.

Plato then extensively describes this guardian class, exploring the attributes it would be desirable for them to possess and the circumstances that will best foster these attributes. Midway through this description that the most significant discussion of property in the *Republic* appears. Socrates introduces the topic of property with the rather prosaic suggestion that the “houses and the possessions provided for [the guardians] ought to be such as not to interfere with the best performance of their own work as guardians” (416d). After his interlocutors assent, Socrates follows:

none [of the guardians] must possess any private property save the indispensable. Secondly, none must have any habitation or treasure house which is not open for all to enter at will. Their food, in such quantities as are needful for athletes of war sober and brave, they must receive as an agreed stipend from the other citizens as the wages of their guardianship, so measured that there shall be neither superfluity at the end of the year nor any lack. And resorting to a common mess like soldiers on a campaign they will live together. Gold and silver, we will tell them, they have of the divine quality from the gods always in their souls, and they have no need of the metal of men nor does holiness suffer them to mingle and contaminate that heavenly possession with the acquisition of mortal gold, since many impious deeds have been done about the coin of the multitude, while that which dwells within them is unsullied. (416e-417a).

Socrates' solution is the most extreme possible—*all* private property, not merely money, is to be denied to the guardians. Consequently, the rulers of the state live in a condition of “generalized poverty” (George Klosko, *The Development of Plato's Political Theory*. New York: Methuen, 1986, p. 142), with a communal lifestyle seemingly modeled on martial Sparta (Malcolm Schofield, *Plato*. Oxford: Oxford University Press, 2006, p. 205).

Socrates's interlocutors respond with disbelief. Adimantus speculates that this setup is “not making these men very happy”, for despite the city “belonging” to them they receive no material benefits (419a-420a). While reserving the possibility of direct refutation of Adimantus (“it would not surprise if these men thus living prove to be the most happy”—a claim that points

to Plato's position on the well-ordered soul as one in which reason rules appetites<sup>3</sup>), Socrates's immediate response is that such an arrangement would be best for the city: "the object on which we fixed our eyes in the establishment of our state was not the exceptional happiness of any one class but the greatest possible happiness of the city as a whole" (420b). He then argues that permitting the guardians access to money would comprise such an elevation of the good of one class over the good of the city as a whole. This is based on the premise that the guardians must not experience "a happiness that will make them anything but guardians" (420d), including a happiness that would make them indulgent or soft. Furthermore, through comparisons with farmers, cobblers, and potters, Socrates makes the more general proposition that if a craftsman becomes wealthy, he will become "worse" ("Far worse", Adimantus agrees) (421d). And if the guardians lapse, the city will be ruined; thus their slippage would be far more disastrous than the dissipation of a cobbler or a farmer who has grown wealthy and indolent.<sup>4</sup>

The guardians' poverty is all the more intriguing in that it is not universal; Socrates (in a strangely indirect construction) declares "But for these only of all the dwellers in the city it is not lawful to handle gold and silver and to touch them nor yet to come under the same roof with them, nor to hang them as ornaments on their limbs nor to drink from silver and gold. So living

---

<sup>3</sup> It could be speculatively argued the essential quality of property is determined by Socrates' claim that it is ultimately far worse to inflict injustice than to suffer it. As the desire for it encourages individuals to behave unjustly-to harm others in the pursuit of their appetites- it can often facilitate the worst type of behavior. Yet property itself is neither good nor bad; that is to say, it lacks inherent normative character. In the hands of the truly just, property is morally neutral; but given human nature it usually tends to make individuals worse off. This idea might be further informed by the different *types* of property suggested in 370-372; it seems as though the goods necessary for a simple but wholesome life are morally neutral; it is *opulent* possessions that are the source of destructive, warlike tendencies.

<sup>4</sup> This response intertwines the two ideas that shape the treatment of property in the *Republic* and is more extensively addressed in Part II of this paper—the importance of specialization both in the soul and the city (as most dramatically manifested in the tripartite division of gold, silver, and earth metals), and the potential for greed as a disruptive force. The centrality of specialization (and one of Plato's most forceful endorsements of the idea) is indicated his claim that the guardians' happiness is to be judged primarily by its contribution to the happiness of the city as a whole, and the disruptive force of greed is unequivocally stated (and agreement extracted from his interlocutors) by considering the effect of wealth on the practitioners of humbler professions (421e).

they would save themselves and save their own city” (417a). Thus, private property is permitted among the non-political laboring and merchant classes (indeed, it is necessary for the material sustenance of the state; see Schofield: 2006, p. 261). Combined with the dependence of the guardians on an “agreed stipend” from these citizens to support themselves, this suggests a strict specialization in the city. Klosko’s interpretation appears the most plausible: “All real property in the state, including all the land, is to be owned by members of the lowest class, while the Guardians are to be maintained by an annual tax upon this class, which they receive as a salary for protecting them” (141).

While the provocative relationship between individual property ownership and political power appears ripe for further analysis, the dialogue digresses to other topics. Adimantus inquires into the military implications of the lack of wealth, arguing that it would be hard for a city to defend itself without money; Socrates responds that the ascetic, martial lifestyle of the guardians would make them well-suited to warfare, and they could easily handle their decadent and poorly-trained opponents (422b-422d)<sup>5</sup>. He furthermore suggests that in cities where rulers do have property, there are at least two cities, “the city of the rich and the city of the poor”, who are “at the least at enmity with one another” (423a). Thus Plato suggests that his rather unusual property arrangement benefits the unity of the city, and that serving this essential virtue has benefits the security of the city as well.

The dialogue then moves away from the topic of property entirely, turning its attention to the education and proper development of the guardians, and the topics of property and wealth are largely ignored until Book 8 when Socrates discusses the decay of the city. He describes the inevitable occurrence of mistakes in the eugenics program, which introduces flaws into the

---

<sup>5</sup> For an analysis of this passage and its implications for the Platonic project, see Malcolm: 2006, pp. 206-207.

political and social ordering of the state (546d). The most devastating effect of the mixing of the metals of the three castes (547e) is the corruption of the righteousness of the guardians, and the this lapsed behavior manifests most dramatically through the increasingly dramatic intrusion of greed into public life. Rulers develop “a fierce secret lust for gold and silver”, leading to a covetous and extravagant lifestyle (548a). This distracts from the valuation of true virtue (550e-551a), culminating in a political system in which citizens “admire the rich man and put him in office but despise the man who is poor” (551b). This produces an oligarchy with property requirements for rule, where the characteristic citizen is “the thrifty and money-making man” (555b). However, the poor come to resent rule by the rich and the disparities in material conditions, inducing them to rebel and evenly distribute both property and political power (556e-557a). This is the democratic state, saliently defined by the absence of the specialized hierarchy characteristic of the best city (“has not every man license to do as he likes?”) (557b). Ironically, Socrates identifies a different, perverted tripartite political division in democracy (564d), with a wealthy, aggressive de facto ruling class (564e), and two subordinate classes, the obedient producers and the humble masses. From the exploitation of the humbled masses—the “people” as Socrates styles them—and their relative deprivation (both political and material) tyranny is born, the worst government characterized by the rule of a single vicious man (565d-e).

Thus, while property does serve as the catalyst of the state’s decay, it plays a central role in the progression. The failure to strictly separate property ownership and political rule is an initial symptom, and later a contributing factor, in the state’s decline. Socrates anticipates this effect in his explicit discussion of property in Books 3 and 4. When explaining why the guardians must not have private property, Socrates states, “But whenever they shall acquire for themselves land of their own and houses and coin, they will be householders and farmers instead

of guardians, and will be transformed from the helpers of their fellow citizens to their enemies and masters...then laying the course of near shipwreck for themselves and the state” (417b). The need to separate political and economic power thus is a unifying theme in Plato’s treatment of property, and perhaps the inspiration for his unusual system.

## II. Specialization and Expertise: the Ordered Society and the Ordered Soul

It is not, then, property per se that plays a central role in the *Republic*, but rather the effects of the desire for property upon the members of the political community. The destructive force imputed to greed, however, is only a product of Plato’s beliefs regarding human psychology. Briefly stated, three drives—reason, spirit, and appetite—comprise the human soul and motivate actions (436a-441c). These elements manifest in politics through their class corollaries in the city, with each class corresponding to a part of the soul: the reasoning class of guardians (gold), the spirited class of military auxiliaries (silver), and the appetitive class of commoners (iron and brass). The moral, healthy, and just existence of an individual or city requires that reason act as the decisive constituent; conversely, if the appetites are dominant, the person or city will be pre-occupied by greed. Thus, one of Plato’s great concerns in the *Republic* is constructing a regime in which reason can have the best chance of controlling decision-making. However, since he believes the appetitive part of the soul is naturally stronger, only through its complete subordination can reason achieve proper sway. Thus the task becomes establishing a system by which the reasoning part of the soul can be entirely sequestered from the appetitive part.

The idea of specialization strongly informs this conclusion. From the beginning of the *Republic*, Plato carefully instructs his interlocutors on the connection between expertise and craftsmanship (341-346), differentiating the making of money as a specific pursuit from the



actual performance of an art or craft (346b) (notably, this portion of the dialogue serves the deeper point of demonstrating that it is not his own good that a right ruler pursues, but that of her citizens (346e)). However, the Platonic idea of specialization receives its most dedicated analysis in the *Gorgias*. Socrates refutes the assertion that rhetoric is the dominant art by examining the role of skill and specialized knowledge in useful arts generally<sup>6</sup>. He claims that experts should make the decisions regarding their crafts (*Gorgias* 455e; see Klosko, p. 26, for further discussion), and that the definition of a craftsman is one who knows a particular craft—a carpenter knows carpentry, a doctor knows medicine, and so forth (460b). Only through such proper deference to those who hold relevant expertise can anything be successfully accomplished; it does no good for someone without knowledge of medicine to provide counsel on curing illness, regardless of how elegant or appealing (or, to use Socrates's own analogy, tasty (464d)) that advice may be. This discussion is already redolent of the *Republic*—Socrates justification of property restraints states “helpers and guardians are to be constrained and persuaded to do what will make them the best craftsmen in their own work, and similarly all the rest...as the entire city develops and is ordered well, each class is to be left to the share of happiness that its nature comports” (*Republic* 421c). Thus, the *Republic* takes a high-level observation of the *Gorgias*—that ends are best achieved when each role (including that of money-maker) is fulfilled by an expert (*Gorgias*, 433-434; see also Schofield: 2006, p. 217)—and provides a detailed scheme for the most essential human activity, politics. And since possession of property distracts from the expertise of rule (because the possibility of its

---

<sup>6</sup> See Schofield: 2006, pp. 67-68 for a perspicacious analysis of Socrates' basic argument. Socrates differentiates between true arts that benefit a person's good which those which do so only superficially, designed for gratification. This distinction discredits rhetoric by locating it as one of the gratifying practices, rather than one that actually benefits the recipient. See the *Gorgias*, 463a-465e. See also Schofield: 2000, pp. 194-195.

accumulation allows the appetites to interfere with the exclusive governance of reason), there must be a separation between property holders and rulers.

However, answering Glaucon's objection that the scheme of the *Republic* fails to make the guardians happy necessitates an examination of the unusual classification of justice as a type of knowledge. A central Platonic claim is that virtue and knowledge of justice are like other crafts, insofar as it is a thing that is practiced—"the just man...does just acts" (*Gorgias*, 460b). However, as Klosko observes (pp. 41-42), morality and its close kinsman politics are in some ways unique. Whereas each of the other crafts can be used for good or ill—a superior knowledge of medicine can be applied to skillful murder as readily as skillful healing—a knowledge of justice necessarily means an individual will behave justly. This explains the dedicated interest in justice in Plato's work, as the knowledge of justice alone is the type of information that will permit (and inspire<sup>7</sup>) an individual to behave in a right fashion; moral knowledge serves as a lexically superior ordering knowledge. And since arts benefit not the practitioner of the art, but the recipient, the practice of politics benefits not the ruler, but the populace (*Gorgias*, 490-491). Thus, once rulers have knowledge of justice, they will both have the information to promote the good of their citizens (indeed, without this knowledge, they cannot properly run the state and guide the citizenry; see Malcolm Schofield, 'Approaching the Republic', in *The Cambridge History of Greek and Roman Political Thought*, eds. Christopher Rowe and Malcolm Schofield. Cambridge: Cambridge University Press, 2000, pp. 190-232, p. 195), and the understanding that

---

<sup>7</sup> That the relationship between good politics and morality is a tight, perhaps identical one is a complex and ultimately correct claim, and one that I cannot afford to fully explore here. See the *Gorgias* 464b ("that [art] concerned with the soul I call the political art"); Malcolm: 2006, p. 34; Malcolm: 2000 p. 195-196; Klosko, p. 40. For the sake of brevity, I will simply make the transition cleanly here. One could perhaps challenge Plato with the argument, following Callicles, that much as the best poisoner would be a skilled doctor and the best embezzler a skilled accountant (see Klosko, p. 42), the 'best' tyrant would be a skilled (i. e., just) politician. While I find this an intriguing possibility, it appears almost foundationally at odds with Plato's definitions; a just man, by definition, could not be a vicious tyrant, as he would simultaneously have a good soul and a harmed soul. But such a discussion is sadly beyond the ken of this paper.

ruling the citizens well is the highest good not only for the citizens but for the rulers themselves. The specialized knowledge of just politics provides not only the technical knowledge of state organization, but also the moral knowledge that governing well and without any hint of self interest is best for the rulers. In other words, justice does not merely indicate how to govern well (though it does do that, much as any knowledge contains such information on how to perform the tasks associated with that particular craft well, and justice is the unique skill of politics), but why governing well necessarily involves propitiating those whom it does (that is, the citizens).

With this understanding of expertise and of the nature of the soul, the specific scheme of the *Republic* follows logically enough. The tripartite division of the citizens (415a) and the soul (441c) provides the organizing content for political specialization and ultimately justifies the exclusion of property from the ruling class. The guardians, possessing reason, must rule, as their superior understanding gives them the knowledge of justice necessary for politics (both the actual organization and ensuring they do not abuse their positions); spirited individuals of silver must act as auxiliaries who implement the policies of the rulers, applying their courage in service of the wisdom of the golden class; and individuals of iron and brass, most strongly guided by appetite, must serve as craftsmen (including the class of moneymakers who have a natural propensity for wealth accumulation; see Schofield: 2006, p. 257), applying their appetites to productive ends. It is important to note, however, that the citizens of iron and brass are not simple brutes. They are individuals in whom the appetitive aspect of the soul is ascendant, but whom can still, with proper leadership, be guided to virtuous existence through the reasoning capacity they do possess<sup>8</sup>. Plato later elaborates upon relations between the classes—the reasoned-governed rulers of gold, through the assistance of the properly conditioned silver

---

<sup>8</sup> This is particularly important in understanding the relationship between the *Republic* and the *Laws*; see Section IV below.

auxiliaries, “preside over” and guide the appetitive individuals of iron and brass (442a-b). At some level, this structure is informed by the fact that the best state is ruled by reason (see 582); indeed, reason is a far greater good for either a man or a city than great wealth (or other material benefits), a central moral claim in the Platonic dialogues<sup>9</sup>.

Once this structure has been delineated, Plato declares that each class must only perform the role in the city to which it is suited: “when...one who is by nature an artisan or some kind of money-maker tempted or incited by wealth or command...tries to enter into the class of the soldiers or one of the soldiers into the class of counselors and guardians...this kind of substitution and meddlesomeness is the ruin of a state’ (433b). Indeed, justice (and thus good politics and the most fundamental good of the city) is defined as the proper performance of each duty by each class, without such destabilizing switching (434b); correspondingly, injustice the very presence of such substitution (434c).

The destructive potential of unmitigated appetite drives Plato’s insistence on this restriction. Infiltration of the rulers by appetitive desires is devastating for two reasons. Firstly, if appetites achieve a dominant position within the soul (or city), the lifestyle of an individual (or the politics of the city) is corrupted; greed inspires self-interested and instrumental conduct focused around wealth accumulation, rather than proper dedication to the crafts and pursuits as ends in themselves. Secondly, Socrates characterizes appetite as naturally the “chief and strongest element” in the soul (*Republic*, 580e), and one which is self-perpetuating: “[h]e who

---

<sup>9</sup> The past two paragraphs have comprised an inexcusably compact adumbration of central concepts in the Platonic corpus. For a fuller explication, see Malcolm: 2000, pp. 215-217 (importance of unity and the rule of the gold class), pp. 229-230 (why the rule of reason is best); Malcolm: 2006, pp. 270-75 (why reason alone must be allowed to rule, and in particular why it must dominate over the appetites); Klosko, p. 67 (reason’s uniqueness in contrast to appetite in looking after the greater good), pp. 105-107 (importance of the rule of reason over appetites); pp. 117-118 (concise description of the structure of the Platonic city), p. 138 (why the principle of justice is strongly associated with specialization in the *Republic*). The last half of the *Gorgias*, meanwhile, is largely dedicated to supporting the ethical claim that goodness does not consist in simple material flourishing, but in right action; see, for example, Socrates claim that one kills wrongly is far worse off than one who is killed wrongly (*Gorgias*, 475).

indulges his appetites makes them larger and stronger, thereby forcing greater indulgence in the future” (Klosko, p. 107). Thus, to make the appetites dominant is not only to confuse the proper hierarchy of the soul or classes, but to enthrone the part that is not only strongest but possesses self-reinforcing tendencies. And the most voracious and threatening appetite is that for money. Firstly, once political and social relations have fully evolved, it is “the chief instrument for the gratification of [other] desires” (581a; see also Schofield: 2006, p. 254). Secondly, unlike other desires, the desire for money is insatiable—one can accumulate in theory indefinite amounts (see Schofield: 2006, pp. 258-264 for an elegant explanation)<sup>10</sup>. Thus, the tendency of appetites to dominate the soul if given any initial traction combined with money’s particularly qualities make greed the most dangerous of appetites (Schofield: 2006, p. 270). If rulers are permitted to engage in property ownership and accumulation and to deal with money, their souls will eventually become dominated by it, producing a cascade that corrupts the city (546 to 564).

The seductive but pernicious nature of the lust for wealth justifies the hierarchical structure of the city and the Spartan, communal life of the guardians. If the laboring classes are to live well despite the ascendance of appetite in their souls and the prominence of material accumulation in their daily lives, they must be guided by the untainted reason of the guardians. The presence of wealth in the lives of the laboring classes renders them unfit to rule<sup>11</sup>; and since a central attribute of justice is each part of a whole performing its proper role, their exclusion from politics must be complete. Likewise, those who do rightly rule by virtue of their access to reason—the guardians—must be entirely isolated from opportunities for wealth accumulation,

---

<sup>10</sup> Interestingly, as Schofield notes, the *Laws* takes place in a simpler time, less inflamed and economically complex than the city of the *Republic*. (Schofield: 2006, pp. 162, 203). Therefore one might wonder if money is less of a threat in the *Laws* because the complexity of desires accessible by wealth have not had time to evolve as much (though one of the purpose of the codes in the *Laws* is to keep out new, foreign desires).

<sup>11</sup> It is worth remembering, however, that the presence of wealth in the lives of the laboring classes is not a necessary evil, but appropriate to their natures. Thus, one could as accurately say that it is the nature of the laboring classes that renders them unfit for rule.

and thus must hold nothing privately. Specialization is demanded equally of the two classes; but since it is the rule of reason that leads to a more “balanced, holistic” existence (Klosko, p. 107), those who possess reason are given the more foundational role of guiding the entire state.

The status of the well-ordered city as single coherent unit provides an even more compelling perspective on why rulers must not be distracted by appetite<sup>12</sup>. Proper allocation of labor creates a healthy network of cooperative dependence (see Schofield: 2006, p. 224), but violations of the allocation impair the performance of each task. Yet in the well-ordered city, such failures occur only when there are disruptions of the “proper distribution of civic functions” (Klosko, p. 138). And one of the most salient instances of such failure occurs when rulers become greedy and focus on wealth accumulation. As discussed above, Plato invokes the struggle between the rich and the poor as potentially rending a city in two (423a, 551d; see Klosko, p. 143 and Josiah Ober, *Political Dissent in Democratic Athens. Princeton: Princeton University Press*, 1998, pp. 228-230). But this only occurs when there is a deviation from the specialization otherwise demanded by justice; the precise division of labor ensures that *only* the guardians should be concerned with rule and *only* the economic class concerned with the acquisition of wealth. Indeed, under the strictest interpretation of property acquisition by the rulers, a concern with property acquisition by rulers does not make them poor rulers, but rather that it impairs them such that they no longer rule at all<sup>13</sup> (thus the definitional breakdown that

---

<sup>12</sup> For a description of the importance of unity in the *Republic*'s politics, see 420a-e, 462d-e, describing the analogy of the statue and analogy of the wounded finger; Malcolm: 2006, pp. 214-215; Ober: 1998, p. 228.

<sup>13</sup> This concept may be clarified by considering the idea from the *Gorgias* that the good of a craftsman is not his own good, but the good of the recipient (490-491) in the context of the nature of right rule as necessarily just and moral. Since rule (or at least good rule) is identified with morality, and morality is by definition (and by the Platonic rejection of the idea of *akrasia*) (see Klosko, p. 43) good, a (good) ruler will necessarily rule justly. Yet once a ruler begins to do things other than rule—begins to pursue wealth, or what have you—he may begin to do things badly. But in doing things badly, he essentially ceases to rule—at least, the bad rule which takes the place of the good rule is not merely different in quality, but in essential type (one might say the ruler becomes something different, a tyrant). Thus the presence good rule that defines the city is not merely corrupted, but the rule itself is lost; thus the city itself no longer exists as the *same type of thing*.

occurs when the rulers accumulate wealth and the *two* cities of the wealthy and poor conflict). The very existence of a city depends upon a set of relationships, and once these relationships crumble, so does the city. If the particular form of that crumbling is that rulers cease being specialized rulers and become property-seekers, the city shatters into the factions of rich and poor. Preventing acquisitiveness among the gold and silver classes (among the other restrictions of specialization) is not merely an issue of ensuring that a city is ruled well instead of poorly—it is an issue of ensuring that the city exists as a coherent entity at all.

Thus, Plato has resolved the corruption of political rule by greed through a strict separation of the functions in the city. The result is a tightly woven, highly specialized network of classes. Two make and execute political decisions but relinquish material indulgence, and the third has the opportunity for extensive material improvement and wealth accumulation, but must abjure political participation and support their materially non-productive rulers and defenders. The function of this strict specialization is two-fold: to prevent contamination of rule by reason through interference from the (naturally stronger) appetitive drive (at an individual level) or classes (at a civic level), and to generate civic holism through the mutual independence of the classes. Indeed, as each class can perform without distraction or contortion its selected function, this specialization program permits the city as a whole to flourish. However, should appetites tempt the rulers, or the economic classes infiltrate the ruling class, the city quickly deteriorates, as rulers become concerned with wealth, first clandestinely and then openly, leading to oligarchy, democracy, and finally tyranny.

This is an extreme response to what Plato perceives as an extreme problem—and perhaps the only response he perceives as valid at the time of writing the *Republic*. However, both Schofield (2006, p. 223) and Klosko (p. 143) note something of a paradox: while Plato is deeply

concerned by the fracturing of cities into factions of rich and poor, he advocates a rigid social infrastructure that seems to formalize such division (albeit by concentrating a different type of power in each class rather than permitting any class universal superiority; while the ruling gold class might have political authority, all economic power is located in the iron and brass class). However, Schofield (2006, p. 224) argues that the partitioning of duties in the ideal Platonic city generates mutual reliance and respect, emphasizing that each element of the city is *necessary* and must perform its role well if the city as a whole is to survive and its members flourish.

This observation applies more generally to Plato's of specialization and the tripartite soul. If one accepts the Platonic account, the city and its accommodation of wealth and property become feasible, though with very little room for error in execution. His narrative of political decay suggests that if the city is to continue operating justly, the city's divisions must be protected against any diffusion of duties across class lines and against the possibility single individuals might be placed in the wrong class (more damningly, be placed higher in the structure than they ought to be). This stringency inspires Plato's precision in enumerating the selection, training, and lifestyle of the rulers. The scheme is demanding but rewarding; the healthy city will operate as a single unit, without dissension or internal strife. Properly ordered specialization produces a harmonious city; and part of this proper ordering involves the absolute and uncompromising allocation of property rights.

### III. Mortal limitations and precise codifications: Property in the *Laws*

Plato's last major work includes a remarkable shift in its management of property. Despite holding many of the same positions regarding human nature—most pertinently the superiority of reason and the need to restrain greed—the *Laws* addresses greed through dramatically different means, rejecting the absolute separation of ownership and political power



in favor of universal but strictly regulated property ownership. The complex interplay between the *Republic* and the *Laws* provides a key perspective in the creation of unified narrative for Plato's approach to property<sup>14</sup>. Indeed, Plato begins his discussion of property in the *Laws* with a reference that temptingly invokes the spirit of the *Republic*, acknowledging that in "first-best society", "friends property is indeed common property" but that such a society would be populated by "gods, or sons of gods" (739c-e; this passage directly precedes Plato's specific statements on property)<sup>15</sup>. However Plato then declares that as he is concerned with creating the best city that can be realistically achieved, he will concern himself with the "second-place" and third-place cities (739e). He recognizes the both the superiority and unavailability of the propertyless society, and then turns to a set of post-lapsarian policies.

Unlike the *Republic*<sup>16</sup>, the *Laws* is rife with detailed schemes for property management. Plato's first concern is ensuring uniformity of land possession and number of households; it is criminal to sell dwellings or land, and the "most keen-sighted" magistrates are charged with enforcing this policy (741c-d). This ensures that the ideal number of 5040 households is maintained—an independent sociological goal—but also "leaves no great room for the making of fortunes" (741e). Stringent limitations also regulate currency—private ownership of precious metals is prohibited, and internal exchanges are maintained through an internal state currency that is "worthless abroad" (742a-b). Plato takes great care to differentiate internal and foreign

---

<sup>14</sup> Laks, pp. 267-275 offers three different potential interpretations of the *Laws* relative to the *Republic*: completion, revision, and implementation. There will not be time to fully investigate each possibility; moreover, revision offers the most flexible interpretive approach for comparing and contrasting the treatment of property in the two works. Of course, as Laks suggests (p. 272), 'revision is in some cases milder than one would expect', though the change in property theory changes seem the most tectonic ('deep and irreversible', as Laks puts it). The essential question is the degree to which this dramatic change reflects foundational changes in Plato's attitude.

<sup>15</sup> It is tempting to interpret this as a direct invocation of the *Republic* (Klosko, p. 200, states the allusion is "palpable"), but, as is argued below, an attentive enough comparison indicates Plato is describing two fundamentally different types of regimes. See Section IV below.

<sup>16</sup> Indeed, Schofield: 2006, pp. 272-275 notes how Plato gives little attention to any policies regarding the economic classes, including how they are to handle property.

currencies, and indicates that if private individuals are required to travel abroad and thus use foreign currency, they must go through administrative channels to ensure foreign currency is not introduced into the domestic economy upon their return. Similarly specific limitations are placed upon the use of dowries or lending at interest (742d); also prohibited are “much making of profits from mechanical crafts...or raising of sordid beasts” (743d). Plato’s intent appears to be preventing the introduction of practices which result in wealth transfers or accumulations.

These regulations rest upon a rather disjointed series of justifications (at least in comparison to the elegance and conceptual parsimony of the *Republic*). The inalienability of land prevents citizens from attempting to gain wealth through land exchanges, a “sordid calling—as even the sound of the reproach ‘base mechanical’ repels the man of free soul—and none will ever stoop to amass wealth by such devices” (741e). He continues that to be “at once exceedingly wealthy and good is impossible” on the grounds that the extremely wealthy are those who will resort to “honest and dishonest means alike”; good individuals “will not find it easy to become either remarkably wealthy or exceedingly poor” (743c). The litany culminates with a declaration the laws ought to produce a sense of unity among the population, and that property accumulation would be divisive (specifically by encouraging lawsuits). Of these three arguments, two are strongly redolent of the *Republic*—the appeal to the importance of non-corruption, and the appeal to unity; indeed, the greatest difference is that Plato now seeks to achieve these through universal but strictly regimented private ownership rather than a class system. However, invoking the values of moderation and balance to argue that wealth and goodness are incompatible is new, diverging from the *Republic*’s position that any wealth taints politics (while the people of iron and brass in the *Republic* appeared good on their own appetitive terms, that is to say, as good laborers and acquirers, they require the guidance of the untainted

reason of the guardians to live virtuously). This new argument intimates many of the underlying change in the *Laws*.

The *Laws* also contains a wealth of positive rather than prohibitory statutes. These describe the acceptable distribution of property, enumerate permitted inequities of wealth, and provide instruction on how the state should supervise and enforce these arrangements. After noting it would be ideal but unrealistic that all settlers should arrive with equal property (744b), Plato accommodates for unequal property by stating “there must be classes of unequal census...in particular because of the equal opportunities our society afford, that so in election to office [and payments of fees] may be had to a man’s due qualifications” (744c). This statement contains the heart of the *Laws*’ political treatment of property—the state’s organization must guarantee property does not determine political and social outcomes. To this end, Plato states “we must arrange our citizens in four classes according to the amount of their property”, indicating that individuals may move from class to class as they “pass from poverty to wealth, or wealth to poverty” (744d; see Klosko, pp. 208-210). This quadripartite scheme frames the remainder of the *Laws*’ property doctrine. Most forcefully, on the grounds that there is “no place for penury in any section of the population, nor yet for opulence” (744d), magistrates must ensure that no citizen has more than four times the property of the least-well off citizens; excess must be consigned to “the state and its gods” (745a). These regulations prevent internal “dissensions” (744c), but also ensure that society is not more subtly corrupted by “illiberality and commercialism [and] opulence” (747c). The management of property must ensure the population remains virtuous and capable, comprised of good citizens, and remains undistracted by the pursuit of wealth.

This scheme is then used to reconcile differences in propertyholding with political equality (a “checks and balances” approach, Klosko, pp. 220-221). The central innovation is the

use of the property classes to structure political representation: the ruling council is divided into four groups of ninety, with one group representing each property class, but all the representatives voted upon by all citizens (756c). This ensures that each class receives due representation, but that representatives will serve the entire electorate (since voting itself is across class lines). A citizen's class also determines vulnerability to fines for failure to participate in the political process (there is a rather precise and elaborate schedules of fines at 756d; in general the poorer classes are exempt more often than the wealthier<sup>17</sup>). The classes make other periodic appearances in the political sphere—for example, some administrative positions are restricted by property class (monitors of building regulations and the public water supply are to be drawn from the highest property class, on the grounds that the position requires great leisure time and thus should only be attended by an individual with sufficient resources, 763e; directors of judges of athletic competitions shall be drawn from the middle property class, 765c. The latter restriction is not given explicit justification, though a possible explanation is apparent enough—the best judges would neither have the surplus money to be patrons of competitors, nor be so penurious as to be vulnerable to bribes). Additionally, penalties for various civic violations (such as failing to marry by a prescribed age) are harsher for those in higher property classes (774a, 774d), and fulfillment of civic duties tends to be compulsory for the wealthier classes but voluntary for the poorer (see, for example, 764b). In general, Plato strives to distribute penalties and duties fairly

---

<sup>17</sup> The logic of the electoral fines system is interesting, and perhaps a bit puzzling. *Everyone* must initially vote for representatives from the two highest classes (or will be punished) and in what might be called a final confirming election, but initial voting for representatives from the lower two classes is compulsory only for the richer citizens. At first glance this might appear to conflict with Plato's new emphasis on equality (described below), as it would suggest political participation is more valued from the rich. Yet it seems also quite possible Plato is merely trying to avoid coercing those less capable of paying fines, reminding the rich of their civic duties to the state and the poor, or merely attempting to use fines only when politically expedient. The elections which are compulsory only for the rich are, after all, those votes for the representatives from the lower classes. The theory that Plato thinks the lower classes are incapable of choosing well seems challenged by the fact that the elections may be voted upon by *all*; the only thing at issue is who will be *punished* for failing to vote, and under what circumstances.

across property classes, ensuring no property class is *politically* disadvantaged by its economic status while simultaneously providing for the effective performance of civic functions.

This treatment of property in the *Laws* lacks the compactness and parsimony the *Republic*<sup>18</sup>, perhaps simply because Plato seeks real-world applicability as much as obedience to principle<sup>19</sup>. However, many of Plato's beliefs regarding the human good, the hierarchy of values, and political organization remain the same. Plato continues to hold the position that accumulation of material wealth and appetitive gratification generally are the lowest form of human satisfaction. He affirms that reason and virtue are inestimably more valuable than wealth—"all the gold on earth or under earth is no equal exchange for goodness" (728a)—and offers a specific ranking of human qualities that places "good qualities of the soul in the first and most honorable rank...advantages and good qualities of body in the second, and in the third, goods of estate, wealth" (697b). In discussing law, Plato reiterates this ranking ("concern for possessions should take the lowest place in our esteem", 743e), and then declares "should any law there be imposed be found to put health before sobriety in point of public esteem, or wealth before health and sober-mindedness, it will stand detected as wrongly imposed" (744a)<sup>20</sup>. Indeed, it is so important that the public recognize and accept this ordering that Plato suggests the language of honor and esteem should be used to reinforce it.

---

<sup>18</sup> As Schofield notes, "The *Republic* maintains an almost total silence on how the economic class is to be educated. Plato's overwhelming preoccupation is with the elite." (2006: p. 272). This neglect of policies regarding the economic class extends to specific treatment of how they may handle property in *The Republic*. One can see this as a facet of the 'remarkably sketchy' treatment of the state (due to the text's subordination to the issue of justice; Klosko, p. 117), or as indicative of the different functions of the *Republic* and the *Laws*.

<sup>19</sup> Indeed Laks, p. 275 offers one hypothetical relationship between the *Republic* and the *Laws* being that the *Laws* humanizes the divine theory of the *Republic*.

<sup>20</sup> Plato's use of the language of honor and esteem to reinforce the hierarchy of mind-body-wealth echoes the *Republic*, where the gold and silver classes were to be reminded that the existence of precious metals in their souls served as compensation for the absence of material wealth (416e-417a).

The hierarchy of soul-body-wealth closely parallels the *Republic*'s division of the soul. Reason, spirit, and appetite mirror soul, body, and wealth, most conspicuously in the priority of the higher elements over the lower. Indeed, the position that rule of appetite rather than reason is a central corrupting force retains its prominence in the *Laws*. Wrong is formally defined as “the domination of the soul by passion, fear, pleasure or pain, envy or cupidity...” (864a). And beyond generic ‘cupidity’, Plato marks out “the passion for wealth” as a drive that can monopolize the soul, excluding other pursuits. Everyone is “ready enough, in his furious thirst for gold and silver, to stoop to any trade and any shift, honorable or dishonorable, which holds out a prospect of wealth, ready to scruple at no act whatsoever—innocent, sinful, or utterly shameful—so long as it promises to sate him, like some brute beast, with a perfect glut of eating, drinking, and sexual sport” (831d; see Schofield: 2006, p. 255 for the parallel point in the *Republic*). Such corrupting effects extend to politics as well—“when a single person, an oligarchy, or a democracy with a soul set on its pleasures and passions and lusting for satisfaction...when such a one tramples law under his feet and takes command of an individual or a society, then...all hope of deliverance is gone” (714a). And as in the *Republic*<sup>21</sup>, education must emphasize virtuous conduct in the face of the temptation of appetites; in discouraging the pursuit of acquisition for the material benefit of progeny, Plato urges that “We should leave our children rich, not in gold but in reverence” (729b).

These passages suggest that—more or less—Plato’s conception of the human soul in the *Laws* is consistent with that in the *Republic*<sup>22</sup>. The fierceness of greed remains a constant

---

<sup>21</sup> See Klosko, p. 118, and in particular Schofield: 2006, p 270—a central role of education is to prevent appetites from dominating reason.

<sup>22</sup> There is a subtle shift in language which I do not have the opportunity to fully explore—the elevation of reason is displaced by the elevation of the soul or the “immortal element”; thus spiritual language seems to displace the language of reason. Consequently, the threat of wealth is no longer a direct threat to reason but rather to the soul or divine status of individuals. See 727-728 for a striking instance of this change.

menace, and based on this alone one might expect continuity with the methods of control recommended by the earlier work- exclusion, isolation, and specialization. However, even before describing the radically different solution noted above, the text hints that other attitudes relevant to property management have changed in essential ways. Plato indicates that placing “our private households and our public societies alike in obedience to the immortal element within us” is an act which reaches back to the “age of Cronus” (714a) when men were perfectly ruled by gods rather than left to their own fallible devices, a statement consistent with the position that the *Laws* depicts the second-best city.

The new attitudes and policies are paralleled by a tectonic shift in the relationship between wealth and the virtuous life. Rather than maintain that the best individuals must lead lives isolated from the temptation of appetites, the *Laws* indicates that balance is optimal: “demands and desires” are still extremely threatening to the proper ordering of both state and soul, but the new goal is “moderation” (918d). Plato singles out material extremes as a manifestation of this, noting the two “enemies” are “penury and opulence”; while the latter “rots souls with luxury”, the former “drives them into sheer insensibility to shame” (919c). Plato further identifies wealth (along with the body) as a thing for which *excesses* are bad, but where a moderate balance is perfect (729a). Appetites in and of themselves no longer pose an ineluctable threat to virtue. The new culprit is excess—either of gratification or denial—for it will lead one astray from personal and political stability. This is a dramatic change from the *Republic*, particularly from the lifestyle of the ruling classes. The state of the *Republic* strove to select, condition, and situate guardian and auxiliaries in order to exclude appetite from their lives to the greatest degree possible. Now, such absolute exclusion would be a form of the very immoderation the *Laws* condemns. However, it is not the valuation of each part of the human

soul that has changed, nor the relationship between them, but rather the appropriate setting for achieving the right relationship between those parts. The *Republic* relied upon an external political setup in which each individual incarnated a particular aspect of the soul, an attribute which determined that individual's political and social relations<sup>23</sup>. The *Laws*, however, reconstitutes this set of relationships *within the individual*, such that the hierarchy and balance is complete within each citizen. Thus the normative ideal of specialization that existed at the level of the state in the *Republic* reappears in a radically new form in the *Laws*. Individuals are now to internalize the priorities that drive that specialization, each person holding reason highest in his own soul.

This new approach has further ramifications for the values and attributes which are essential to the properly constituted state. The city of the *Republic* was characterized by differentiation between classes (both professionally and in terms of lifestyle), informed by the identification of justice with proper specialization. With the relocation of this specialization, a new political virtue emerges among the citizens of the *Laws*—equality<sup>24</sup>. Justifying his electoral policies, Plato indicates

“There can never be friendship between the slave and his owner, nor between the base and the noble when equal honors are bestowed on both; indeed, equal treatment of the unequal ends in inequality when not qualified by due proportion; it is these two conditions, in fact, which are the fertile sources of civil discord. It is an old saying...that equality gives birth to friendship...the true and best equality...assigns more to the greater and less to the lesser, ...In this matter of honors, in particular, it deals proportionately with either party...” (757a-c).

Plato then remarks that achieving this equality, identified with “sheer justice” (757c) (and thus parallel to the proper assignment of specialized roles in the *Republic*), is the most exigent and

---

<sup>23</sup> An interesting—but somewhat tangential—attribute of this setup is that each member of the society must be possessed of enough reason such that she can at least recognize reason and the superior directives of the guardians. Thus, while the auxiliaries and laboring classes might have spirit and appetite as the dominant aspect of their souls, they still must be possessed of a substantial part of reason such that they can appropriately interact with the ruling, reason-embodiment guardians.

<sup>24</sup> Obviously, the democratic nature of the *Laws* reflects a remarkable shift from the condemnation of democracy in the *Republic*- libertine and barely prior to tyranny. However, this political shift cannot be fully explored here.



noble political aim. Politics serves not “the interest of a handful of dictators or a single dictator, or the predominance of a populace”, but “always justice” (757d)—and thus, if justice is equality, politics must seek to serve the interests of all citizens equally.

Of course, reason endures as the foundation of the virtuous existence for both the collective and the individual, so the good state, above all else, must cultivate reason in its policies and its citizens. And given the continued tendency of greed to distract from proper reason-inspired conduct, excluding or minimizing its effects remains a priority. In light of the rejection of the *Republic*'s classist allocation, flat equality in property distribution might appear an optimal solution, even if that property is privately owned; such a policy would minimize the effects of property in the political sphere and realize the newly celebrated virtue of equality. Yet as noted above, Plato is resigned to the fact that individuals will not enter society on an equal material footing, and that given this limitation must seek alternatives to ensure differences in wealth do not corrupt the political process.

Adjusting for these new values and limitations, the innovations of the *Laws* serve the same ends as the strict prohibitions of the *Republic*. Both texts strive to prevent wealth from influencing political outcomes and those with political power from yielding to the temptations of greed. The mechanisms employed within the political structure to achieve these goals, however, have changed dramatically. The *Republic* relies upon complete exclusion of the ruling classes from property ownership; with no individual in a position of political authority even capable of achieving private material benefit by her very status within society, greed simply has no point at which to make purchase. Alternately the *Laws* adopts the less dramatic tactic of legislating that wealth must be sufficiently evenly distributed such that it is unlikely greed will override other motives for any individual, and tailoring a political structure to these distribution that will

mitigate the political. More surprisingly some of the underlying values that determine the treatment of greed have changed as well. The central value of the *Republic*—specialization and complete dedication by each individual to her assigned task—has given way to an interest in equality of both political participation and material status. Consequently, prescriptions that extracted and elevated the best rulers have been supplanted by policies that encourage equal political participation (or close to it) by all citizens.

Before delving into a full comparison the two paradigms, one final—and in some ways countervailing—trend must be noted. While the *Laws* generally assumes worse conditions, Plato makes two positive presumptions regarding the populace that shore up his new theory of property. The *Laws* takes as a given “a population with no disrelish for such social regulations, who will tolerate lifelong fixed limitations on property...and deprivation of gold and other things...” (746a). Additionally, Plato presumes it is “very unlikely” that under the regime posed in the *Laws* that his citizens will become greedy, based on the lifestyle and freedom his recommendations produce (832d). The first statement is merely a presumption of the psychological attributes of the raw material from which the state is to cast; the second makes a postulation regarding the effects of his political system. In particular, the “very unlikely” claim suggests the population must be receptive the *Laws*’s policies. Unlike the rest of the *Laws*, these statements posit a population that will be *more* pliable and easier to mold than the citizens of the *Republic*, in that exposure to greed will not result in the complete domination by appetite and the subsequent total corruption of politics. However, as explained below, these statements might be seen as describing the minimum sufficient conditions if one wishes to erect the virtuous state in the absence of guardians. Without those bastions of reason, even the lapsed populace must meet a certain standard if one wishes to establish a city along Plato’s lines.

#### IV. From the rule of indigenous reason to the rule of law: Towards a unified narrative

The dramatic differences between the *Republic* and the *Laws* can be traced to two theoretical sea changes. The more explicitly political involves the basis of authority. Whereas the *Republic* identifies the guardians as the definitive source of reason, the *Laws* holds pre-established code—comprised of Plato’s own explicit instructions—to be the ultimate source. The locus of reason and thus right governance shifts from individuals native to the society to external, immutable rules. Secondly, Plato appears to reassess his normative organizing principles in the *Laws*, favoring ideas of balance and proportion over purity and specialization (whether this change reflects a genuine normative shift or simply willingness to compromise his convictions on Plato’s behalf is a more subtle question). Broadly speaking, these changes fit into one of two narratives described by Laks (Andre Laks, ‘The Laws’, in *The Cambridge History of Greek and Roman Political Thought*, eds. Christopher Rowe and Malcolm Schofield. Cambridge: Cambridge University Press, 2000, pp. 258-292): either the *Laws* does not break with the *Republic* but is a logical extension (“completion”) or “implementation”, or it reflects a deep-seated shift in perspective (“revision”). Klosko ardently supports the latter, seeing the *Laws* as possessed of a mood of “tiredness and resignation”, indicating that Plato’s “faith in man’s power and dignity, in man’s ability to know, have waned” (p. 198). He further suggests the rejection of the rule of philosopher-kings follows from this pessimism, and that it is their absence that inspires a reconsideration of the political infrastructure: “ideal philosophers are not to be found. This causes Plato to renounce the guardians’ way of life as well” (Klosko, p. 200; see also pp. 242-243). Klosko traces this reappraisal to a grimmer view of human psychology, in which individuals “are pulled by their emotions and passions” (p. 200)<sup>25</sup>. Ultimately, Plato is no longer

---

<sup>25</sup> For a less dramatic interpretation of changing human nature, see Laks, p. 276: ‘From the vantage point of the *Laws*, the *Republic*, in subordinating the guardians to communism and in entrusting power to the most accomplished

convinced that the soul can be protected from emotion and appetite through organizational mechanisms. Even a properly trained philosopher-king succumbs in time to the temptation of “corrupting self-interest” (Schofield, p. 236) unless the individual is truly divine, a circumstance too rare to be the basis of political practice.

Without an infallible ruling class, Plato must develop an alternative to the hierarchical political structure of the *Republic*. He thus promulgates a more rigid set of instructions (see Klosko p. 201): the eponymous laws<sup>26</sup>. Indeed, that Plato includes detailed instructions on such a comprehensive variety of topics in the *Laws* seems to accommodate the inability of generalized human reason to rule well; Plato now believes the fundamentally impaired populace needs specific guidance on all matters. This interpretation of the *Laws*—including the universal possession of private property—can be interpreted as the last step in a new political narrative: Plato begins with a pessimistic psychology, contemplates its implications for the political potential of the population and the rulers, and finally constructs an alternative system.

While there is much to commend this interpretation, it is worth complicating it with the “completion” or “implementation” narrative. This reading treats the *Republic* either as an idealistic sketch rather than a practical plan, or as an allegorical account of the individual. The relationship between the *Republic* and the *Laws*—points of congruence but with a few key differences that vastly affect implementation—can be explained as a shift in the texts’ functions rather than in Plato’s actual beliefs. The *Republic* describes either a utopian or symbolic city,

---

guardians (the philosophers), has ignored the facts of human nature, and simultaneously overestimated the power of the rational part while underestimating that of the irrational part.’ Applying this new conception of humanity to property specifically, Laks continues ‘To the extent that pleasure and pain make up what man properly is, property is the paradigmatic source of pleasure. The ‘retreat from the sacred line’ consist, in the most general formulation, in knowing how to deal with what is ‘properly’ human even at the cost of a certain compromise. At issue is understanding what, exactly, is the nature of this compromise. This is the sole criterion by which to measure the distance between the ‘second-best’ city of the *Laws* and its first city.’

<sup>26</sup> See Schofield: 2006, pp. 274-275 for a description of the actual execution of law in both texts.

while the *Laws* adapts this account for implementation. Thus the ‘same’ Plato could have written both texts; such a reading challenges the cleavage between the earlier, optimistic, reason-emphasizing and later, pessimistic, passion-emphasizing Plato.

There is much evidence for this view, not the least that the quest to understand justice generally and the just individual in particular inspire the investigation of the ideal city of the *Republic* (368d-369a). The strongest single piece of evidence may come from Book IX: when Glaucon comments he could not find a city such as Socrates describes, Socrates responds “perhaps there is a pattern of it laid up in heaven for him who wishes to contemplate it and so beholding to constitute himself its citizen. But it makes no difference whether it exists now or ever will come into being. The politics of this city only be his and of none other” (592b). This passage can be taken to support either or both of the reconciling interpretations. Most literally, the city is an ideal political structure that can inspire the conduct of just persons (and, if a city were comprised only of just citizens, it might look like Socrates’s city), but it does not take much imagination to construe the well-ordered city as a cipher for the virtuous individual. The symbolic interpretation may receive additional support from passages in the *Republic* wherein Socrates analogizes the effects of greed upon the city and soul. He indicates a “the state governed by a tyrant” is “utterly enslaved” (577c) and correlates it to the “the tyrannized soul...driven and drawn by the gadfly of desire” (577e). He then points out that the moral status of an individual who live out a tyrannical lives in private is comparable in quality, if not in material effect, to one who lives a tyrannical life in a position of power (579c)<sup>27</sup> (of course, these passages might also just be interpreted as helpful analogy).

---

<sup>27</sup> Most pertinently for with the treatment of property, this tyrannical type is particularly associated with greed (579b); this passage demonstrates the corrupting effects of greed in both a personal and political context. It elevates the destructive components of the humanity—both individually and collectively—to the position of rule, leading to defective forms of existence.

Beyond these hints that the *Republic* is not a literal handbook for political action, the continuity in the underlying psychology of property supports a reconciling interpretation. Greed remains a devastatingly disruptive element in the political sphere, and any changes in Plato's management of greed tend to be re-assessments or tactical adjustments rather than sharp cleavages. The most important illustration of this trend is so deeply and subtly woven into the texts that it almost fades into the background: *neither* work applies its main efforts to describe the 'first-best' city of the *Laws*, or the non-luxurious but paradisiacal and feverless city of the *Republic* (the further implications of this are most fully explored below). As Klosko notes, while the ideal city is entirely without private property, the *Republic* restricts this propertyless lifestyle to a small percentage of the population (p. 200), and the *Laws* does away with a propertyless lifestyle all-together. It is a reasonable inference that the first-best city would be *entirely* without greed or disruptive appetites among any citizens; however, even the ostensibly ideal city of the *Republic* does not eliminate such passions but only offers a rubric for managing them. This would suggest that the difference between the cities described in the *Republic* and the *Laws* is not as dramatic as that between the first-best and second-best cities. Schofield's suggestion the management of the economic class in the *Republic* might be the 'embryo[nic]' genesis of the rule of law (2006, p. 274) provides further linkage between the two texts. In this reading, the people of bronze and iron are a prefiguration of the populace of the *Laws*. Thus the *Republic* and the *Laws* both recognize the omnipresent, disruptive effect of greed; they merely adopt differently approaches to its management. The difference is the mechanism—native reason or external law—saddled with the responsibility of regulating the destructive power of appetite.

This evidence suggests that change between the two texts is best described as a re-assessment of human potential or best management of human instability, rather than emergent

pessimism or adoption of new theoretical foundations. The possibility of specialized philosopher-kings allows for the pure rule of reason in the *Republic*, while the *Laws* rejects the idea that even a select group of carefully trained humans can attain this status. However, the *Laws* also moderates the prognosis that politics will be irredeemably corrupted if those who rule are permitted opportunities for property ownership; on the other hand, the rulers of the *Laws* operate under the strictures indicated by Plato, so seemingly such guidance would delimit their ability to err. This change in the nature of rulership is clarified by examination of the *Statesman*, a work that falls between the *Republic* and the *Laws* both chronologically and substantively<sup>28</sup>. The Statesman is a master organizer (a “supreme orchestrator” in Schofield’s diction, a “weaver” in Plato’s; Schofield: 2006, p. 168; see also Melissa Lane, *Method and Politics in Plato’s Statesman*. Cambridge: Cambridge University Press, 1998, p. 142), a role somewhat different from that of the guardians (Schofield: 2006, p. 175). Yet like the guardians, his<sup>29</sup> rule (if achieved), would be ideal, “free from any compromise with the limiting or inhibiting materials of reality”, and he ought to be granted “unconditional authority due to his knowledge” (Lane, p. 139). Most striking, however, is Plato’s simultaneous recognition of the possibility of ideal rule and accommodation for its absence:

The true statesman does not arise naturally, like a queen-bee in a hive (301e1); but it is incumbent on actual cities to recognize that he could arise... This recognition does not come in degrees of hope which would shade it into either optimism or pessimism. It creates a dual requirement of cities lacking political expertise. They must, on the one hand, acknowledge the possible perfect existence, or the perfect possibility, of the true statesman, while on the other hand undertaking to imitate the ideal constitution... “so far as possible” which signifies the inevitably imperfect (Lane, p. 139).

---

<sup>28</sup> See Lane, *Method and politics in Plato’s ‘Statesman’* and Schofield: 2006, pp. 166-185 for full expositions. Since my use of the Statesman is instrumental, I follow these two texts in my analysis. A full examination of the text is not feasible here, and while Laks cautions against merely seeing it as “heralding the *Laws*” (Laks, p. 271), its consideration of the possibility of a philosopher king is a useful transition point. See in particular Schofield: 2006, pp. 174-182 for a discussion of the contrast between the *Statesman* and the other two political texts.

<sup>29</sup> The use of the gendered pronoun will remain consistent with Plato’s use, even if it reveals an unfortunate prejudice.

Lane further connects this dichotomy to two roles for law (pp. 147-163). In the presence of superior rule (the guardians or the Statesman), knowledge trumps laws and the ruler(s) employ laws instrumentally, rather than being bound by them (p. 149). However, in the absence of such specialized knowledge (“second-best cities”), laws will not be changed “when the expertise required for doing so is not present” (p. 158). Thus the status of law is linked to the availability of political expertise. In its presence, the superior ruler with expertise is the ultimate decision-maker, but in the absence of such knowledge, law becomes the highest source of political authority (see also Klosko, pp. 225-226).

This analysis explains why the *Republic* offers so few instructions regarding the management of property among the economic classes, and the *Laws* so many. In the *Republic*'s city, the expertise of the guardians would manage property and the economic classes with more judiciousness and sensitivity to context than immutable law possibly could. In the absence of such expertise in the *Laws* established doctrine—inflexible but sound—must hold sway. Moreover, both texts are concerned with the corrupting effects of greed, and tailor their management of the problem to the particular political setup. While the *Republic* strives to protect the purity of the expert through exclusion of property, the *Laws* merely attempts to ensure obedience to the laws is not overwhelmed by acquisitive fervor (this may explain the *Laws*' greater attention to the coercive potential of law; see Lane, p. 147).

Such an interpretation suggests a fairly tidy final interpretation of Plato's property theory. The *Republic* and the *Laws* reflect the contingencies of two different political arrangements, one with the presence of a statesman and one without it. Indeed, that Plato is willing to grant property to all citizens (including, one might expect, those of the nocturnal council, the closest parallel to the guardians in the *Laws*; see Klosko, p. 234), but none to the guardians, suggests that the



citizens of the *Laws* are not ‘lapsed’ compared to those of the *Republic*, but merely operating under a different set of circumstances (the absence of a Statesman or guardians). Plato addresses different conditions with different tools. The implications for propertyholding flow from this change in circumstances and the subsequent response. As the citizens of the *Laws*, including political decision-makers, are bound by rules beyond human interference, they can possess property with less risk of the state’s political structure being permanently damaged. However, as the guardians of the *Republic* have supreme political authority, the state rises and falls with the righteousness of their governance; if they are corrupted, the states falls with them.

However, this narrative is more broadly situated by further consideration of the two ‘un-corrupted’ cities introduced in each text. As described in Section II, Plato expresses a deep skepticism towards the type of city Glaucon and Adimantus prod him to construct. In particular, Socrates’s claim that his interlocutors demand a “fevered state” (372e) suggests that everything that follows—including the painstakingly specific conditions under which Guardians might live—is a response to this (ostensibly diseased) condition. Indeed, the non-luxurious “city of pigs” (372d) Socrates initially proposes seems an entirely different society, one characterized by such material simplicity that greed cannot gain initial psychological purchase. The ease and peacefulness that characterize this city of pigs—individuals live in “pleasant fellowship”, avoiding conduct that will induce them to fall into “poverty or war”—appears, of all things, most evocative of the first-best society Plato describes in the *Laws*. Indeed, the similarities to that first-best society extend beyond the content itself. In both texts, the allusion to such a city is brief, and serves primarily to situate the discussion of a later, lapsed society—one characterized by appetite, greed, and the need to corral such destructive instincts. Additionally, a resigned, melancholic tone pervades the passages describing the first cities. Plato observes, with aching

brevity, the possibility of a human society without destructive passions, before resigning himself to their presence and offering artful constructs for their management. But his unwillingness to more vigorously promote or describe such a society implies that it is either a remote possibility or a relic of an age before divisive appetites were engendered by material wealth and social differences. The notion of a society without such differences is so foreign that even the ‘godlike’ sons of Ariston (*Republic*, 368a) demand a more indulgent city; subsequently, Plato apparently believes it practically unworthy of extensive consideration.

However, the presence of such a city suggests the comprehensive Platonic account of property is more complex than the ‘main’ narratives of the *Republic* and the *Laws* alone indicate. In both works, the initial inquiry is into the extent of politically possible: would it be feasible to create the optimal state, uncontaminated by the presence of destructive appetites in its constituents in the first place? The two texts describe different preconditions as necessary for such a society—the *Republic* offers up the non-luxurious ‘city of pigs’ as fulfilling this criterion, while the *Laws* suggests the ideal city would be distinguished by its divine qualities (ruled by “not men but spirits” (713d), or populated with “gods, or sons of gods” (739d)). Greed and destructive passion would be unknown in such a city, so there would be no need to erect political structures to control them. On its face, the absence of greed appears to an irreducible, primary attribute of the cities. The lack of any incentive for wealth accumulation in the *Republic*’s ideal city means greed is an alien motive to its citizens, and the inherently superior citizenry of the *Laws*’s city are simply by nature immune to distraction by appetite. Yet there is an explanation for the absence of greed in the ideal cities that draws from a shared theoretical basis of the two works (albeit an explanation Plato adumbrates with frustrating fleetingness). In the *Republic*, when Socrates presses Adimantus on what would constitute justice for the people of the non-

luxurious city, Adimantus responds justice could only exist “in some need that those very constituents have of one another” (372a) (Socrates ambiguously responds “Perhaps that is a good suggestion”). And the *Laws* even more explicitly identifies the first-best city with a universal sharing of interest and welfare that precludes private property ownership:

if all possible means have been taken to make even what nature has made our *own* in some sense common property, I mean, if our eyes, ears, and hands seem to see, hear, act, in the common service; if, moreover, we all approve and condemn in perfect unison and derive pleasure and pain from the same sources—in a word, when the institutions of a society make it most utterly one, that is a criterion of their excellence than which no truer or better will ever be found (739d).

Thus, the ideal city is defined by a perfect realization of Platonic unity, such that unity *becomes* justice, without intermediary concepts such as specialization or balance. Unity, of course, is a politically important concept regardless (see footnote 11 above), but it seldom receives such a cogent or uncompromising expression in Plato’s philosophy. And it is the loss of this unity—the fact that individuals begin to distinguish *their own* good from the collective good at all—that permits for the emergence of greed.

Of course, the differing reactions to the loss of this unity distinguish the *Republic* from the *Laws*, as this essay has endeavored to show. But the different solutions can now be located in an over-arching narrative. The *Republic* observes that while perhaps unity cannot be maintained for the entire state, there may remain a select few individuals who, with the proper conditioning and lifestyle, may live as the individuals did before the emergence of greed; they are, as it were, atavistic remnants of the period before luxury. If properly cultivated (and sheltered), the guardians may rule the city as a simulacrum of its original unfevered condition; however, to realize successfully fulfill this role, the guardians must remain uncorrupted by the new passions that dominate the vast majority of the luxurious city’s citizens. These guardians (and their auxiliary subordinates) essentially relinquish the opportunity for individual self-indulgence so

that they may possess the untainted reason necessary for rule. This permits the rest of the city to simultaneously derive the benefits of luxury<sup>30</sup> and live under the rule of reason. Because of this setup, dedication to specialization is the prized virtue, as it is the only attribute that ensures the guardians rule effectively and maintain the state's integrity and virtue. In the *Laws*, however, these potentially virtuous holdovers are gone; the citizenry is entirely constituted of individuals most like the people of iron and brass. The only way to achieve a virtuous political order is obedience to reasoned instruction which comes from Plato himself. The memory of the pre-luxurious, first-best city is entirely gone—indeed, so distant that it seems a city inhabited by beings of spirit rather than flesh. And gone with it is the expertise of the Statesman that can, through reason, transcend law and guide the state through pure reason. Thus, the only hope for the virtuous state is rigorous obedience to Plato's own instructions<sup>31</sup>. This solution, unwavering adherence to law, is comparatively crude, but less susceptible to continual erosion by accumulating human error (as described in the *Republic's* narrative of state decay).

At the risk of appearing reductive, it is possible to formulate the relationship between these three sets of circumstances as a decision tree. The first question is if the society has an inherent capacity for greed as a result of its fevered state or lapsed citizenry? If no, the political recommendations of the *Republic* and the *Laws* are superfluous, as the citizens of such a city would be so closely bound to one another they would never differentiate between the individual good and the collective good. In these conditions, the destructive appetites that make property a thorny political problem simply do not appear. Both texts suggest the answer to this question *can*

---

<sup>30</sup> The introduction of the role of the guardians puts this sacrifice in explicitly martial terms: "a whole army...will march forth and fight it out with assailants in defense of all our wealth and the luxuries we have just described" (374a).

<sup>31</sup> Of course, this clearly suggests that Plato sees himself as a Statesman-like figure, for his instructions provide the reasoned guidance in the absence of any other appropriate source of authority.

be no, but that it is highly unlikely. This being the case, the next step for a fallen city is to inquire into the presence of a Statesman or guardians. If such beings are available (or can be trained), they may, through access to reason uncorrupted by appetite, rule a virtuous city as the highest authority. This is the city of the *Republic*. Yet if no such individuals exist, then it is necessary to retreat to the inflexible but less readily corrupted rule of law. Thus minimum condition for a virtuous city (other than the conditions of population imposed by the *Laws* itself) is a correct and reason-guided set of instructions. This is the city of the *Laws*. In short, the tree states: 1) if in the unfevered or first-best city, there is no need for addressing greed; 2) but if not in this city but individuals exist who can still elevate reason to the place of unchallenged dominance in their soul, they may lead as the highest authority; 3) but if such individuals do not exist, then one must rely upon the codification of reason-inspired rules to create the virtuous state.

#### V. Conclusion: Unity of the State and the Perfectibility of Politics

This consolidated account illuminates the role of appetitiveness in Plato's political theory. Indeed, his more extensively described cities appear in large part a reaction to the threat of these passions, and in particular greed. This is because greed itself is one of the first destructive passions to appear once the city is no longer characterized by unity of interest. So long as this unity exists, there is no need for authority or politics, for internecine strife—the child of self-interest—is entirely alien.

Once this unity is shattered, individual appetite begins its intrusive forays into public life. Plato's subsequent political theory is characterized by steadfast dedication to the problems of the lapsed city, but there is divergence in the proffered solutions. The *Republic*, perhaps a bit more ambitiously, seeks to return to the original condition of unity. So long as each individual in the state is placed in her proper role with crystalline precision and there is no sharing or mixing of

roles across class lines, the state may again exist as a unified whole. In this situation, the problem of property can be managed perfectly at least in politics: cultivated solely to rule and express reason, the rulers will have no opportunities nor desire for wealth accumulation and the temptation of greed will not affect politics. Thus, even if some citizens are pre-occupied with wealth accumulation<sup>32</sup>, the *good of the state of as a whole* will not be entirely untroubled by property. Specialization combined with political holism generates a solution functionally as good as the unfevered state.

Yet what if there are no individuals who can act as throwbacks to the unfevered city, no citizens able to fulfill the role of guardian? Firstly, without individuals who have access to pure reason, guidance must be external, derived from law. Moreover, in this fallen state, equality must displace specialization as the attribute that characterizes the state. This new state will not even attempt to recreate the conditions of the best city and simulate perfect unity, but will only seek to prevent any particular individual from tearing the state apart in the pursuit of self-interest. The laws may reduce the influence of property on politics, and even successfully curb its corrupting effects, but the possibility wealth accumulation and ultimately the appeal of greed *to each citizen* entails that the complete exclusion of the political effects of property cannot be guaranteed. The best that can be hoped for is a mitigation of the effects.

Plato's evolving narrative of property management, with its progressive retreat from extremes of collective ownership—first universal in the society, then reduced to the rulers, then abandoned entirely—captures his gradual retreat from perfection in politics. The truly ideal city does not allow for greed by its very nature; yet the *Republic* and the *Laws* themselves differ in

---

<sup>32</sup> Schofield: 2006, pp. 257-258 suggests as much, indicating money accumulation is the primary concern of the laboring class; while the working class are not vicious in their desire for gratification, pp. 272-273, their core social function and behavior still reflects an appetite for wealth.

how exotic and foreign they consider this city. For the *Republic* it is only differentiated by its lack of luxuries; but in the *Laws* it has become a veritable city of gods. This initial perspective on the ideal city anticipates the degree to which each work tries to recapture its qualities. The *Republic* attempts to achieve the unity of the ideal city, but through exceptional measures; no price is too great to pay (*Republic*, 361e). For the sake of this unity, Plato requires a class of individuals who are capable of relinquishing all personal gain in order to create the just unity of the city. However, by the time of the *Statesman*, Plato seems less certain such measures will succeed. Addressing this contingency, the *Laws* describes the most stable state that makes only moderate demands of admittedly mortal citizens. Rather than relying upon structured relations between individuals to provide for the fundamental integrity of the state, the *Laws* locates the basis of control within each individual, basing a state on the best that can be expected from each citizen. No individual is asked to completely subsume his or her identity to the good of the state. And for all his exhortations to obey virtue, what Plato ultimately asks of the citizens of the *Laws* is relatively modest: that they do not permit their desires—including for material gain—to exceed certain bounds. Yet with no paragons of virtue, the guidance for this state must come from external instruction. There are, within this state, no individuals who access the highest levels of reason independently; thus it must come from without.

This final reconsideration demonstrates that the relationship between the *Republic* and the *Laws* cannot be neatly characterized by either continuity or revision. There is too much consistency in the description of the problem, and the solutions of the two works are, as this essay has attempted to demonstrate, complementary rather than mutually exclusive. Yet the dramatically different solutions, and the shift in values that informs them, clearly demonstrates something has changed. It is the ostensibly singular but pivotal nature of this change that makes

the relationship between the *Republic* and the *Laws* so unique. The two texts offer distinct solutions premised on a change in a single variable, the presence of perfectible beings who can guide with native reason. The other differences in the texts—changes in political structure, the values the state holds most dear among its citizens, in the definitive source of reason—perhaps merely illustrate what must be done based on the changing value of that variable if one hopes to design a state that can weather human passion.

#### VI. Postscript: Plato's Politics and Property in Context

Two remaining questions can perhaps be usefully (if speculatively) addressed by considering historical context. First, why was Plato so worried about the problem of property? And secondly, why did his interest in political conditions transition from those in which expertise was readily available to those in which they were absent (eg, law was the best source of rule)? Athenian democracy and its tense relationship with Athenian class structure may illuminate the first question; and some light may be shed on the second through a consideration of contemporary political developments Plato witnessed and, at least in one case, in which he was personally invested.

Plato's attention to property in politics (rather than the potential for the disruptive effects of greed or appetite more generally) can be traced to a tension inherent in the Greek political structure: while all male citizens were political equals, there were "glaring inequalities within Athenian political society [that] were the result of the unequal distribution of wealth" (Ober: 1998, p. 148). Thus an egalitarian political system was awkwardly wedded to an economic system rife with inequality. The result was class conflict, specifically the perpetual threat the poor might employ their greater numbers and the existing political apparatus to level property ownership—in effect, class revolt achieved by politically pre-existing means (Ober: 1998, p.



148; Josiah Ober, *Mass and Elite in Democratic Athens*. Princeton: Princeton University Press, 1989, p. 197)<sup>33</sup>. This paradigm clearly influenced Plato’s analogy of the “two cities” of the rich and poor in the *Republic* (432a). And indeed, beyond direct political implications, inequities of wealth may have encouraged the development of destructive personal traits that tended to have social and political implications, such as decadence or hubris among the richer classes (Ober: 1989, pp. 206-208).

The diversity and pervasiveness of these pernicious effects—in particularly those that subtly impaired the soul as well as explicitly tainting political and social relations—further explain why Plato initially attempted to produce a political order that was entirely emancipated from influence by property, as opposed to merely intensifying or formalizing the traditional mechanisms for addressing inequities in wealth (see Ober: 1989, p. 199, for a description of such traditional means; the elaborate system of fines in the *Laws* echoes these devices). With the *Republic*’s prohibition of any property, or indeed, any distinguishing private attributes, among the guardians, “there will be no need for litigation about property or relatives: no guard can improve his own material situation or harm that of another through legal means” (Ober: 1998, p. 228). Indeed, the result is that politics no longer need to be democratic to be just (Ober: 1998, pp. 231, 235), as there are no means whatsoever for private advancement available by political means.

By the time of the *Laws*, however, Plato has abandoned the absolute-exclusionary approach of the *Republic* in favor of the moderated, managing approach of the *Laws*. Given that the *Republic* completely eliminates property’s corrupting influence with far more parsimony than

---

<sup>33</sup> This threat must have been particularly pressing if the more poor had reason to suspect the rich of exploiting their wealth to additional political or social power. Ober (1989, pp. 202-219) provides multiple examples of such exploitation (actual or perceived), ranging from the opportunities for wealth to bias the judicial process (p. 218) to traditional class divides in military service, with the rich assuming purportedly safer roles (p. 204).

the *Laws*, it might seem that, *ceteris paribus*, it would be a preferable solution. The entire reason for the shift is too complex a story to be told here (as it extends far beyond Plato's property theory), but it is easy enough to briefly consider historical contributions. One notable thread might be Plato's emerging grimness regarding the Athenian model—and rising respect for their Spartan opponents—as a result of the Peloponnesian War and the aftermath. As both Laks (p. 261) and Klosko (pp. 207-208) note, the *Laws* seems to model itself on Sparta ideas of politics and economy (for example, in the prohibition of species currency)—perhaps influenced by the success of Sparta and the dominance of special interests in Athens, Plato turned to his opponents for inspiration in creating a new structure. Why Plato felt it necessary to turn to imperfect if effective models, however, may be best explained by the failure of his own attempt to influence politics. As Klosko describes (pp. 185-188), drawing extensively on Letter VII, Plato was periodically involved with the tyrants of Syracuse, largely on account of their relative Dion. However, Dionysus I reacted extremely poorly to Plato's efforts at philosophical reform, and Dionysus II's commitment to philosophy was "superficial" (Klosko, p. 186); even Dion's own later attempts to usurp the throne were sufficiently compromised by real political pressures to prevent the establishment of any type of Platonic regime (Klosko, p. 187). Particularly interesting is the correlation between the timing of Plato's Syracusan adventures and the development of his political theory. His encounter with Dionysus I came in 387 BCE, during his travels following the death of Socrates; evidently it made a strong impression for, and as Schofield notes (2006: p. 103), Dionysus I served as a model of tyranny in the *Republic*. Plato's second (and initially more promising visit) came 20 years later, after the *Republic* but before the *Laws*. The failure to influence the ostensibly more receptive and pliable Dionysus II might have weakened Plato's belief in the likelihood of philosopher-kings. The general difficulties

associated with the realities of reform—even when a potential political figure was enthusiastic—might have been further accented by the inability of Dion to stabilize his position enough to initiate Platonic reforms even after he seized power. It is tempting to superimpose this historical narrative upon Plato's increasing willingness to compromise regarding private property and increasing pessimism regarding the possibility of an elevated, specialized ruler.

These historical factors did not overdetermine Plato's treatment of property—his conception of the soul, consistent position regarding the threat posed by appetites and changing belief in the potential solution of specialization, and conviction that the good of the state must be the first end of politics clearly shaped his theory more than any particular historical development. However, even the scant historical knowledge available demonstrates Plato's theories reacted to and attempted to negotiate the realities of Greek politics. Most notably with regards to property, his indictment of its disruptive possibilities demonstrated a keen eye for a major cause of *stasis* within Athenian politics; but the correspondence between his changing policies prescriptions and historical developments demonstrated his the difficulties in effectively containing corrupting effects of property and other forms of personal gratification within his fundamentally idealistic political theory.

Chapter 2: The Unspoken Institutional Battle over Anti-Corruption: *Citizens United*, *Honest Services*, and the Legislative-Judicial Divide\*

In 2010, the Supreme Court dramatically constrained federal regulation of political corruption through two facially unrelated decisions. In *Citizens United v. Federal Election Commission*,<sup>1</sup> the Court ruled limits on corporate spending in federal elections are an unconstitutional violation of the right to free speech. The decision further eroded federal constraints on private financing of elections, an issue that has generated extensive judicial debate since modern campaign finance reform in the 1970s. In a trio of cases in June 2010 — *Skilling v. United States*,<sup>2</sup> *Weyhrauch v. United States*,<sup>3</sup> and *Black v. United States*<sup>4</sup> — the Court hobbled federal anticorruption in a different context by limiting prosecutorial discretion under the honest services provisions of 18 U.S.C. § 1346.<sup>5</sup> By indicating a broad interpretation of the anticorruption measure would raise vagueness and notice concerns, the Court obstructed federal efforts to combat self-enriching conduct by public officials and more generally mandated narrow construction of official corruption law.

Though at first blush these cases and their respective precedents appear unrelated, parallel analysis of their histories reveals a striking pattern: in both contexts, Congress has passed broad and flexible measures to regulate what influences can permissibly enter the public sphere and

---

\* This chapter appears in the First Amendment Law Review, citation Jacob Eisler, *The Unspoken Institutional Battle over Anti-Corruption: Citizens United, Honest Services, and the Legislative-Judicial Divide*, 9 FIRST AMEND. L. REV. 363 (2011). Please ensure any citations are to the published version of that article.

<sup>1</sup> 558 U. S. \_\_\_, 130 S. Ct. 876 (2010).

<sup>2</sup> 561 U. S. \_\_\_, 130 S. Ct. 2896 (2010).

<sup>3</sup> 561 U. S. \_\_\_, 130 S. Ct. 2971 (2010). This essay addresses public corruption alone (excluding acts by private fiduciaries). While *Weyhrauch* alone addressed misconduct by a public official, the Supreme Court issued a full opinion only in the private-corruption case of *Skilling*, and remanded *Weyhrauch* to be reconsidered by in its light. *Id.* Therefore *Skilling* and its implications for public corruption are addressed in this article.

<sup>4</sup> 561 U. S. \_\_\_, 130 S. Ct. 2963 (2010).

<sup>5</sup> 18 U.S.C. § 1346 (2006).

determine when government figures are tainted by private interests. As epitomized by its most recent holdings, the Court has curtailed these measures on the grounds they infringe individual rights (First Amendment rights with regards to campaign finance, and due process trial rights with regards to honest services). Consequently, the Court has consistently frustrated certain forms of congressional anticorruption, resulting in a protracted institutional conflict.

This conflict, however, has not occurred as an explicit, open, or unified debate. Neither the Court nor Congress has openly articulated a theory (or even a comprehensive definition) of corrupt conduct, and the narrow legal questions at play in the relevant cases often do not include a direct inquiry into the nature of corruption. Yet analysis of the disputed law reveals the two institutions have advanced differing types of anticorruption enforcement (even if they have done so indirectly and perhaps without deliberate intent). This chapter argues that, once reconstructed, this conflict illuminates the path of modern corruption law over the past 40 years.

Because of consistent thematic similarities in the discrete disagreements, the conflict can be framed as a clash between differing schools of anticorruption. This chapter organizes this divide through the distinction between competitive and deliberative democracy.<sup>6</sup> In focusing on the protection of individual rights from government intrusion, the Court has adopted a competitive approach to corruption. The competitive approach presumes democratic practice is self-interested and adversarial, with constituents unblinkingly focused on their own particular political goals.

---

<sup>6</sup> Cf. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 130-212 (2003) (describing two models of democracy). “Concept 1” bears some similarities to deliberative democracy; “Concept 2” bears similarities to competitive democracy. *See id.* at 130. Posner is ultimately critical of Concept 1, on the grounds that it is “aspirational”, whereas Concept 2 is laudably “realistic.” *Id.* at 158. Posner’s descriptions do not map onto the categories in this paper precisely, and in particular Concept 1 at times moves into caricature. *See, e.g., id.* at 131 (describing as a basic premise of Concept 1 democracy that individuals should deliberate on what is “best for society as a whole rather than on narrow self-interest”). Deliberative process may pursue consensus, but more broadly individuals must be willing to engage in productive discourse about their interests, and recognize the legitimacy of others’ claims. For an alternative foundational conception of these two models, compare Jürgen Habermas, *Three Normative Models of Democracy*, 1 CONSTELLATIONS 1 (1994) (describing “republican” and “liberal” models which correspond to Posner’s “Concept 1” and “Concept 2” respectively).

Competitive democrats tend to prefer an anticorruption regime that penalizes undesirable behavior through narrowly delineated rules — not coincidentally, the type of regime less likely to metastasize and invade individual rights. Conversely, Congress has at times advanced ‘deliberative’ anticorruption measures. Deliberative democracy emphasizes discourse and cooperation, rather than formal selection processes, as the core of healthy politics. Because trust, empathy, and respect for other parties are prerequisites for successful deliberative democracy, deliberative anticorruption inquires into the actual motives underlying public conduct. Yet the Court has shown little toleration for deliberative anticorruption or interest in its possible justifications. Thus the Court’s rulings have established a consistently and uncompromisingly competitive regime.

This chapter first develops a theoretical apparatus to analyze this conflict; then compiles the evidence; and concludes with a theoretical analysis and policy implications. Section I provides a brief synthetic description of the two conceptions of democracy. Section II proceeds to describe differing views of the corruption each produces.<sup>7</sup> Section III uses these ideas to analyze the judicial and legislative debate on campaign finance. Section IV does the same for honest services, and official corruption more broadly. Section V provides a comprehensive analysis of the conflict, in particular why the Court’s decisions have so consistently had a competitive alignment. Section VI addresses the broader effects the conflict on politics and offers policy recommendations.

---

<sup>7</sup> Analyzing corruption through a binary competitive and civic-deliberative axis is neither exclusive nor definitive. Rather, this article uses it as an instrumental framework, stylized to aid perception of the conflict between courts and Congress. For other frameworks for understanding corruption, *see, e.g.*, MICHAEL JOHNSTON, SYNDROMES OF CORRUPTION: WEALTH, POWER, AND DEMOCRACY (2005) (providing four approaches based on a comparative analysis of different levels of political and economic development by country, designed to complicate and add nuance to the traditional quid pro quo bribery model); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 387-97 (2009) (describing different approaches courts have used); Mark Philp, *Defining Political Corruption*, 45 POL. STUD. 436, 440 (1997) (describing the three common definitions of corruption as “public office-centred” (focused on behavior by leaders), “public interested-centred” (focused on harm to public welfare), and “market” centered (abuse of public positions as opportunities to maximize profit)).

## Part One: Theoretical Foundations

### I. Two Conceptions of Democracy

This section summarizes a lively debate in democratic theory, between those who believe properly functioning democracy is characterized by *competition* between citizens, leaders, and interests groups, and those who believe healthy self-governance consists of shared *deliberation* among members of a polity.<sup>8</sup>

#### A. Competitive Democracy

Competitive theorists define democracy as a structured conflict between political actors. In a representative democracy citizens express their political preferences by electing leaders.<sup>9</sup> Democracies must possess sufficiently effective and impartial procedures by which the electorate can make such selections.<sup>10</sup> Beyond any background structural constraints (often expressed

---

<sup>8</sup> Cf. Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31-32 (1985) (observing the tension between “republican” founders who thought politics should be centered around “[d]ialogue and discussion”, and pluralists, who saw politics as characterized by “conflict and compromise” between interest groups fighting for scarce resources, and who saw the notion of the common good as “incoherent, potentially totalitarian, or both”) (internal citations omitted). Sunstein’s distinction has some ahistorical kinship to the competitive/deliberative distinction, though pluralism need not correspond to idealized competitive theory. Sunstein discusses a type of corruption, but it is fundamentally different from the conception addressed in this essay: he defines corruption as the broader systemic infiltration of special interests into government, not as particular acts of malfeasance. *Id.* at 32, 39. This idea of corruption is related to that of institutional corruption. *See infra* note 29.

<sup>9</sup> Joseph Schumpeter provides the authoritative modern definition of competitive democracy: “the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.” JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 269 (Unwin Paperbacks, 1987). He analogizes individual voting to consumption, *id.* at 283, thus indicating his sympathy toward the competitive idea of democracy as preference-satisfaction. Schumpeter’s view of politics may be overly pessimistic and focused on elite control — he suggests that most individuals lack rationality or coherence in their political views, *id.* at 260-62, and that “the electoral mass is incapable of action other than a stampede”, *id.* at 283. Nevertheless he offers “the most influential power-centered theory of government developed in the twentieth century . . . .” IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 51 (2003). More recent competitive-democratic theorists are less dismissive of non-elite political participation. *See, e.g.*, ROBERT DAHL, *PREFACE TO DEMOCRATIC THEORY* 67-71 (2006) (defining democracy as a competitive preference-realizing infrastructure); Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, in *DEMOCRACY’S VALUE* 23, 31 (Ian Shapiro & Casiano Hacker-Cordon eds., Cambridge Univ. Press 1999) (describing the relationship between Schumpeter’s and Dahl’s theories, and offering its own defense of competitive democracy, drawing on the inevitably natural conflict between varied interests). Cf. RONALD DWORKIN, *SOVEREIGN VIRTUE* 357-62 (offering an ultimately critical assessment of competitive democracy even while observing it may include discursive components).

<sup>10</sup> *See* Habermas, *supra* note 6, at 6 (“According to the liberal [competitive] view, the democratic process takes place exclusively in the form of compromises between competing interests. Fairness is supposed to be granted by the general and equal right to vote, the representative composition of parliamentary bodies, by decision rules, and so on.”); DAHL,

through constitutional provisions)<sup>11</sup> which preserve the fair character of competition, competitive democracy is agnostic with regard to how individuals should make political decisions, or what outcomes are appropriate.

The function of politics in competitive democracy is to allocate goods managed by the government; individuals' political conduct seeks to realize their preferences in the distribution of these goods.<sup>12</sup> Voters and interest groups attempt to elect leaders whom will advance policies that they desire; motivated by a desire to govern or the opportunity to directly advance policies, candidates attempt to obtain votes in order to win elections. Within the bounds of structural (constitutional) constraints, successful elections produce outcomes that reflect the wishes of the voting polity.<sup>13</sup> Since this view describes democracy as little more than a selection rubric, many competitive theorists reject politics as a forum for substantively shaping values and preferences.<sup>14</sup>

---

*supra* note 9, at 125 (If the background conditions for democracy are met, “then the election is the critical technique for insuring that governmental leaders will be relatively responsive to non-leaders; other techniques depend for their efficacy primarily upon the existence of elections and the social prerequisites.”).

<sup>11</sup> Perhaps most famous structural threat is tyranny of the majority. *See* THE FEDERALIST NO. 10 (James Madison). The 13th, 14th, and 15th Amendments guarantee a level of protection for a particular type of minority; it is instructive of their weight that the most devastating conflict in American history was fought at least in part over the institutionalization of this protection. *But see* SHAPIRO, *supra* note 9, at 11-21 (criticizing the traditional minority-protection justification for constitutional and judicial restriction).

<sup>12</sup> *See* DAHL, *supra* note 9, at 66 (taking the formation and existence of preferences as a given). *Cf.* ROBERT DAHL, DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL 36-38 (1982) (describing the role played by autonomous collective organizations in creating individual preferences and how these organizations serve as vehicle in politics for such preferences). *But see* Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1692 (1984) (arguing Court's insistence for “reasonableness” effectively prohibits government from exercising “raw political power” to transfer wealth on behalf of interest groups). Sunstein's suggestion that the Constitution *prohibits* otherwise unjustified purely competitive outcomes contrasts with the outcome of the competitive implication of the Court's outcomes. Yet the Court's alignment can be traced to its treatment of individual rights, and nothing suggests the Court has less interest in protecting the individual rights of political figures (or those who wish to succor them). Thus, the reconciliation can be framed as such: a deliberative anticorruption regime that holds public officials (and those who attempt to corrupt them) to a special standard, requiring them to offer deliberative justifications for their conduct. Yet to demand this special justification for the political context is to take unique action against a set of political participants, which, according to Sunstein, requires a unique justification. *Id.* at 1692-93.

<sup>13</sup> SHAPIRO, *supra* note 9, at 57-58, interprets Schumpeter, to describe this as the democratic process of “leaders” being “disciplined by the demands of competition”.

<sup>14</sup> *See, e. g., id.* at 21-34 (critiquing deliberative methods that seek to adapt and reconcile citizens' political preferences through discourse).



Competitive theorists suggest that properly structured opposition promotes effective governance and protects individual rights.<sup>15</sup> When leaders govern in the shadow of meaningful elections, they will treat the electorate well; pervasive competition ensures that the state remains responsive to the popular will. Perhaps more incisively, competition encourages constituents to translate the popular will into political outcomes. If citizens and interests groups must actively compete to determine policy, they will defend their interest robustly and resist domination — or simply being neglected by — by other political groups or leaders.<sup>16</sup> Consequently citizens are less likely to be dominated by either direct oppression or subtle cooption. A competitive approach to politics may also encourage citizens, perhaps recognizing the possibility of future political defeat, to place certain rights and liberties beyond the reach of electoral politics.<sup>17</sup>

Because of its focus on power-based outcomes, competitive democratic theory often has a minimalist or pessimistic character, particularly in rejecting the ‘common good.’<sup>18</sup> At their most aspirational, competitive theorists suggest that democracy can ensure responsible governance and protect liberties. If politics is ultimately about power, democracy must channel and moderate that power in a responsible manner. Competitive democrats argue this is best accomplished by making explicit, unvarnished, and uncompromising the institutional conflict over governmental goods.

---

<sup>15</sup> *Id.* at 63 (observing that the competitive model both ensures “politicians have incentives to be at least as responsive as their competitors to the demands of the electorate” and that competition “is a valuable constraint on the corrupting effects of power...shin[ing] light in dark corners, exposing corruption, and demanding that governments be held to public account.”).

<sup>16</sup> See DAHL, *supra* note 9, at 133 (observing that democracies operate as rule by minorities, but minorities greatly extended in terms of “number, size, and diversity”). Dahl proposes that the competition between minorities greatly interested in political outcomes will ensure that no one is capable of dominating the political sphere, and will prevent tyranny of the majority or domination by the majority of an unaccountable elite.

<sup>17</sup> See SCHUMPETER, *supra* note 9, at 272 (suggesting the competitive set-up of elections will, on the whole, create the greatest amount of freedom for citizens, citing as an example that competitive democracy will require “a considerable amount of freedom for the press”). See also DWORKIN, *supra* note 9, at 358 (describing the role of free speech in the majoritarian democracy).

<sup>18</sup> See SHAPIRO, *supra* note 9, at 3. Unlike the deliberative, the aggregative (competitive) approach does not take “a transformative view of human beings.” *Id.* Schumpeter is particularly harsh in his attack on the idea of the common good. See also SCHUMPETER, *supra* note 9, at 251-52.

## B. Deliberative Democracy

Deliberative democracy appeals to tractable reason and human sociability.<sup>19</sup> Deliberative theorists suggest formal elections ought to only be the denouement of a holistic political process.<sup>20</sup> Citizens advance their claims by demonstrating their positions' reasonableness to other members of the polity. For deliberative democrats, this journey of debate and engagement may have greater importance than formal political outcomes.

Discourse is the central tool by which constituents gain understanding of their own and others' goals.<sup>21</sup> It increases participants' understanding of the reasonableness and legitimacy of others' positions. Ideally, discourse may reconcile diverse interests to reach consensus,<sup>22</sup> and even if it does not, citizens with opposing views gain greater mutual understanding, enabling greater cooperation.<sup>23</sup>

Deliberative democrats require rich social engagement for healthy politics, and theorists have proposed a variety of techniques to facilitate deliberation.<sup>24</sup> These techniques encourage citizens to reflect upon the values and interests that shape their political preferences and to

---

<sup>19</sup> As used in this article, 'deliberative democracy' draws from a range of thinkers, not all of whom would necessarily be classified (or wish to be classified) as deliberative democrats in the narrowly formal sense — in particular Sunstein and Dworkin. See CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 72 (1993) ("considered judgments of a democratic polity" should have priority over "consumer sovereignty"); DWORKIN, *supra* note 9, at 357, 364 (preferring "partnership democracy" over "majoritarian" democracy in part because its richer account of political life includes "democratic discourse").

<sup>20</sup> DWORKIN, *supra* note 9, at 385 ("[S]elf-government means more than equal suffrage and frequent elections. It means a partnership of equals, reasoning together about the common good.").

<sup>21</sup> See AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY* 3-56 (2004) (providing a seminal overview of deliberative democratic theory).

<sup>22</sup> G. A. Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY* 17, 23 (Alan Hamlin & Philip Pettit eds., 1989) ("[I]deal deliberation aims to arrive at a rationally motivated *consensus* — to find reasons that are persuasive to all who are committed to acting on the results of a free and reasoned assessment of alternatives by equals.").

<sup>23</sup> GUTMANN & THOMPSON, *supra* note 21, at 4 (the reason-giving emphasis of deliberative democracy is "meant both to produce a justifiable decision and to express the value of mutual respect").

<sup>24</sup> See, e. g., Bruce Ackerman & James S. Fishkin, *Deliberation Day*, in *DEBATING DELIBERATIVE DEMOCRACY* 7 (James S. Fishkin & Peter Laslett eds., 2003); James Fishkin & Cynthia Farrar, *Deliberative Polling: From Experiment to Community Resource*, in *THE DELIBERATIVE DEMOCRACY HANDBOOK* 68-79 (John Gastil & Peter Levine eds., 2005); Robert E. Goodin & John S. Dryzek, *Deliberative Impacts: the Macro-Political Uptake of Mini-Publics*, 94 *POL. & SOC'Y* 219 (2006).

empathetically engage with those who hold differing views. Thus, pre-existing desires are only one contributor to citizens' final positions, as this reasoning process modifies final preferences. This may lead to outcomes better than any raw compromise that would result from tallying pre-engagement preferences.<sup>25</sup> Yet rivaling the importance of better policy outcomes is the opportunity for self-realization provided by reflective political engagement. Deliberative process is not only a more social and engagement-intensive process, but seeks benefits that extend beyond the resolution of political decision-making.

Despite its differences, deliberative democracy seeks many of the same practical benefits as competitive democracy — rights protection and responsiveness to the constituency. Robust deliberative engagement promotes responsible government, and reflecting on other citizens' political standing protects rights and prevents abuses. In a healthy deliberative democracy, citizens gain greater mutual respect and become more politically involved, creating both a tighter community and stronger links between citizens and elected leaders.<sup>26</sup> These stronger relationships in turn increase state accountability, renew citizens' involvement with politics, and generate a healthier, more inclusive political dynamic.<sup>27</sup>

## II. Two Conceptions of (Anti)Corruption

Actual democracies will inevitably have both competitive and deliberative qualities, though they can tend towards one alignment. One aspect of this alignment is a regime's approach to identifying and combating corrupt public behavior. Deliberative theory and competitive theory

---

<sup>25</sup> See Archon Fung & Erik Olin Wright, *Deepening Democracy: Innovations in Empowered Participatory Governance*, 29 POL. & SOC'Y 5, 25-29 (2001).

<sup>26</sup> See GUTMANN & THOMPSON, *supra* note 21, at 10-11 (describing main benefits of deliberative democracy as “encourag[ing] public-spirited perspectives on public issues” and the “promot[ion of] mutually respectful processes of decision-making”).

<sup>27</sup> See Cohen, *supra* note 22, at 26 (“[I]n seeking to embody the ideal deliberative procedure in institutions, we seek, *inter alia*, to design institutions that focus political debate on the common good, that shape the identity and interests of citizens in ways that contribute to an attachment to the common good, and that provide the favourable conditions for the exercise of deliberative powers that are required for autonomy.”); Cf. DAHL, *supra* note 9, at 131-33.

each identifies different aspects of conduct as determinative of the corrupt status of behavior, and each adopts characteristic anticorruption measures that correspond to these respective aspects.

### *A. Establishing the Terms of the Debate*

Many scholars have indicated defining corruption poses significant challenges,<sup>28</sup> and a comprehensive account is beyond this chapter's scope. An underspecifying baseline definition that contains the full range of plausibly corrupt behaviors is: an official's act is corrupt when an official's motives for public action are excessively private-regarding, and a private individual's act is corrupt when the citizen attempts to incentivize an official to act in such an excessively private-regarding manner.<sup>29</sup> To be useful in theory or practice, this definition must be further informed by foundational political and ethical norms.<sup>30</sup> Most pressingly, these norms must identify

---

<sup>28</sup> See John G. Peters & Susan Welch, *Gradients of Corruption in Perceptions of American Public Life*, in *POLITICAL CORRUPTION: CONCEPTS & CONTEXTS* 155-160 (Arnold J. Heidenheimer & Michael Johnston eds., 2002). Some commentators have observed that the necessary existence of particular political and social norms undermine any universal definition of corruption. See, e.g., SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT* 91 (1999) (noting the problem but indicating that even in cultures without clear distinctions between public and private there are "distinctions between appropriate and inappropriate behavior"). Others are even less optimistic about the possibility of a universal theory. See, e.g., John Gardiner, *Defining Corruption*, in *POLITICAL CORRUPTION: CONCEPTS & CONTEXTS* 25 (Arnold J. Heidenheimer & Michael Johnston eds., 2002) (observing underlying definitional problems and possible divergence between legal definitions of corruption and practices perceived as corrupt); Philp, *supra* note 7, at 457 (observing that a theory of corruption must be grounded in a foundational understanding of "the ethical appeal of politics", of which there are several possible interpretations).

<sup>29</sup> Cf. J. S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 *AM. POL. SCI. REV.* 417, 419 (1967) (offering a classic definition of corruption as a violation of public duty for private gain); Samuel Issacharoff, *On Political Corruption*, 124 *HARV. L. REV.* 118, 130 (2010) (identifying "the potential private capture of the powers of the state" as the real nature of corruption, at least in the electoral context).

The definition used by this article excludes two types of political occurrences. The first is broad decay or general non-agent-attributable moral collapse of a state. This definition of corruption was prominent in early modern political thought. See J. G. A. POCOCK, *THE MACHIAVELLIAN MOMENT* 204 (2003). For a contemporary account of corruption as decay, see generally Laura Underkuffler, *Captured by Evil: The Idea of Corruption In Law* (Duke Law Sch., Working Papers in Public Law), available at [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2030&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2030&context=faculty_scholarship). This definition of corruption also excludes incompetence. An official behaves incompetently but not corruptly when the *motive* is acceptable, but the subsequent practical policy is unacceptable. See DENNIS THOMPSON, *ETHICS IN CONGRESS* 17 (1995) (observing corruption may at times be ultimately less harmful than incompetence; and that some theorists have observed that corrupt payoffs can induce usually ineffective or slothful public figures to act). See also Philp, *supra* note 7, at 459.

<sup>30</sup> See Philp, *supra* note 7, at 446 ("[W]e are forced to accept that to identify political corruption we must make commitments to conceptions of the nature of the political and the form of the public interest . . . definitional disputes about political corruption are linked directly to arguments about the nature of the healthy or normal condition of politics.").

motives that are excessively private-serving.<sup>31</sup> Some systems demand total disregard of self-interest in politics; others will permit some self-interest, but constrain what types of such interest are permissible.<sup>32</sup> A related question is when actions qualify as “public” — an act is politically corrupt only when it falls within an actor’s sphere of public duty. These questions of private motive and public status are ultimately informed by a system’s ethical framework, in particular its theory of representative responsibility. On a less abstract note, assessment of corrupt motives raises the evidentiary problem of inferring *mens rea*. Evidentiary concerns can be especially difficult when an official acts for unacceptable reasons (such as being bribed), but the action itself, underlying motivation aside, appears to be a publicly acceptable one; without public vetting or formal supervision, the corrupt character of the act may never come to light.<sup>33</sup> Establishing appropriate standards for inferring corrupt intent requires striking a difficult balance. Harsher standards identify more potential offenders, but may classify too much behavior as presumptively corrupt.

Each of these questions is a rich topic for further study. However, to demonstrate the institutional conflict in U.S. corruption law, it is only necessary to observe that any anticorruption regime must address them (directly or indirectly), and that competitive and deliberative theories offer characteristically differentiated methods for fighting corruption.

---

<sup>31</sup> See ROSE-ACKERMAN, *supra* note 28, at 2 (observing self-interest lies at the root of any corrupt act).

<sup>32</sup> For example, an elected official who desires re-election may take an act purely because it propitiates a group of voters necessary for his re-election (and does not alienate any other particular group of voters); the elected official may not think the act is inherently justified by public reasons, but takes it anyway. The act is clearly self-interested, but a system that incorporates the idea of official-as-pure-representative will not call it corrupt. However, if a public official takes the same act because each member of the same group of voters will provide him with a dollar for campaign finance purposes, some systems of campaign finance regulation would call it corrupt. And if each voter provided him with a dollar for his unrestricted personal use, virtually every healthy government would call it a criminal bribe.

<sup>33</sup> See ROSE-ACKERMAN, *supra* note 28, at 56 (describing the difficulty of detecting acts taken for corrupt reasons when the communication between official and donor are covert or oblique); THOMPSON, *supra* note 29, at 108-09 (describing the challenges posed by “mixed motives”); see also Bardhan, *Corruption and Development: A Review of Issues*, in POLITICAL CORRUPTION: CONCEPTS & CONTEXTS 321-22 (Arnold J. Heidenheimer & Michael Johnston eds., 2002). For a discussion of the relevance of corrupt *mens rea* in the context of American jurisprudence, see Daniel Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 798-99 (1985).

*B. (Anti)Corruption in Deliberative Democracy: Examining Reasons Directly*

Deliberative anticorruption directly addresses whether or not the mental states of public officials are sufficiently public-regarding. This normatively straightforward approach follows from deliberative democracy's emphasis of publically reasoned justification in political decision-making. A legitimate political act must be able to survive discursive examination by the polity; for the purposes of corruption, this means the official must be able to reasonably argue the act is adequately motivated by the public good. Actions that fail to satisfy this public-regarding test are corrupt.<sup>34</sup> In actual discourse, this deviation consists of a failure to participate in politics with good faith, misleading other participants during deliberative engagement. When the official is a delegate, and thus her discrete actions are not publicly debated, the deviation consists of failure to consider if an act would survive such deliberative consideration. Thus, when a public official willfully acts for reasons that could not be justified through public deliberation, her behavior is corrupt.<sup>35</sup> Since any motive that cannot be justified through public reasoning is ultimately inspired by self-interest, an act that could not pass muster before public reason-giving is unacceptably private,<sup>36</sup> even if it does not assume the traditional form of a bribe.<sup>37</sup> In practice, the influence of

---

<sup>34</sup> Such failures to engage in proper engagement may be systemic, occurring when political institutions and cultural practices do not facilitate collective deliberation. See THOMPSON, *supra* note 29, at 26-33 (the practices of institutional corruption “so closely resemble practices that are an integral part of legitimate political life that we are reluctant to criticize politicians who follow them”). Systemic/institutional corruption lies between clearly corrupt individual acts and the diffuse decay classically associated with corruption.

<sup>35</sup> See *id.* at 20 (observing the first principle of legislative ethics mandates “a member should act on reasons relevant to the merits of public policies or reasons relevant to advancing a process that encourages acting on such reasons”).

<sup>36</sup> See Teachout, *supra* note 7, at 373-74 (observing, to the congressional founders, “political corruption referred to self-serving use of public power for private ends . . . political corruption is a particular kind of conscious or reckless abuse of the position of trust . . . political corruption is using public life for private gain.”) Teachout thus observes that the Founders’ idea of corruption has a deliberative streak — they were also concerned with promoting “civic virtue” defined as a “orientation toward the public interest” and discouraging the use of political power to advance special interests (whether personal — self-enrichment — or political — the advancement of their districts at the cost of collective national welfare). *Id.* at 374-75.

<sup>37</sup> See ROSE-ACKERMAN, *supra* note 28, at 91-110 (distinguishing bribes from patronage and gift giving based on cultural norms). If an official reflects upon his reasons for acting and concludes his actions are publicly justified, his actions are not corrupt. If the reasons for acting are in reality publicly justified, the official has satisfied her duty and

self-interest upon democratic political outcomes is inevitable. Yet the perceptible role of self-interest must be discursively defensible to other citizens (that is, an official could defend the self-interest as politically legitimate) in light of the polity's norms and expectations.

An ideal deliberative anticorruption regime would discursively assess official action on a case-by-case basis. While this solution would demand political behavior that is deeply and sincerely public-regarding, it describes not law, but perpetual self-reflective politics. It is not practical for anticorruption laws to replicate retrospective deliberative democracy.<sup>38</sup> Producing enforceable laws, while still accommodating deliberative values, proves challenging. Procedurally good laws are precise and crisp, define offenses clearly for the benefit of regulated parties, and are easily applied in the courtroom.<sup>39</sup> Conversely, deliberative anticorruption is structured around constant debate over political values and subtle motive inquiries, which are difficult practices to neatly package in criminal or regulatory code.

In practice, deliberative anticorruption laws resolve this tension by adopting measures that investigate public actors' relevant motivations to the greatest degree feasible using regulatory and

---

acted with integrity. If the reasons are not publicly justified but the leader sincerely believes them to be, the official is incompetent in a subtle way (he has a poor grasp of his polity's beliefs, or of dominant norms) but not corrupt. Consider the distinction from incompetence, *see supra* note 29. If, however, the official concludes that her action is not publicly justified, but acts anyway for other reasons, those reasons must at some level be self-interested, at least as a public-regarding motive. For example, an official who takes an action that violates public duty because of the vicarious reward of watching a third party benefit is still deemed to have acted corruptly. This does presume that every official: (1) is aware of the obligation to act in a manner that could be justified; and (2) self-reflects before taking public action. An official who fails to satisfy these two presumptions may be negligently corrupt; the official *should* be aware of the obligation to act in a manner that accords with public reasons. If such negligent malfeasance of public duty is corruption or mere incompetence is a technical question beyond this article's ken, along with other difficult situations (for example, that of the official who suffers from false consciousness and thus believes herself to be acting for public reasons but, at a deep level, is motivated by self-interest).

<sup>38</sup> The judicial system performs a very limited form of this review, *see* discussion *infra* p. 33. However, because it is limited to questions of fact, it cannot engage with the foundational normative questions regarding corruption.

<sup>39</sup> *See generally* Seana Valentine Shffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010) (describing the tension between the deliberative approach to democracy and the traditional view of good, crisp laws by exploring the difference between rules and standards). The role of this tension in driving the Court's anticorruption jurisprudence is described, *infra* Section IV.

prosecutorial tools. As a result of using measures with adaptability or breadth,<sup>40</sup> deliberative anticorruption laws sweep or have the potential to sweep beyond narrowly defined boundaries with a fluidity and sensitivity that mirrors discursive reflection, and have the capacity to focus upon and potentially shape the general motivational state of actors. These two traits — flexibility or breadth, and a focus upon motive as opposed to sharply defined and easily identified bad behavior — grant such anticorruption measures the holistic, expansive quality that is characteristic of deliberative politics.

Deliberative anticorruption thus defines corruption by a specific element of public conduct — motive — and creates legislation designed to assess, regulate, or shape motives directly. These laws deploy a conception of motive that extends beyond the narrow legal assessment of *mens rea*. Instead the laws broadly assess if the relevant mental states provide an acceptable justification for the action. The goal is to create measures that assay public conduct in light of public norms (in effect, simulating discursive evaluation as best as possible). Because such an assessment may be holistic and highly individualized, the laws that instantiate it will often have a broader potential reach, or fail to have precisely delineated contours.

These anticorruption measures seek to guarantee a political culture that is broadly civic-minded and guided by public expectations. Evidentiary precision and bright preemptive delineation of the public-private divide are de-emphasized in favor of ensuring officials' motives satisfy the standards of reasoned collective discourse; indeed, the measures themselves aspire to simulate this discourse. However, deliberative democracy itself does not entail substantive positions on corruption, nor must laws with characteristics of a deliberative anticorruption

---

<sup>40</sup> For an explanation of why competitive-style bright-line rules are inadequate to achieve deliberative anticorruption, see Lowenstein, *supra* note 33, at 838-43 (describing the pluralist-competitive approach as adopting “rules of the game” and describing the problems of treating these rules as fixed and adequate rather than reflecting distinct substantive investments that may themselves be up for debate).



approach adopt specific positions on corruption. Rather, deliberative anticorruption is distinguished by how it defines integrity in politics: adherence to public standards of justifiability, as defined by the ability to satisfy discursive assessment.

*C. (Anti)Corruption in Competitive Democracy: Procedure above All*

Competitive theory faces an initial conundrum in combating corruption. Corruption is defined by normatively unacceptable motives, yet norms and motives have no special weight in competitive democracy — ethical norms and leaders’ underlying motives are *non-unique* items on the menu assessed by voter preference. Competitive democrats could not *a priori* condemn constituents’ support for a leader who had egregiously self-serving motives if voters found she had other attributes that made her, on the whole, desirable.<sup>41</sup> Yet, as described in Section IA of this chapter, the baseline requirement for competitive democracy is a fair, formal procedure that establishes a legitimate selection process. Competitive democracy cannot tolerate acts that violate this framework,<sup>42</sup> and competitive anticorruption subsequently condemns actions that threaten it. Competitive anticorruption thus negotiates between normative neutrality toward motives and protection of a framework that has ultimately normative roots.

Competitive anticorruption is, in short, results-oriented. It wishes to discourage public behavior that is clearly an abuse of power or office, but does not wish to make direct normative inquiries. To engage in such normative inquiry would reach beyond the emphasis on procedure and neutrality that characterizes competitive democracy. The resulting anticorruption regime has

---

<sup>41</sup> The ideal competitive system would have no anticorruption laws. In this system, all voters would have full knowledge of all acts and intentions of public officials, perpetual and instantaneous recalls and elections are feasible, and there would be no transaction costs associated with elections. As a result, voters could simply express any disapproval of leader conduct through political means. In contrast, corruption laws in competitive systems can be explained by departures from this ideal: elections are costly and necessarily involve a time lag, and information is imperfectly provided and expensive to obtain.

<sup>42</sup> See DAHL, *supra* note 9, at 132-33.

a minimalist character.<sup>43</sup> Competitive anticorruption condemns specific behavior that transgresses clearly established baseline values, but avoids subtle normative assessments of leaders' motives or probing the relationship between ethics and public service. Consequently, competitive anticorruption tends to assume the form of bright-line rules, which directly identify certain types of conduct as unacceptable, prohibited, or illegal. The archetypal instantiation of competitive anticorruption is the formulaic quid pro quo law, which delineates the institutional framework with minimum reflection upon ethical norms. Such laws offer a formula for identifying corrupt acts: a public official<sup>44</sup> performs a public act for a donor who, in exchange, provides a private payoff to the public official.<sup>45</sup> The status of each component (when a payoff is private; when an act is public; when a reason for a public act is sufficiently public-regarding; and when a transferred good qualifies as substantial or definite enough to be a payoff) is crisply defined by law,<sup>46</sup> and when

---

<sup>43</sup> See generally Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111 (1995) (critiquing the “deliberative,” and what he calls, “moralist/idealist” approach to politics, of Thompson and Lowenstein).

<sup>44</sup> Competitive democrats may outlaw buying of citizens' votes, but this is the simple recognition that citizenship itself is a type of public office and voting is a type of public act. For a general overview of anti-vote-buying laws, see 18 U.S.C. § 597 (2006) (imposing criminal penalties for those who exchange their vote for money); *Brown v. Hartlage*, 456 U.S. 45 (1982) (holding that the First Amendment protected candidate's later-retracted promises to reduce salaries and thus save taxpayers' money); Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323 (2000); Pamela S. Karlan, *Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System*, 80 VA. L. REV. 1455 (1994). While raising interesting questions of the nature of civic duty, this body of law is sufficiently distinct from other corruption law to be omitted from this analysis.

<sup>45</sup> Peters & Welch, *supra* note 28, at 157-60 (providing a more extensive account with detailed breakdowns of each element of the offense). J. S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 419 (1967) (providing one of the early seminal accounts of corruption in this form).

<sup>46</sup> The definitional challenge, see *supra* section II(A), is especially acute for the quid pro quo formulas, as their efficacy depends upon accurate “coefficients” in the equation. Unlike deliberative measures which can “punt” the definitional problem to deliberation inherent in enforcement, competitive approaches must define the terms crisply. For example, what is defined as a payoff? Does a guarantee of support in an upcoming election count? Promise to look favorably upon a friend's child during an upcoming interview? When is an act “sufficiently” public-regarding to be protected from claims of corruption — if an act is inherently good for the public, but the official also receives a pre-emptive (or ex post facto) gift, is the gift a bribe, or merely a tip? For an analysis observing that a field-wide consensus has emerged regarding quid pro quo bribery, and simultaneously examining the inadequacies of the consensus in light of comparative differences between cultures and nations, see MICHAEL JOHNSTON, *SYNDROMES OF CORRUPTION* 20-35 (2005). Cf. ROSE-ACKERMAN, *supra* note 28, at 92-96 (observing the impact and limits of cultural relativism). For an element-by-element analysis of American laws on corruption, see Lowenstein, *supra* note 33, at 795-828 (examining corruption law in American state and federal law as having five components — target of a public official, corrupt intent, a benefit of value, a relationship to an official act, and an intent to influence — and providing an analysis of

they are linked together by quid pro quo, the act is corrupt. Such formulas concretize the framework's norms through bright-line tests: did the official receive a tangible private payoff? Did the donor receive a public act in return? Does there appear to be a causal connection between the two (a motivational inquiry much closer to traditional criminal treatments of *mens rea*)? Corrupt behavior is cast as analogous to breach of contract to govern responsibly, and the initially standard-like question that underlies any corruption inquiry — has a leader acted in a manner that violates obligations to the polity? — is reduced to a (relatively) crisp and precise rule.<sup>47</sup>

The competitive approach minimizes the need to directly address the ambiguities of norms and motivation by codifying the relevant inquiries. Of course, while it adopts constrained and crisp forms, the competitive approach does not necessarily adopt a particular substantive view regarding what particular acts are corrupt. A quid pro quo regime may criminalize many behaviors and force disclosures of large amount of information. Yet, the form does not suggest that this regime does more than instantiate aggregate preferences regarding how leaders should act.

#### *D. The Dirty Middle: Laws of Corruption in Practical Application*

These accounts describe idealized anticorruption regimes. Actual enforcement must blend the two approaches because in practice each offers particular virtues. Competitive anticorruption measures define offenses and requirements in concrete terms, offering greater predictability and more transparent enforcement. However, this has both practical and principled downsides. Because competitive anticorruption is preemptively defined, it is less capable of reacting to

---

each); Daniel H. Lowenstein, *When is a Campaign Contribution a Bribe?*, in PRIVATE AND PUBLIC CORRUPTION 127, 136-40 (William C. Heffernan & John Kleinig eds., 2004) (analyzing the explicitness prong in particular).

<sup>47</sup> Narrow, brightly defined prophylactic conflict-of-interest statutes may be explained in a like fashion. For example, a law prohibiting employment with a company over whom an official has recently held regulatory power may be necessary to prevent bribe-like conduct where the public act is provided prior to the payoff, and the transaction is consummated tacitly. This topic touches on the distinction between “bribes, gifts, prices, and tips.” See ROSE-ACKERMAN, *supra* note 28, 92-110 (providing a theoretical analysis); Lowenstein, *supra* note 33, at 796-97 (describing the distinction between bribes and an “unlawful gratuity offense with bribery”).

innovatively or intricately corrupt acts.<sup>48</sup> Competitive anticorruption also neglects corruption's ethical underpinnings: leaders and officials are in positions of public trust and responsibility, and corruption is unacceptable, in part, because it contravenes this unique moral standing. Minimal formal adherence to the sharply delineated laws may satisfy competitive theory, but appears brittle as an ethical posture. Deliberative anticorruption does not suffer from this problem; its measures look to deeper motivations and can adaptively incorporate moral intuitions, so evasion of a narrow formal prohibition will not shield an offensive act. Yet, these virtues are offset by a lack of precision and the possible need for enormous discretion by enforcement agents — the very flaws competitive enforcement generally solves.

Many corruption laws integrate attributes of deliberative and competitive anticorruption. For example, the most straightforward federal anticorruption law, 18 U.S.C. § 201,<sup>49</sup> is a quid pro quo formula — precisely defining officials, candidates, and official acts, and requiring donors and payoffs to activate the statute — but includes broader discretion in assessment of payoffs (defined as “anything of value”) and inserts the un glossed qualifier “corruptly” before “giv[ing]”.<sup>50</sup> The resulting measure has a generally competitive form, but with interpretive elements that introduce some deliberative flexibility. And prophylactic statutes — those that prohibit conduct such as receipt of gifts by public figures from interested parties, with no requirement of proof of influence or actual quid pro quo — can serve either deliberative or competitive values, based on their

---

<sup>48</sup> One notorious example of such a corruption-law failure is that of the recent prosecution of Rod Blagojevich, which involved acts that were morally abhorrent to many but only equivocally illegal. *See* Monica Davey & Susan Saulny, *Jurors Fault Complexity of the Blagojevich Trial*, N.Y. TIMES, Aug. 19, 2010, at A1; Monica Davey & Susan Saulny, *For Blagojevich, A Guilty Verdict on 1 of 24 Counts*, N.Y. TIMES, Aug. 18, 2010, at A1. *See also supra* note 40 and accompanying text.

<sup>49</sup> 18 U.S.C. § 201 (2006).

<sup>50</sup> § 201(b)(1).

breadth. A narrow statute will have the competitive qualities of an anti-bribery law, while a broader statute will create a zone of mandated public-regardingness.<sup>51</sup>

Finally, while I have scrupulously avoided correlating approaches with substantive content, a correlation does exist between regime affiliation and the content of corruption law. Content here refers to the questions posed by the generic corruption model: what are bad motives, what are the foundational norms, and what is excessively private-serving? A competitive system will generally condemn fewer motives and self-interested actions, relying more heavily on elections to promote acceptable behavior. Conversely, the deliberative approach will tend to condemn a broader array of motives and permit less self-interest, because any action must satisfy (hypothetical) critical consideration by the polity. This contrast may be clearest in the assessment of vote-seeking behavior. In competitive democracy, acts or promises by candidates to gain votes is the very preference-driven engine of the system. Conversely, for deliberative democrats, the belief, “I only take this action because it will encourage a block of voters to elect me, not because I believe it publically beneficial,” usually contravenes the mutual respect and genuine other-regardingness that defines legitimate politics.<sup>52</sup> However, this parallel between democratic theory and substantive content of anticorruption regimes is correlative rather than causal. The competitive approach could indict such a wide array of acts under *quid pro quo* and disclosure statutes as to virtually exclude self-interest from officials’ political conduct. Likewise, upon deliberation, a polity (or its

---

<sup>51</sup> The spectrum-like nature of prophylactic statutes demonstrates that the competitive and deliberative concepts of corruption define the same misconduct, and seek the same final good of political integrity. All theories and laws of corruption merely attempt to define the extent of political obligation, to separate the public from the private, and to describe permissible behavior in their intersection. In the prophylactic statute context, this is demonstrated by the fact that both types of statutes ultimately identify the behavior that is deemed presumptively unacceptable for the polity (receipt of a good even without proof of a corresponding public act), according to the relevant norms. A competitive view pushes this normative focus into the background, whereas a deliberative approach embraces the broad sweep of a prophylactic statute, treating them as part of a scheme to encourage good motives in public officials.

<sup>52</sup> See Sunstein, *supra* note 8, at 32 (suggesting that the Madisonian conception of democracy rejects the competitive position and defining corruption as acting only to satisfy interest groups, including, presumably, enough interest groups to ensure reelection).

delegates) might conclude only the most egregious abuses of public power for private gain are corrupt. As with the forms of laws, in practice a polity will have an intermediate position on substantive corruption. For this chapter, these ideal substantive positions are primarily helpful in that they can serve as guideposts to the form-oriented analysis of the institutional conflict.

#### Part Two: Campaign Finance, Honest Services, and The Institutional Divergence

Examining modern anticorruption law through the competitive-deliberative divide reveals a remarkable episodic conflict between the Supreme Court and Congress. Both lines of cases (campaign finance reform and honest services) reflect a consistent pattern: Congress passed deliberative anticorruption laws, only to watch the Court nullify them by either narrow interpretation or outright rejection. Consequently, the Court has served as the unspoken (and perhaps inadvertent) champion of a competitive response to corruption.

The conflict has manifested on two levels. When the Court has examined anticorruption legislation, its holdings have pruned back deliberative anticorruption while leaving intact competitive anticorruption measures. In the campaign finance context, when Congress has regulated certain types of campaign spending, the Court has responded by holding such limitations violate the First Amendment. In the honest services context, the Court has held that broadly defined anticorruption laws, which grant substantial discretion to prosecutors, violate due process, and indicated that only quid pro quo prohibitions satisfy vagueness and notice requirements. Thus, on its face, the conflict has occurred indirectly, as the Court has found constitutional infirmities in most deliberative anticorruption schemes, rather than made specific statements regarding corruption. However, the Court's statements on corruption — which comprise a penumbra of dicta around its holdings — suggest it views politics as a market populated by self-interested actors. The Court has been dubious of congressional efforts to challenge this conception.

A final caveat before plunging into the evidence: neither institution has treated anticorruption law as a coherent whole or articulated a general theory of corruption. Congressional legislation has accumulated piecemeal, often in response to external political pressures. The Court's immediate objections to such legislation have been framed in terms of individual rights. The subsequent two sections must piece together the deliberative-competitive divide through examination of the legislation and judicial responses themselves. Moreover, neither the Court nor Congress has comprehensively or consistently defined corrupt action or framed the conflict in unified terms. Thus, this chapter definitively concludes only that the divide over anticorruption exists, but does not suggest either institution has intentionally advanced or consciously holds a coherent theory on corruption.

### III. Campaign Finance: The Battle over Money in Elections

Campaign finance has been the most active forum for debating anticorruption in modern Supreme Court jurisprudence. The Court has generally struck down congressional efforts to deliberately restrict the influence of private money (and thus private motivational influence). The campaign finance literature is well-trod,<sup>53</sup> so this section focuses on the points most relevant

---

<sup>53</sup> Campaign finance reform has been a darling of the academy, though corruption has received proportionally little attention. The latter reality is curious given anticorruption was modern campaign finance reform's original inspiration. The debate has instead focused on the tension between free speech versus equality of political participation.

The 'free speech' wing, led on the Court by Scalia and Thomas, has argued that campaign finance reform unconstitutionally, and perniciously, restricts the right to political speech. See *Citizens United v. FEC*, 558 U. S. \_\_\_, \_\_\_, 130 S. Ct. 876, 929 (2010) (Scalia, J., concurring) (noting that "[a] documentary film critical of a potential Presidential candidate is core political speech" and thus protected by the First Amendment even if it is created by a corporation); *id.* at \_\_\_, 130 S. Ct. at 980 (Thomas, J., concurring in part, dissenting in part) (agreeing that a campaign finance reform provision violated the First Amendment and noting that "[p]olitical speech is entitled to robust protection under the First Amendment"). For the argument that the broadest possible treatment of First Amendment and minimal finance regulation enhance democratic governance, see Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1089 (1996) (federal and state finance regulation have not only failed to achieve the anticorruption and pro-egalitarian goals of reform, "but . . . have themselves had undemocratic consequences for the electoral system"). See also Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U. C. DAVIS L. REV. 663, 672-75 (1997) (arguing political expenditures may enhance the democratic process). Others have argued less regulation permits for a broader range of ideas by giving challengers a means to counteract the incumbent advantage. See Samuel Issacharoff, *Throwing in the Towel: The Constitutional Morass of Campaign Finance*, in PARTY FUNDING AND CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE, 183, 190 (K. D. Ewing & Samuel Issacharoff eds., 2006) (describing as "essentially unanswered" by the Court Scalia's

to the institutional divide: the original judicial gutting of the 1974 Federal Election Campaign Act amendments<sup>54</sup> deliberative measures in *Buckley v. Valeo*<sup>55</sup>, and the recent interdiction of Congress's much more modest deliberative efforts in the Bipartisan Campaign Reform Act<sup>56</sup> through *Wisconsin Right to Life*<sup>57</sup> and *Citizens United*.<sup>58</sup>

#### A. Congress's Turn toward Deliberative Democracy: 1974 FECA

Campaign finance regulation began to assume its current character following Watergate.<sup>59</sup>

The scandal demonstrated that disclosure requirements alone would not adequately ensure ethical

---

observation that the McCain-Feingold Act restricts soft money while increasing hard money limits, yet that hard money is the type easier for incumbents to raise. The inference is thus that Congress might be engaging in legislative self-dealing. See also *Randall v. Sorrell*, 548 U.S. 230, 248-49 (2006) (“[C]ontribution limits that are too low also can harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.”).

Conversely, the “equality” wing, represented on the Court by Breyer and (until recently) Stevens, suggests that unchecked campaign spending damages political equality by allowing wealth to determine political outcomes. See, e.g., Burt Neuborne, *Money and American Democracy*, in *LAW AND CLASS IN AMERICA*, 37, 42-43 (Paul D. Carrington & Trina Jones eds., 2006) (arguing current campaign spending practices, validated by *Buckley*, leave a vast percentage of the population politically unequal); *id.* at 48 (observing, “[v]irtually every other serious democracy subsidizes the campaign process, assuring that the rich do not exercise disproportionate political influence”); Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 77 (2004) (arguing that even after the McCain-Feingold Act, “[m]assive disparities in the distribution of wealth cause disparities in political participation”); Frank Askin, *Political Money and Freedom of Speech: Kathleen Sullivan’s Seven Deadly Sins - an Antitoxin*, 31 U. C. DAVIS L. REV. 1065, 1077-80 (1998) (observing the plutocratic effects of current campaign finance laws, and the incompatibility of this system with Constitutional values). For a defense of public financing of campaigns, see, e.g., Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160 (1994) (arguing that publically financed campaigns are superior in terms of the constitutional idea of equal access to politics, and in preventing quid pro quo conduct or related behavior); Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials*, 37 LOY. U. CHI. L.J. 669 (2006) (arguing campaign spending limits will result in both fairer elections and better governance, as leaders will be less concerned with fundraising). For a more general account supporting the equality wing, see OWEN M. FISS, *THE IRONY OF FREE SPEECH* 79 (1996) (differentiating between “libertarian” and “democratic” treatment of the First Amendment). Cf. SUNSTEIN, *supra* note 19. See generally *supra* Section I.

<sup>54</sup> Federal Election Campaign Act of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431-55 (Supp. 2002)). 1974 FECA amended the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

<sup>55</sup> 424 U. S. 1 (1976).

<sup>56</sup> Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C. (2002)).

<sup>57</sup> *Wis. Right to Life v. Fed. Election Comm’n*, 551 U.S. 449 (2007).

<sup>58</sup> 561 U. S. \_\_\_, 130 S. Ct. 876 (2010).

<sup>59</sup> Cf. George D. Brown, *Putting Watergate Behind Us - Salinas, Sun-Diamond, and Two Views of the Anticorruption Model*, 74 TUL. L. REV. 747 (2000) (describing Watergate as an anticorruption threshold). Brown argues immediately after Watergate there was a pervasive “hard-line” approach to corruption, which has been followed by an accelerating “counterrevolutionary critique.” See *id.* at 751-64. Brown claims the Court’s conduct reflects this pattern, claiming its



campaign practices.<sup>60</sup> Congress responded with its first attempt to comprehensively regulate campaign spending. It established the Federal Election Commission; created monitoring and reporting mechanisms for most expenditures; placed strict limits on contributions by individuals, parties, and political action groups; limited candidates' expenditures, whether funded by outside contributions or their own wealth; limited "independent expenditures" by private individuals in support of candidates;<sup>61</sup> and established a network of public funding (matching funds for primaries and general funds for general elections).<sup>62</sup> The goal was ambitious: to provide "complete control over and disclosure of campaign contributions and expenditures in campaigns for Federal elective office";<sup>63</sup> Congress indicated that "[t]he election of federal officials is not a private affair".<sup>64</sup> The goals of FECA were twofold: ensuring any viable candidate could communicate with the electorate, and preventing corruption by discouraging excessive candidate reliance on a small pool of donors.<sup>65</sup>

The 1974 FECA recognized democratic decision-making involves a competitive selection process, but sought to make the contextual political culture as deliberative as possible. It facilitated

---

initial decisions are strongly anticorruption but gradually it has adopted a more lenient stance. *See id.* at 811-12. Conversely, this article suggests the Court has maintained a consistent competitive approach to corruption.

<sup>60</sup> *See* S. REP. NO. 93-689, at 2 (1974), as reprinted in 1974 U.S.C.C.A.N. 5587, 5588. *See generally* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1002 (1976) (stating that "Congress passed these provisions in response to political abuses which culminated in the 1972 presidential campaign and its aftermath . . .").

<sup>61</sup> For recognition of the constitutional issues raised by this measure, *see* S. REP. NO. 93-689, at 18-19 (1974).

<sup>62</sup> Federal Election Campaign Act of 1974, Pub. L. No. 93-443, §101(b), 88 Stat. 1263, 1263-64 (1974) (codified as amended at 2 U.S.C. §§ 431-55 (Supp. 2004)), describes contribution limits; § 101(c) describes expenditure limits; and key terminology for contribution and expenditure limits are articulated by §§ 201, 204-309.

<sup>63</sup> S. REP. NO. 93-689, at 1.

<sup>64</sup> *Id.* at 5.

<sup>65</sup> *Id.* ("The only way in which Congress can eliminate reliance on large private contributions and still ensure adequate presentation to the electorate of opposing viewpoints of competing candidates is through comprehensive public financing.") (emphasis in original). Both goals are emphasized throughout the introductory text as motivations for the regulations. Current circumstances make it "exceedingly difficult to finance an adequate campaign to carry . . . [candidates'] message[s] to the voters." *Id.* The Report also speaks of the need to "purify" the campaigns, *id.* at 6, and ensure, by encouraging small contributions by many donors in a party context, that any private funding "represents the involvement of many voters and not merely the influence of a wealthy few," *id.* at 8.

competitive elections, particularly by providing the electorate with information.<sup>66</sup> Yet the bill also strove to make elections more robustly public affairs by “encourage[ing] a candidate to involve large numbers of voters in the fundraising process”<sup>67</sup> and ensuring citizen participation in politics.<sup>68</sup> The goal was elections imbued with the hallmarks of deliberative democracy: citizen involvement, meaningful discourse, and engagement between polity and leaders.<sup>69</sup>

The central measures of 1974 FECA can be classified as reflecting competitive or deliberative anticorruption concerns. The direct limitations on contributions to candidates and functionally equivalent independent expenditures on their behalf<sup>70</sup> were the most explicitly competitive measures. Their purpose was to prevent “undue influence by a group or individual”.<sup>71</sup> In effect, they were anti-bribery measures in the campaign finance context. By treating such payments to or on behalf of politicians as unacceptable payoffs, these limitations prohibited a quid pro quo through campaign donations. Operating on the contestable descriptive premise that excessive aid to a candidate could potentially sway the candidate in the donor’s favor, these prohibitions manifested a straightforward political principle: democratic political outcomes ought not to be overdetermined by the private deployment of personal wealth. By evoking this principle — which underlies any regulation of quid pro quo bribery — Congress avoided investigation of motivational subtleties in this facet of the regulatory framework.

---

<sup>66</sup> See *id.* at 5 (defining the legislation’s purpose as protecting “the whole process of political competition”); *id.* at 6 (describing the goal of permitting candidates “to run a fully informative and effective campaign”).

<sup>67</sup> *Id.* at 7.

<sup>68</sup> This is particularly salient with regards to the role of parties, described in, *id.* at 7-9. For a description of how party competition can contribute to a deliberative approach to democracy, see NANCY ROSENBLUM, *ON THE SIDE OF THE ANGELS* 306-11 (2008).

<sup>69</sup> See Senator Pell’s comment, S. REP. NO. 93-689, at 89 (suggesting that the goal of the bill is to “return[] to our people, to our individual voters a rightful share and a rightful responsibility in the choosing of their candidates. And it can serve to establish that climate of public trust in elected officials which this country so earnestly desires”).

<sup>70</sup> Federal Election Campaign Act of 1974, Pub. L. No. 93-443, §§ 101(a)-101(f)(1), 88 Stat. 1263, 1263-65 (1974) (codified as amended at 2 U.S.C. §§ 431-55 (Supp. 2002)) (limiting amount of contributions to political figures and criminalizing honorariums paid to elected officials).

<sup>71</sup> S. REP. NO. 93-689, at 19. See also *id.* at 5 (suggesting the desirability of emancipating candidates from dependence “on those relatively few individuals capable of contributing the maximum amount permitted by law”); *supra* note 68.

Conversely, the expenditure limitations<sup>72</sup> directly evaluated the legitimacy of certain political motives. The expenditure limitations discouraged candidates from approaching campaigns as private undertakings, and, as such, were an attempt to shape political motives. Rather, the limitations induced candidates to treat their campaigns as a public process. The motivational aspects of this are subtle — candidates were discouraged from privately structured self-aggrandizement and instead encouraged to participate in broader public engagement. Congress’s interests in shaping candidate motivation may have been more apparent in the positive element supporting the expenditure limitations, the public financing regime. In constructing it, Congress expressed a desire to make candidates more broadly public- rather than private-regarding,<sup>73</sup> and to engage the citizenry as a whole, rather than propitiate the individuals who offer the most funding.<sup>74</sup> These measures are typical of overbroad deliberative anticorruption which discourages overly self-serving conduct by political actors.

Ultimately, the two classes of measures complemented each other: narrower competitive measures sought to improve the translation of constituent preference into government action, while deliberative provisions attempted to infuse the selection process with a sense of collective engagement. Additionally, some elements of 1974 FECA were justified on both deliberative and competitive grounds, such as streamlined disclosure requirements.<sup>75</sup>

---

<sup>72</sup> Federal Election Campaign Act of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263, 1263-68 (codified as amended at 2 U.S.C. §§ 431-55 (Supp. 2002)).

<sup>73</sup> S. REP. NO. 93-689, at 5 (describing the need “*to pay for the public business of elections with public funds*”) (emphasis in original) (internal citation omitted); *id.* (observing elections are not “private affair[s]”).

<sup>74</sup> S. REP. NO. 93-689, *Id.* at 6 (describing a major goal of matching public financing as encouraging candidates to rely mainly on “grass roots” for fundraising); *id.* at 7 (describing the use of matching limits to “encourage[] a candidate to involve large numbers of voters in the fundraising process”).

<sup>75</sup> Federal Election Campaign Act of 1974, Pub. L. No. 93-443, §§ 201-318, 88 Stat. 1263, 1272-89 (codified as amended at 2 U.S.C. §§ 431-55 (Supp. 2002)) (summary of the changes). *See also* S. REP. NO. 93-689, at 15-16. These changes can be explained by both the desire to improve voter accuracy and expose speculative quid pro quo to public scrutiny, but also by the desire to facilitate public debate and encourage general awareness of public norms in acceptance of campaign contributions. *See Buckley v. Valeo*, 424 U.S., 1, 68 (“[D]isclosure requirements – certainly in most applications – appear to be the least restrictive means of curbing the evils of campaign ignorance and

Some have offered an alternative interpretation of FECA, suggesting campaign finance reform must, by structural necessity, be dedicated to the elimination or mitigation of the effect of wealth disparities upon elections.<sup>76</sup> This argument suggests Congress addressed two possible effects of wealth in politics. The use of wealth by the rich might unfairly reduce the relative political power of the poor, and the disproportionate power of wealthy candidates might preemptively bias candidates towards taking positions appealing to rich (prospective) donors. Some have argued Congress's efforts addressed these political imbalances, rather than fought corruption. However, the history and context of 1974 FECA demonstrates this critique is

---

corruption. . . ."); *Id.* at 83 ("[D]isclosure serves informational functions, as well as the prevention of corruption. . . .").

<sup>76</sup> The "equality" wing holds elimination of the effect of wealth disparities on elections to be a valid goal of campaign finance reform. *See supra* note 53. A strand in the campaign finance literature, moreover, has argued that campaign finance reform must never be targeting corruption in a simple form. *See, e.g.*, David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369 (1994). Strauss claims that campaign finance regulation is, at its root, never about corruption. *Id.* at 1373. He explains:

The conventional form of corruption occurs when elected officials take advantage of their position to enrich themselves. In effect they convert their public office into private wealth. But when the quid pro quo for an official action is not a bribe but a campaign contribution, the official has used the power of her office, not for personal enrichment, but in order to remain in office longer.

*Id.* Strauss thus suggests the problem facing campaign contributions is not corruption of leaders, but the effect of inequality upon candidate conduct. Campaign contributions just manifest a broader problem of ensuring leaders' accountability; electoral pressure applied by other forms of citizen action can distort the impact of individual vote as much as a campaign contributions. Strauss's insight presumes a competitive view of politics as a simple vote-market. From a competitive view *all* corruption can be traced to inequality; if all individuals had equal resources and political markets were efficient, then there would be no corruption, merely accurate expression of desired political outcomes through both votes and financial expenditures.

Similar arguments are developed by Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1723-24 (1999) (arguing that since campaign finance funds are ultimately directed towards voters through expenditures, the real issue must be corruption of voters, and that this raises significant theoretical difficulties for both competitive ("pluralist-protective") and deliberative ("republican-communitarian") democrats, since defending campaign finance in either view suggests voters' interests or reasoning processes can be distorted by candidate spending); *see also* Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 903 (1998) (arguing that campaign spending is really only a concern if it is presumed most voters are "civic slackers" who are disengaged from political reasoning). These authors ultimately attempt to reason away the possibility of campaign finance contributions corrupting leaders, instead suggesting campaign finance reform must be an effort to deliberatively reform voters. This view, insightful as it is, does not give sufficient shrift to the alternate deliberative desire that leaders should be genuinely public-minded, as opposed to voracious vote-obtainers. *Cf.* Molly J. Wilson, *Behavioral Decision Theory and Implications for the Supreme Court's Campaign Finance Jurisprudence*, 31 CARDOZO L. REV. 679, 740-41 (2010) (arguing "the relationship between money and potentially manipulative communication strategies arguably supports a more expansive definition of corruption") (internal citations omitted) (quotations omitted).

inaccurate, at least as an assessment institutional intent.<sup>77</sup> As the legislative history confirms, the measures were primarily directed toward politicians, not toward constituents. Increased equality in political influence may have been a benefit of the FECA regime, because it required candidates to achieve widespread popular support rather than rely on a few wealthy donors. Yet this will generally be true of any anticorruption enhancement, because it will reduce opportunities to convert wealth into political action.

*B. Buckley: Laying the Foundation for a Competitive View of Corruption*

This mixed campaign finance regime did not survive judicial review. In *Buckley v. Valeo*,<sup>78</sup> the Court left intact 1974 FECA's competitive measures while striking down or emasculating most of the deliberative ones. The Court balanced the governmental interest<sup>79</sup> in anticorruption against First Amendment rights and concluded provisions that limited contributions to candidates or parties were lawful, while those that limited expenditures (of candidates, parties or, with a particular limitation, independent advocates)<sup>80</sup> were not.<sup>81</sup> Moreover, the Court's analysis reflected the presumption that competitive corruption is the only valid type, though it never clearly articulated the theoretical foundations of this position.

---

<sup>77</sup> This article remains agnostic regarding the critics of campaign finance reform as anticorruption mentioned in the previous footnote.

<sup>78</sup> 424 U.S. 1 (1976).

<sup>79</sup> The Court's classification of anticorruption as a *governmental* interest is itself theoretically substantive. Certainly, the regulation is state action, so in a formal legalistic sense clearly citizen rights are being balanced against government action. However, the relationship between anticorruption and representation is more ambiguous. Insofar as anticorruption seeks to ensure accurate and just translation of constituents' wills into governmental action, anticorruption might be described as a popular interest, rather than a narrow governmental one. In this vein, some have argued that anticorruption should be given constitutional weight on the basis of an accurate originalist reading. See Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L.J. 75, 83-86 (2003) (arguing for an "Anti-Corruption Legacy" in the Constitution that addresses federalism concerns); James A. Gardner, *Madison's Hope: Virtue, Self-Interest, and the Design of Electoral Systems*, 86 IOWA L. REV. 87, 122-23 (2000) (arguing that the founders hoped to create a state based in "virtuous" concern of public affairs rather than "self-interest"); Teachout, *supra* note 7, at 387-97 (discussing various Justices' views of corruption and how contemporary definitions of corruption differ from that of the Framers').

<sup>80</sup> *Buckley*, 424 U.S. at 40-45 (resolving the line between "express" and "issue" advocacy using a "magic words" approach, and thereby differentiating between independent advocacy and de facto contributions).

<sup>81</sup> *Id.* at 45.

Measure by measure analysis reveals the Court's competitive bent. The Court held limits on direct contributions to candidates lawful, on the grounds that such contributions could be traded by donors in exchange for political favors by or greater influence over candidates.<sup>82</sup> By preventing such trades, these measures deterred corruption or the appearance of corruption.<sup>83</sup> Moreover, the Court held such limitations did not significantly restrict the individual First Amendment right to association, as a small contribution showed one's political allegiance with the same symbolic heft as a large one.<sup>84</sup> The Court held, however, that expenditure restrictions did not directly address corruption, and substantially restricted both speech (since much communication requires money) and association (since impairing speech harms associations dedicated to political advocacy).<sup>85</sup> Thus, in the Court's view the more effective measure also did less harm: contribution limits were the better anticorruption tools, and infringed less upon First Amendment rights.<sup>86</sup>

The opinion balanced government interests against the burden upon constitutionally protected rights. The Court's positive focus ensured no government action unjustifiably harmed the rights of speech or association. As such, the Court was not independently concerned with anticorruption, but rather ensuring Congress's own anticorruption efforts did not have untoward ancillary effects. Yet in weighing the anticorruption efficacy of the government's measures, the Court deployed a narrowly competitive concept of corruption.

[T]he primary interest served by the limitations and, indeed, by the Act as a whole, is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office . . . . To the extent that large contributions are given to secure political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.<sup>87</sup>

---

<sup>82</sup> *Id.* at 29.

<sup>83</sup> *Id.* at 25-30.

<sup>84</sup> *Id.* at 22.

<sup>85</sup> *Id.* at 45, 51-52, 58-59. The Court also summarily rejected the argument that expenditure of money is not speech and thus outside the ken of First Amendment protection. *Id.* at 16.

<sup>86</sup> *Id.* at 47-49. See SUNSTEIN, *supra* note 19, at 94-95.

<sup>87</sup> *Buckley*, 424 U.S. at 25-27. See also *id.* at 53 ("The primary governmental interest served by the Act [is] the prevention of actual and apparent corruption of the political process . . . .", thus implying that corruption of the political process is coextensive with the prevention of quid pro quo corruption of individual candidates.).

With its sole concern for prohibiting quid pro quo, this was a classically competitive formulation of corruption.<sup>88</sup> The Court also recognized that the appearance of corrupt acts may pose risks:

Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions . . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.<sup>89</sup>

This demonstrated awareness of the evidentiary difficulties of monitoring corruption,<sup>90</sup> and the subsequent impact inadequate enforcement can have on popular trust in politics. Yet quid pro quo was the only form of “improper influence” the Court recognized as possibly having this trust-eroding effect; the risk that citizens believe their leaders are being corrupted was identified with the risk citizens believe their leaders are being bribed.<sup>91</sup> Thus, the Court’s consideration of the appearance of corruption reinforced its commitment to competitive corruption.

As demonstrated in Section IIIA of this chapter, Congress wished to establish an electoral culture that condemned excessively self-interested political conduct. Consequently, types of behavior Congress sought to discourage as corrupt included not only the most explicit quid pro quo violations, but also broadly self-interested behavior. Yet the Court demonstrated no concern

---

<sup>88</sup> *Id.* at 27-28. The Court notes that:

laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action . . . . Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.

*Id.* Thus, the Court observes that bribery laws may not adequately capture or monitor *all* corrupt exchanges (at least in the election context), simply because there may be difficulties in adequately proving and defining the terms of the corrupt exchange; corruption still consists of illicit public-private exchanges. This concern with defining terms for bribery formulas is characteristic of quid pro quo competitive corruption. *See also* Brown, *supra* note 59, at 803 (recognizing that the Court condemns corrupt behavior based on its “perception of how close it is to bribery”).

<sup>89</sup> *Buckley*, 424 U.S. at 27 (internal quotes and citations omitted).

<sup>90</sup> *See id.* at 27 (“[T]he scope of such pernicious practices can never be reliably ascertained . . .”).

<sup>91</sup> *See id.* at 26-27.

for Congress's desire to promote deliberative practices, nor acknowledged that Congress's deliberative measures targeted illicit behavior of a form other than quid pro quo. Rather, when condemning the anticorruption efficacy of expenditure restrictions, the Court inquired solely whether a measure deterred quid pro quo.<sup>92</sup> This excluded Congress's deliberative concerns from incorporation into the assessment of anticorruption practices, and thus from the balancing against First Amendment rights that determined if measures passed constitutional muster. In short, the Court's own conceptualization of corruption preemptively ensured only competitive measures would survive constitutional assessment. The Court's narrow competitive allegiance is further apparent when it preemptively declared that efforts to equalize the relative ability of voters to express themselves do not have constitutional weight.<sup>93</sup> According to deliberative theory, public engagement benefits greatly when members of a polity interact as equals, and hints of this are apparent in the 1974 FECA design.<sup>94</sup> Equalizing measures are one facet of the deliberative effort to reduce corrupt motivations, by limiting opportunities for aggressive self-aggrandizement and thus encouraging publicly-oriented engagement.<sup>95</sup> Yet the Court refuses to acknowledge this possible justification for advancing expressive equality.

---

<sup>92</sup> *Id.* at 45-47 (addressing independent expenditures restrictions, with references to “buy[ing] influence” and “alleviat[ing] the danger that expenditures will be given as *quid pro quo* . . . .”); *id.* at 52-53 (addressing personal expenditures, and concluding that use of personal expenditures is actually a *good* way to avoid corruption; this is clearly antideliberative given the potential for self-promotion in sheer reliance on personal wealth); *id.* at 56-57 (discussing general limits on campaign spending).

<sup>93</sup> *Id.* at 17 (declaring as a core principle that equalizing cannot be a valid justification);

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

*Id.* at 48-49 (internal citations and quotation marks omitted).

<sup>94</sup> S. REP. NO. 93-689, at 8 (1974), *reprinted in* U.S.C.C.A.N. 5587, 5594 (describing the goal of “the involvement of many voters and not merely the influence of a wealthy few” in politics and campaign finance); *id.* at 6, *reprinted in* U.S.C.C.A.N. 5587, 5592 (describing the value of “grass roots” campaign finance).

<sup>95</sup> *Cf.* Strauss, *supra* note 76 (discussing David A. Strauss' view on the effect of inequality on elections).



Of course, the Court need not have concluded that FECA's expenditure provisions *do* pass constitutional muster; it is a separate substantive question if their benefits justify the harm to protected rights. Yet the Court never even acknowledged that Congress is, through these measures, addressing practices and political deviations that might be deemed corrupt. The Court declared that only fighting quid pro quo corruption, and that alone, can satisfy the anticorruption "compelling government interest" bar.<sup>96</sup> In light of the Court's initial statement that anticorruption alone could possibly balance the infringement of constitutional rights, deliberative anticorruption measures that run afoul of constitutional rights will never survive. Since meaningful anticorruption reform will almost necessarily regulate political conduct that receives some level of constitutional protection, this virtually guarantees a competitive electoral anticorruption regime.

Of course, it might be argued that the Court did substantively endorse deliberative democracy, and that its decisions were motivated by a desire to sustain the deliberative mainstays of "political debate and discussion."<sup>97</sup> However, as with corruption, the Court's theory of discourse was founded in competitive democracy. The Court perceived debate and discussion to be facilitated by greater volume of speech with minimal government intervention.<sup>98</sup> In the Court's view, the electoral process operates best as a libertarian free market; *Buckley* rests on the premise that the only reason for interfering with this dynamic is the prospective quid pro quo corruption of legislators, or suspicion thereof. Yet Congress intended to advance a foundationally different

---

<sup>96</sup> *Buckley*, 424 U.S. at 26-27.

<sup>97</sup> *Id.* at 58; *see also id.* at 48-49 (describing need to protect "unfettered interchange of ideas") (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964)).

<sup>98</sup> *See id.* at 19.

[T]he First Amendment right to speak one's mind . . . on all public institutions includes the right to engage in vigorous advocacy no less than abstract discussion. Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.

*Id.* at 48 (internal citations and quotation marks omitted).

electoral ethos — one premised around elections with a public rather than private character — with the ensuing consequences for political speech and preference formation.<sup>99</sup> By judging democratic practices through free-market principles and treating voters as raw information-obtaining, preference-fulfilling consumers, the Court excluded deliberative values from consideration.

The practical effect of the Court’s decision was to institutionalize the contribution/expenditure divide, a policy that still stands.<sup>100</sup> It left the competitive measures intact and the deliberative measures either overruled or ineffective — with the expenditure restrictions gone, the public financing regime was rendered ineffective.<sup>101</sup> Moreover, the Court’s analytic framework suggested it would continue to enforce this dichotomy so long as its current principles remained in place — a prediction borne out in *Citizens United*.

### C. Out of Buckley towards BCRA

In the three decades following *Buckley*, the Court handed down a number of decisions that merely shifted the margins of campaign finance regulation, even as the status quo endured harsh criticism from commentators<sup>102</sup> and within the Court.<sup>103</sup> Generally speaking, these decisions

---

<sup>99</sup> Some commentators (predictably from the equality wing) have criticized *Buckley*’s marketized conception of political discourse. See DWORKIN, *supra* note 9, at 362 (observing that *Buckley* operates in the majoritarian conception of democracy). Cf. STEPHEN BREYER, ACTIVE LIBERTY 46-49 (Alfred A. Knopf ed., 2005) (suggesting that free speech in the campaign context is better conceived of as “a conversation” rather than simple non-obstruction, but ultimately lauding the Court’s decision in *Buckley* for respecting this balance). Others have suggested *Buckley* respected deliberative ends. See SUNSTEIN, *supra* note 19, at 94-101.

<sup>100</sup> Interestingly, the Court also struck down Congress’s construction of the FEC as a nonpartisan/bipartisan anticorruption enforcement body. *Buckley*, 424 U.S. at 120. This decision — based on the appointments clause — is not directly relevant to corruption law, but suggests formalist interpretations of the Constitution contribute to the Court-Congress conflict over corruption.

<sup>101</sup> See *id.* at 86. See generally Askin, *supra* note 53 (describing how absence of regulation renders public financing ineffective).

<sup>102</sup> See generally *supra* note 53. Neither faction was happy with *Buckley*; the ‘free speech’ wing suggested the impact on free speech is unjustified and produces a byzantine enforcement regime, while the ‘equality’ wing found wealth still too influential in politics in the absence of expenditure limitations.

<sup>103</sup> It seems a majority of sitting justices favored overruling *Buckley* by the time of *Colorado Republican v. FEC* (*Colorado Republican I*), 518 U.S. 604 (1996). See also Neuborne, *supra* note 53, at 47 (“If *Buckley* is a rotten tree just waiting to be pushed over, the question is: which way will it fall?”); for a more extensive description of this

elaborated on three doctrinal issues: when money deployed by outside parties comprised a non-coordinated independent expenditure as opposed to a coordinated de facto contribution;<sup>104</sup> when to treat political speech by independent parties as direct advocacy for a candidate, and thus face treatment as a contribution (the ‘issue/express’ advocacy divide initially determined by *Buckley*’s magic words formula);<sup>105</sup> and how money accumulated by corporate entities could be used in campaigns.<sup>106</sup> Other commentators have extensively analyzed these issues; most relevantly for this argument, the Court continued to define electoral corruption as quid pro quo between large donors and candidates.<sup>107</sup> These decisions also affirmed the Court’s commitment to the competitive approach to politics and the idea of a democratic marketplace.<sup>108</sup> In short, the Court’s commitment to competitive anticorruption remained unequivocal in both theory and practice.

---

deadlock, *see generally* Pamela Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743 (2007).

<sup>104</sup> *See Colorado Republican I*, 518 U.S. at 616 (holding that non-coordinated expenditures by a party do not count to contribution caps); *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado Republican II)*, 533 U.S. 431, 446, 456 (2001) (holding that when expenditures by a party are coordinated with a candidate, they do count to contribution caps).

<sup>105</sup> *See F.E.C. v. Mass. Citizens For Life*, 479 U.S. 238, 248-250 (1986) (discussing *Buckley*’s “express advocacy” requirement and holding that “an expenditure must constitute ‘express advocacy’ in order to be subject to [limitations].”). *See also* Richard Briffault, *Issue Advocacy: Redrawing the Election/Politics Line*, 77 TEX. L. REV. 1751, 1755-63 (1999) (explaining the Supreme Court’s definition and analysis of “express advocacy” and how lower federal courts have applied that definition). In *F.E.C. v. Wis. Right to Life*, 551 U.S. 449 (2007), the Court adopted an ultimately much more permissive perspective on the issue/express advocacy divide.

<sup>106</sup> *See First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776, 792-5 (1978) (holding general restrictions against corporate spending for a popular referendum overinclusive and unconstitutional); *Austin v. Mich.*, 494 U.S. 652, 660-61 (1990) (permitting a general prohibition on non-segregated independent campaign expenditures by corporations). Some have observed the Court’s argument in *Austin* is uniquely aligned in the jurisprudence with the ‘equality’ theory of speech, arguing it indicates a new approach to corruption in the Campaign Finance literature. *See* David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL’Y REV. 236, 271-76 (1991). However, this argument has not aged well; later cases showed *Austin* to be an anomalous decision, and *Citizens United* openly overruled it. 558 U.S. \_\_\_, \_\_\_, 130 S. Ct. 876, 913 (2010). More importantly, the idea that the Court adopted a new theory of politics in *Austin* for any length of time is undermined by its continued support for the idea of politics as a competitive process. *See infra* note 110.

<sup>107</sup> *See Nixon v. Shrink Missouri*, 528 U.S. 377, 387-95 (2000) (encapsulating the Court’s continued definition of corruption as elected officials yielding to donors’ interests). For a recent instantiation of this principle, *see Randall v. Sorrell*, 548 U.S. 230, 261 (2006) (striking down a state attempt to impose especially tight campaign finance restrictions in the absence of evidence or appearance of illicit quid pro quo).

<sup>108</sup> For a discussion of how even the Court’s more expenditure-restricting decisions (*Austin*) contribute to this broader logic, *see* DWORKIN, *supra* note 9, at 378-79 (arguing that *Bellotti* and *Austin* can be reconciled as seeking to ensure campaign practices do not “deprive citizens of information that might not otherwise be available to them”); Julian Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 SUP. CT. REV. 105, 109 (1990). These

None of this needlework, however, produced a satisfactory campaign finance regime, and in 2002 Congress again took action. The Bipartisan Campaign Reform Act<sup>109</sup> attempted to “plug”<sup>110</sup> the particularly egregious gaps in the *Buckley* campaign finance regime (soft money and electioneering communication) while respecting the Court’s constitutional instructions.<sup>111</sup> BCRA also demonstrated Congress’s commitment to enact some deliberative anticorruption even in the shadow of *Buckley*. One specific concern was that soft money provided an unregulated opportunity to directly corrupt candidates.<sup>112</sup> This raised both competitive and deliberative concerns, as soft money could serve as a circuitous quid pro quo vehicle and provide a diffuse means by which private donors could influence candidates and parties. Likewise, unsourced communication raised both types of concerns. Since voters could not always trace the source of campaign information, their ability to make trusting or discerning political judgments was impaired.<sup>113</sup> This had

---

analyses suggest that even when the Court seemed — anomalously in the context of its other jurisprudence — to permit equalizing legislation, it was undertaken in defense of a competitive political dynamic.

<sup>109</sup> Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C. (2002)); see generally Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 ELECTION L.J. 147 (2004) (offering a comprehensive measure-by-measure description of BCRA).

<sup>110</sup> *McConnell v. FEC*, 540 U.S. 93, 133 (2003) (referring to the soft-money loophole, but the term is an accurate description of BCRA’s general character). *McConnell* was the Court’s initial and most comprehensive assessment of BCRA, and left most of the regulatory structure intact. Both BCRA and *McConnell* were, as contributions to the campaign finance debate, subjected to substantial criticism. Some argued that BCRA did not do enough to truly fix the campaign finance system. See, e.g., Richard Briffault, *Reforming Campaign Finance Reform: A Review of Voting with Dollars*, 91 CAL. L. REV. 643, 645 (2003) (arguing that even after the BCRA was passed, candidates still needed large donors to be competitive). Others, however, attacked *McConnell* for failing to address First Amendment concerns with sufficient rigor and instead capitulating to its political overtones. See, e.g., Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 60-63 (2004) (criticizing the Court’s “blanket calls for deference” towards the legislature in the *McConnell* majority opinion); Bruce Cain, *Reasoning to Desired Outcomes: Making Sense of McConnell v. FEC*, 3 ELECTION L.J. 217 (2004) (describing the Court’s analysis and backwards reasoning in *McConnell* as political, thus making the Court susceptible to political control).

<sup>111</sup> See H. R. REP. 107-131, at 48 (2002), as reprinted in 2002 U.S.C.C.A.N. 106, 121 (minority views of Steny H. Hoyer, Chaka Fattah, and Jim Davis) (“The [BRCA] . . . addresses two of the most serious ills infecting American political campaigns today: (1) unregulated soft money contributions and (2) undisclosed issue advocacy.”). See also *McConnell*, 540 U.S. at 122-30 (providing extensive descriptions of both the soft money and issue advertising challenges).

<sup>112</sup> See H. R. REP. 107-131, at 5 (2002), as reprinted in 2002 U.S.C.C.A.N. 106, 110.

<sup>113</sup> See *id.* at 50, 2002 U.S.C.C.A.N. at 123.

As long as pseudonymous groups are able to communicate to the electorate, the ability of the electorate to judge the legitimacy of the message that is being offered is seriously weakened. Voters

competitive implications — the lack of clarity reduced accurate preference expression. Yet such communication without accountability also creates a venue for aggressively private, often highly confrontational political debate, which increasingly polarized politics and made the respectful discourse central to deliberation difficult.<sup>114</sup>

BCRA addressed these problems by restricting soft money donations and replacing *Buckley*'s 'magic words' formula with a more precise methodology for identifying independent electioneering. However, as a tradeoff, BCRA permitted increased hard money donations to candidates. If Congress could not ensure a broadly public campaign environment (an original goal of 1974 FECA), it would settle for one in which the private elements were at least transparent and controlled, and the most viciously partisan elements perhaps ramped down. Thus BCRA sought to subtly reestablish a balance between competitive and deliberative anticorruption. BCRA permitted a higher level of transparently competitive quid pro quo influence (through raising the hard-money donation limits),<sup>115</sup> but in exchange sought to eliminate the non-accountable impact of soft money and electioneering. This curtailed diffuse, difficult-to-trace influences and correspondingly placated candidates by increasing regulable (by capping and disclosure) hard money donations.

---

cannot confidently determine how much credibility to lend to a communication when they do not know the source of the communication. In short, without real disclosure of the sources of money funding sham issue ads, the ability of the voters to make informed decisions is severely undermined.

*Id.*

<sup>114</sup> For a classic example of such an ad, see the Bill Yellowtail ad reproduced in Jack Beatty, *A Sisyphean History of Campaign Finance Reform*, ATLANTIC (last visited Nov. 14, 2010), available at <http://www.theatlantic.com/magazine/archive/2007/07/a-sisyphean-history-of-campaign-finance-reform/6066/>.

<sup>115</sup> Bipartisan Campaign Reform Act, Pub. L. No. 107-155, § 307, 116 Stat. 81, 87-88 (codified in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C. (2002)). Admittedly, many have criticized this measure as either purely political or incumbent protection. *See* H. R. REP. 107-131, at 2 (2002), 2002 U.S.C.C.A.N. at 107 (The disparate treatment of Representatives and Senators is "cynically included for no reason other than its sponsors' belief that it increases their chances of cobbling together a majority on the house floor." Notably, the main Committee on House Administration Report from which this observation is derived was critical, rather than supportive of, BCRA.); Charles J. Cooper & Derek L. Shaffer, *What Congress "Shall Make" The Court Will Take: How McConnell v. FEC Betrays the First Amendment in Upholding Incumbency Protection Under the Banner of "Campaign Finance Reform"* 3 ELECTION L.J. 223, 225-28 (2004) (arguing that the BCRA was passed to stop "negative attack" ads and "protect incumbents against meaningful electoral challenge"); Issacharoff, *supra* note 53, at 190 (noting that the BCRA increased limits on hard money, which is easier for incumbents to raise).

Because soft money and electioneering are not deployed directly to candidates, they are more difficult to use as the (real or apparent) vehicles of quid pro quo exchange. They induce candidates to be generally private-regarding rather than public-regarding — a type of deliberative corruption.<sup>116</sup> By restraining such effects BCRA sought again to balance direct quid pro quo regulation and promotion of a deliberative political environment, albeit in a hamstrung form compared to 1974 FECA.

The Court obliquely condoned the deliberative character of some BCRA anticorruption measures in *McConnell v. FEC*, the initial judicial review of BCRA. *McConnell* upheld most of the substantive legislation, and its *dicta* suggested the Court might be growing amenable to the deliberative view of corruption.<sup>117</sup> The Court acknowledged that campaign finance regulation may seek to do more than prohibit quid pro quo, specifically approving of measures that promoted public-minded behavior and purity of the campaign atmosphere. The Court did not indicate that its broader view of democratic participation extended to its formal definition of corrupt behavior, leaving it unclear if it still adhered to a competitive view of corruption.<sup>118</sup> However, the case hinted at possible future comity between Courts and Congress regarding anticorruption enforcement.

---

<sup>116</sup> That is, soft money and electioneering, if they were to corrupt, would do so in a manner that is more closely analogous to deliberative corruption. In response to the benefit or harm of campaign funds quasi-independently deployed, candidates might subtly behave in a more private-regarding manner, both towards soft money contributors or electioneering advocates (in order to seek their favor) and towards themselves (because they need to self-interestedly consider the effects of such uncontrolled campaign resources). BCRA showed a preference for corrupt behavior, if it were to occur, to occur through open competitive channels.

<sup>117</sup> In justifying a form of scrutiny more forgiving to campaign regulation, *McConnell v. FEC*, 540 U.S. 93, 137 (2003), indicated “Because the electoral process is the very ‘means through which a free society democratically translates political speech into concrete governmental action,’ contribution limits, like other measures aimed at protecting the integrity of the process, tangibly benefit public participation in political debate.” (quoting *Shrink Missouri*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring)).

<sup>118</sup> Commentators on *McConnell* have disagreed regarding how much the Court expands its definition of corruption. See Hasen, *supra* note 110, at 57-60 (2004) (criticizing *McConnell* for claiming fidelity to the *Buckley* anticorruption rationale while simultaneously so loosening the definition of corruption that the Court’s constitutional analysis is compromised). Cf. Cain, *supra* note 110, at 219-20 (observing that the use of the anticorruption rationale to justify BCRA risks “calling everything corruption, or implied corruption”, but that the Court seemingly intends to permit the BCRA regulations as “an analogy to conflict of interest regulation”; however, Cain notes that the Court is potentially

*D. A New Extreme in Competitive Retrenchment: Citizens United*

However, cracks quickly began to appear in the détente suggested by *McConnell*, first through the *Wisconsin Right to Life* cases.<sup>119</sup> The first case in the series clarified the procedural point that *McConnell* did not include a blanket prohibition of as-applied challenge to BCRA’s regulation of electioneering communication.<sup>120</sup> The subsequent *WRTL II*<sup>121</sup> inquired if a particular advertisement comprised express advocacy equivalent to a contribution, or issue advertising that fell beyond the zone of governmental regulation.<sup>122</sup> In a fractured opinion, the Court rejected a number of subtle tests<sup>123</sup> to conclude that ads were regulable under BCRA only if they were the unequivocal functional equivalent of express advocacy.<sup>124</sup> The Court’s first concern was ensuring political speech was not chilled;<sup>125</sup> however, it also reiterated the conception of corruption as quid pro quo<sup>126</sup> and declaimed any suggestion that *McConnell* suggested otherwise.<sup>127</sup> Most subtly, the Court suggested a concept of electoral decision-making based on competitive information-

---

on the “slippery slope” of broadening the definition of corruption to the point of uselessness); Briffault, *supra* note 109, at 162-67 (observing the broadening of the definition of corruption in *McConnell*, but describing a broadening that is best characterized as a redefinition of the terms that comprise a competitive notion of quid pro quo, and in particular expanding the idea of payoff); Dennis Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1037-38 (2005) (lauding the Court for recognizing a new concept of corruption). Hasen and Thompson see in *McConnell* a broadening of corruption to include electoral political integrity. Conversely, Cain and Briffault note the *potential* for such a move, but conclude the Court still defines corruption as quid pro quo or quid pro quo like acts, even if it is loosening the definitional terms.

<sup>119</sup> *Wis. Right to Life v. FEC (WRTL I)*, 546 U.S. 410 (2006); *FEC v. Wis. Right to Life (WRTL II)*, 551 U.S. 449 (2007).

<sup>120</sup> *WRTL I*, 546 U.S. at 410.

<sup>121</sup> *WRTL II* had only two justices support the Court’s opinion. 551 U.S. at 455. Three others concurred in the judgment, but would have struck down *McConnell* directly; four others dissented. *Id.* at 482-504.

<sup>122</sup> *WRTL II*, 551 U.S. at 456.

<sup>123</sup> *WRTL II*, at 464-69. Among the rejected tests was an intent-based one, which would mesh well with the deliberative goal of purifying motivation. *Id.* at 467-69.

<sup>124</sup> *Id.* at 469-70 (“[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”).

<sup>125</sup> *See id.* at 469, 481-82.

<sup>126</sup> *Id.* at 478-79 (“Issue ads like WRTL’s are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them. To equate WRTL’s ads with contributions is to ignore their value as political speech.”).

<sup>127</sup> *Id.* at 479-80; *see McConnell v. FEC*, 540 U.S. 93, 206 n.88 (2003).

gathering and individual preference-selection.<sup>128</sup> In sum, the decision reinforced the priority of maximum breadth of unrestricted free speech and the associated treatment of corruption.

On its face, the impact of *WRTL* was quite localized; it merely encouraged corporations and organizations that engaged in campaign advocacy to claim their ads were not the functional equivalent of express advocacy, and thus fell outside the range of BCRA's electioneering prohibition. However, this prohibition was originally designed to advance deliberative political conduct by establishing a broad zone of public-regardingness. By applying a narrowly competitive test to determine if ads were "functional express advocacy" and thus fell under this regulation, the Court stripped the prohibition of much of its deliberative character.

Three years later, the Court nullified a significant element of BCRA directly while articulating its most staunchly competitive stance yet. In *Citizens United v. FEC*,<sup>129</sup> the Court ruled restriction of independent corporate campaign expenditures to be facially unconstitutional,<sup>130</sup> eliminating a central pillar in the regulation of campaign spending.<sup>131</sup> As in *Buckley*, the Court's decision was premised primarily on First Amendment rights, and on the principle that corporations possess the same constitutional right to speech as individuals;<sup>132</sup> BCRA's regulation of campaign speech by corporate entities was equivalent to an "outright ban" on speech.<sup>133</sup> Secondly, the Court's decision was based on a theory of corruption – public figures act corruptly only when they participate in the most blatant quid pro quo.<sup>134</sup>

---

<sup>128</sup> See *id.* at 470 ("An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose – uninvited by the ad – to factor it into their voting decisions.").

<sup>129</sup> 558 U.S. \_\_\_, 130 S. Ct. 876 (2010).

<sup>130</sup> *Id.* at \_\_\_, 130 S. Ct. at 917; see *id.* at \_\_\_, 130 S. Ct. at 888.

<sup>131</sup> See Bipartisan Campaign Reform Act, Pub. L. No. 107-155, § 203, 116 Stat. 81, 91-92 (codified in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C. (2002)); see also 2 U.S.C. § 441b (2006).

<sup>132</sup> *Citizens United*, 558 U.S. at \_\_\_, 130 S. Ct. at 904 (citing *First Nat. Bank of Boston v. Bellotti*, 435 U.S., 765, 777 (1978) and *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)).

<sup>133</sup> *Id.* at \_\_\_, 130 S. Ct. at 897.

<sup>134</sup> *Id.* at \_\_\_, 130 S. Ct. at 901-02.



The Court’s reasoning began with competitive democratic theory. It first presented the indisputable proposition that “[s]peech is an essential mechanism of democracy”; it allows “citizens to inquire, to hear, to speak, and to use information to reach consensus” that comprises “a precondition to enlightened self-government and necessary means to protect it.”<sup>135</sup> Ironically, this language evokes the ideals of deliberative democracy, particularly the suggestion that the goal of discourse is to reach “consensus.” However, the Court had an unequivocally competitive vision of political communication: it strongly condemned any government efforts to control or shape communication,<sup>136</sup> holding that the restrictions at issue interfered with the “open marketplace of ideas”.<sup>137</sup> By this model, ideal democracy selection consists of maximally-informed consumers making preference-optimizing choices in a political market.

With this theoretical framework, the Court went beyond strictly scrutinizing government speech restrictions for chilling effect. It posited that First Amendment rights are most valuable when they facilitate political agonism, particularly between voters and government.<sup>138</sup> This entails two presumptions prejudicial against deliberative anticorruption: first, that public structuring of electoral communication is government oppression, rather than a collective decision to order public life; and second, that there is a fundamental dichotomy between the citizenry and the

---

<sup>135</sup> *Id.* at \_\_\_, 130 S. Ct. at 898.

<sup>136</sup> *See id.* at \_\_\_, 130 S. Ct. at 899 (“The Government may not . . . deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.”).

<sup>137</sup> *Id.* at \_\_\_, 130 S. Ct. at 906 (criticizing *Austin v. Mich. Chamber of Com.*, 494 U.S. 652 (1990)) (internal citation omitted). For a further claim that more speech equals good speech, *see supra* note 33.

<sup>138</sup> *Citizens United*, 558 U.S. at \_\_\_, 130 S. Ct. at 898 (“Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people . . . . Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.”).

government. This position impairs governmental efforts to promote deliberative political debate because it holds such efforts impede the private autonomy upon which political justice relies.<sup>139</sup>

The Court then articulated its most narrowly imagined theory of competitive corruption. The Court began from the premise, familiar from *Buckley*, that corrupt acts must assume a quid pro quo form, and that independent expenditures pose less of a threat because they are more difficult to coordinate than corrupt payoffs.<sup>140</sup> However, beyond the practical difficulties, the Court then concluded that *no* independent expenditures can “give rise to corruption or the appearance of corruption.”<sup>141</sup> The Court justified this position through a brazenly competitive notion of representation:

The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt . . . . “Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.”<sup>142</sup>

This stance – a logical outgrowth of the Court’s marketized democratic theory – necessarily curtails deliberative anticorruption.

The Court’s other holdings and dicta further buttress this interpretation. *Citizens United* upheld disclosure requirements for expenditures,<sup>143</sup> validating informed citizen preferences as a

---

<sup>139</sup> *Id.* at \_\_\_, 130 S. Ct. at 904-05 (“The Constitution . . . confers upon voters, not Congress, the power to choose the Members of the House of Representatives . . . it is a dangerous business for Congress to use the election laws to influence the voters’ choices.”) (quoting *Davis v. FEC*, 554 U.S. \_\_\_, \_\_\_, 128 S. Ct. 2759, 2774 (2008)).

<sup>140</sup> *Id.* at \_\_\_, 130 S. Ct. at 902 (“[A]bsence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”) (quoting *Buckley v. Valeo*, 424 U.S. 1, 47-48 (1976)).

<sup>141</sup> *Id.* at \_\_\_, 130 S. Ct. at 909.

<sup>142</sup> *Id.* at \_\_\_, 130 S. Ct. at 910 (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (opinion of Kennedy, J.)). The Court goes on to suggest that this position is fundamental to a correct reading of the First Amendment, revisiting the root of the divide in individual rights: “generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.” *McConnell*, at 297.

<sup>143</sup> *Id.* at \_\_\_, 130 S. Ct. at 914-17.

sufficient defense against bad political outcomes and self-serving motives.<sup>144</sup> Indeed, the Court's theory of corruption did not even have the apparatus to recognize as undesirable the motive-shifting of leaders in response to self-interest, so long as the pressure to act came from constituents in a manner that did not violate the bright-line quid pro quo rule against direct donations.

The cumulative effect of *Citizens United* was to strip federal campaign finance regulation to a competitive core. The Court eliminated a central pillar in BCRA's modestly deliberative regime and the opinion's attendant rhetoric suggests other deliberative measures will meet a similar fate.<sup>145</sup> Furthermore the Court articulated a starkly economic theory of democracy: that good government is a mechanism for converting private interests into state action. In light of this, the Court's sympathy for deliberative theories of democracy and anticorruption expressed in *Austin* and, less dramatically, in *McConnell* appears anomalous or outdated.

*Citizens United* also marked a fitting coda to the battle over campaign finance that began with *Buckley*. In *Buckley*, the Court laid out its basic position – campaign regulation that infringes upon substantial First Amendment rights is impermissible unless the governmental interest is preventing explicit quid pro quo. *Citizens United* pushed this position to its logical extreme by defining explicit quid pro quo as the only typologically corrupt conduct, and suggesting that preventing such quid pro quo is the only legitimate goal of direct electoral regulation. While this position has its origins in the Court's zealous protection of individual rights, the implications for the anticorruption are striking: judicial decisions have nullified deliberative anticorruption efforts in the campaign finance realm for almost forty years.

---

<sup>144</sup> *Id.* at \_\_\_, 130 S. Ct. at 910.

<sup>145</sup> This predictive claim ignores the partisan divide that underlies *Citizens United*; as a hotly contested 5-4 decision, under a Democratic president it may be a literal heartbeat away from reversal. But so far the various political permutations of the Court have not resulted in any change to the Court's commitment to competitive democracy and anticorruption.

#### IV. Official Corruption: the Battle over Honest Services

The evolution of law on official corruption – in the broadest terms, official action by a governmental figure taken on account of an illicitly private benefit<sup>146</sup> – has taken a meandering path. Official corruption legislation has not enjoyed the consistent attention and coherent consideration of the campaign finance narrative<sup>147</sup> – congressional legislation has been diverse and piecemeal,<sup>148</sup> the Court’s rulings have been sporadic and frequently unrelated, and the entire dispute has failed to engender much of an ideological or jurisprudential firestorm.<sup>149</sup> Moreover,

---

<sup>146</sup> Adequately defining official corruption lies at the center of the Court-Congress debate; this definition merely provides a big-tent starting point. The key distinction between official corruption and campaign finance is that the former involves acts taken by officials for private gain, and the latter by candidates for campaign contributions. As *McCormick* and *Evans*, discussed *infra* Part IV(B), demonstrate, this is often a blurry line in practice.

<sup>147</sup> At a high level of abstraction, official corruption and campaign finance corruption doctrines merge. Ultimately, both ask what duties do public figures owe their constituents, and what external obligations, influences, or gifts might prevent them from fulfilling these duties? Campaign finance corruption doctrine addresses the electoral process and how private individuals become public fiduciaries. Official corruption doctrine inquires into the propriety of acts taken under the guise of official government action. Both seek to establish standards of political accountability and good representation. See generally Lowenstein, *supra* note 33, at 795-828 (defining corruption in the context of political bribery and campaign contributions and discussing how the two intersect); Lowenstein, *supra* note 46. For a general theoretical discussion, see Philp, *supra* note 7, at 440. For an attempt to use campaign finance to inform the less well developed official corruption literature, see George Brown, *The Gratuities Debate and Campaign Reform: How Strong is the Link?*, 52 WAYNE L. REV. 1371, 1373 (2007).

<sup>148</sup> See Peter Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 ARIZ. J. INT’L & COMP. L. 793, 798-99 (2001) (characterizing federal anticorruption law as a “hodgepodge,” listing the various measures, and observing the lack of an overarching scheme); Michael W. Carey, Larry R. Ellis, & Joseph F. Savage, Jr., *Federal Prosecution of State and Local Public Officials: The Obstacles to Punishing Breaches of the Public Trust and a Proposal for Reform, Part One*, 94 W. VA. L. REV. 301, 324-33, 354 (1991-92) (providing a descriptive overview of federal anticorruption law, and arguing for their consolidation in a single statute). For an explanation of why politicians undervalue coherent approaches to anticorruption, see generally John Dumbrell, *Corruption and Ethics Codes in Congress: Ethics Issues in the U. S. Congress*, 6 CORRUPTION & REFORM 147 (1991).

<sup>149</sup> The official corruption cases have raised various issues tangential to the actual nature of anticorruption enforcement. Perhaps most salient of these tangential issues has been the jurisdictional question: how much of a nexus is necessary between a corrupt act offense and the federal government to permit federal prosecution? Federalism concerns are especially salient following the strict reading of the commerce clause. See *United States v. Lopez*, 514 U.S. 549, 561-68 (1995). Recent Supreme Court cases in the official corruption context have affirmed broad federal jurisdiction. See *Sabri v. United States*, 541 U.S. 600, 604-06 (2004); *Salinas v. United States*, 522 U.S. 52, 58 (1997) (both affirming that federal jurisdiction under 18 U.S.C. § 666 only requires a relationship between bribe-receiving party and state agency or project receiving federal funding). See George Brown, *Carte Blanche: Federal Prosecutions of State and Local Officials after Sabri*, 54 CATH. U. L. REV. 403, 404-05 (2005) (arguing *Sabri* and *McConnell* demonstrate that the Court believes it is the duty of the federal government to prevent corruption).

One unanswered question from *Weyhrauch* is if a state law violation is a prerequisite for federal honest services prosecutions. The non-engagement of the Court with this particular federalism issue is surprising, though the limitation of honest services to bribery may alleviate some of the exigency, as unequivocal bribery is almost universally criminal. Still, the Court seems to implicitly grant the honest-services fraud statute, § 1346, unique federal anti-bribery jurisdiction over state and local offenders. *Skilling v. United States*, 561 U.S. \_\_\_\_, \_\_\_\_, 130 S. Ct. 2896,

the most conspicuous line of cases on federal anticorruption law – the honest services cases – has been predicated on individual due process rights and questions of statutory interpretation, and has not directly addressed the definition of corruption. In the campaign finance context, the Court explicitly balanced individual First Amendment rights against government interest in anticorruption, and thus addressed the nature and efficacy of anticorruption measures. Conversely, in the honest services cases, individual rights have served as a simple bar to prosecution, obviating the inquiry into the nature of corruption. Yet because the honest services cases have curtailed deliberative anticorruption, they have mirrored the campaign finance cases in their impact upon federal anticorruption. The Court has twice pruned down 18 U.S.C. § 1341, the most wide-reaching federal anticorruption law, on grounds that it evoked vagueness and notice concerns. This section begins with the history of § 1346 and its predecessor, § 1341, climaxing with the *Skilling* series. It then reviews the judicial treatment of other federal official corruption laws, in order to demonstrate the consistently competitive nature of the Court’s underlying theory.

*A. The Battle over Honest Services: McNally, Skilling, and the Latest Demise of 1341*

At the highest level, honest services has been shaped by two Supreme Court cases and a terse congressional act. The first case, *McNally v. US*,<sup>150</sup> struck down the expansive use of a long-standing law, 18 U.S.C. § 1341, which prosecutors had cultivated as a powerful deliberative

---

2934 n.45 (2010). *Cf. Sorich v. United States*, 555 U.S. \_\_\_, \_\_\_, 129 S. Ct. 1308, 1310 (2009) (denying cert.) (Scalia, J., dissenting) (“Is it the role of the Federal Government to define the fiduciary duties that a town alderman or school board trustee owes to his constituents?”). *See also* Sara Sun Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L.J. 699, 700 (2000) (observing honest services law regulates state and local officials more harshly than federal law regulates federal officials); Roderick M. Hills, *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?*, 6 THEORETICAL INQ. L. 113, 114-15 (2005) (arguing federal prosecution of otherwise non-federal state and local corruption undermines local democracy and damages the federalism balance). A related question is if honest services creates federal common law. *See* John Coffee, *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 431-32 (1998).

<sup>150</sup> 483 U.S. 350 (1987).

anticorruption tool, on the grounds such use was not the original intent of the law.<sup>151</sup> Congress quickly responded with 18 U.S.C. § 1346, which restored § 1341 to its pre-*McNally* contours. In the final case, *Skilling*, the Court, again guided by due process concerns, constrained the breadth of § 1346, effectively reducing it to a competitive anticorruption law.<sup>152</sup> This sequence mirrors the conflict over anticorruption in campaign finance law. Even more clearly than in the campaign finance realm, the Court has intervened in honest services law to protect individual rights. As a result, the Court's impact on the competitive-deliberative divide in the honest services context has been especially oblique. Yet this only highlights that the competitive-deliberative divide reflects differing foundational investments.

Section 1341 emerged as a potent deliberative anticorruption tool only thanks to textual ambiguities in a century-old anti-fraud law.<sup>153</sup> The statute imposes severe criminal penalties upon “Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses”, proceeds to use interstate mails<sup>154</sup>

---

<sup>151</sup> *Id.* at 359-60.

<sup>152</sup> *Skilling*, 561 U.S. at \_\_\_, 130 S. Ct. at 2928 (2010).

<sup>153</sup> The core prohibition of the law, against ‘any scheme or artifice to defraud’ was first codified in an 1872 reorganization of the postal laws; a 1909 revision added the prohibition against obtaining money or property by false pretences. The 1909 addition codified language from a late 19<sup>th</sup> century case, *Durland*. See *McNally*, 483 U.S. at 356-57 (citing *Durland v. United States*, 161 U.S. 306, 312-14 (1896)). See Jed Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 779-86 (1980) (providing early history of the mail fraud statute). The debate between broad and strict interpretations of the mail use requirement in some respects paralleled the current deliberative-competitive conflict. *Id.* at 816-20.

<sup>154</sup> 18 U.S.C. § 1341 (2010). The entirety reads:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs

or telecommunications<sup>155</sup> to advance such a scheme. The statute can be read as creating an offense with two necessary conditions, and thus prohibit fraudulent use of mails to obtain property. Alternately, it can be read disjunctively, with the prohibition on “obtaining money or property by means of false or fraudulent pretenses” criminalizing one offense, and the prohibition on “schemes or artifices to defraud” criminalizing another. The second prong of the disjunctive reading criminalizes any fraudulent action, even if there is no harm to the wronged party, thus creating the intangible right to honest services. It was not until the 1940s<sup>156</sup> that courts began to apply the disjunctive reading, but by the early 1980s,<sup>157</sup> the Courts of Appeals had universally embraced the disjunctive reading and with it the intangible right to honest services.

In its original form, the intangible right to honest services had the breadth and adaptability to be a potent and uniquely deliberative anticorruption tool.<sup>158</sup> In the public service context, the law could plausibly reach any behavior where a public official betrayed the duties owed to the polity. This underspecification allowed for an investigation of deeper political intentions;<sup>159</sup>

---

in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

<sup>155</sup> 18 U.S.C. § 1343 (2010) (creating an identical offense for wire fraud).

<sup>156</sup> See *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941).

<sup>157</sup> By 1982, all Courts of Appeals accepted honest services fraud. Daniel Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 AM. CRIM. L. REV. 423, 456 (1983). For a more extensive discussion of the history of 1341, see *Skilling*, 561 U.S. at \_\_\_, 130 S. Ct. at 2926-27.

<sup>158</sup> In practice, honest services emerged as a uniquely deliberative tool in the federal arsenal, insofar as it allowed for broader prosecution of self-dealing and conflict of interest violations. Conflict of interest by federal officials is governed by more precise (i.e. competitive) federal laws and regulations. See, e. g., 18 U.S.C. § 203 (2006) (setting forth the rules of compensation for Members of Congress). Thus, there exists virtually no other federal law that reaches conflict of interest among state and local officials. See Beale, *supra* note 149, at 714 (observing “the potential for honest services prosecutions to reach conduct that would not fall within the criminal statutes that govern the conduct of federal officers and employees”). See also *Sorich v. United States*, 555 U.S. \_\_\_, \_\_\_, 129 S. Ct. 1308, 1310 (denying cert.) (Scalia, J. dissenting) (criticizing the federal government’s role defining duties of local officials, especially in the area of honest services).

<sup>159</sup> See Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 161 (1994) (observing honest services came to prohibit “a state of mind”).

enforcement agents and courts were not limited to condemning a predefined set of illicit behaviors, but could adaptively target any conduct displaying excessively private-regarding motives.<sup>160</sup> The breadth of the law could also encourage deliberation among potential offenders; aware that any violation of norms governing self-interested public conduct, rather than explicitly defined malfeasance, was potentially criminal, they might have reflected on the general normative legitimacy of their conduct. In this way, the underspecified law could encourage greater public-mindedness among public officials.<sup>161</sup> Finally, the openness of the law demanded that enforcement agents and courts provide interpretive guidance to define offenses, and reflect on the norms that should guide enforcement. The result was a continuous adaption in interpretation of the law. This process eventually created a body of judge-created law describing specific violations with some detail, encompassing conduct that would be deemed illicit even in the narrowest competitive readings (bribery) as well as more nebulous offenses such as self-dealing and non-disclosure.<sup>162</sup>

---

<sup>160</sup> Justice Kennedy broached the idea that anticorruption law should focus on actual intent rather than legal formalities in *Evans*. *Evans v. United States*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring). Addressing the general question of when a payoff is a bribe, he noted “The criminal law in the usual course concerns itself with motives and consequences, not formalities. And the trier of fact is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor.” *Id.* The fixation on jury instructions runs through *McCormick* as well and is the core of the dissent: “the instructions . . . properly focused the jury’s attention on the critical issue of the candidate’s and contributor’s intent.” *McCormick v. United States*, 500 U.S. 257, 287 (1991) (Stevens, J., dissenting). The emphasis on triers of fact — juries — is a noteworthy one, because juries are one of the most well-established venues of deliberation in contemporary democracy. *See, e.g.*, Lyn Carson & Janette Hartz-Karp, *Adapting and Combining Deliberative Designs*, in *THE DELIBERATIVE DEMOCRACY HANDBOOK* 120-38 (John Gastil & Peter Levine eds., 2005). However, this emphasis on the substantial nature of corruption inquiries does not seem to be a consistent thread of anticorruption jurisprudence.

<sup>161</sup> *See* Shiffrin, *supra* note 39, at 1222-25 (describing the benefits of standards over rules in inducing deliberation).

<sup>162</sup> Most Circuit Courts included both bribery-style offenses and self-dealing as honest services offenses by the time of *McNally*, when, as described *infra* notes 156-160, the judge-created law was incorporated by statute. *See, e.g.*, *United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir. 1980) (identifying bribery and self-dealing as the two forms of prohibited conduct even in the absence of material lost to the betrayed party); *United States v. Margiotta*, 688 F.2d 108, 122 (2d Cir. 1982) (holding failure by a de facto public official to disclose a secret agreement violated honest services obligations). *See also* *United States v. Woodward*, 149 F.3d 46, 62-63 (1st Cir. 1998)) (post-*McNally* case assessing honest services law in several circuits, and concluding it encompassed conduct such as bribes and self-dealing such as non-disclosure); *United States v. Rybicki*, 354 F.3d 124, 139-144 (2d Cir. 2003) (examining pre-*McNally* jurisprudence, but with a focus on the private context). *Rybicki* had been described by another Circuit court as the “leading opinion on honest-services fraud.” *United States v. Brown*, 459 F.3d 509, 521 (5th Cir. 2006). The Seventh Circuit was the only pre-*Skilling* Court to dissent from this reading, instead adopting a misuse-of-position-for-private-gain standard. *United States v. Sorich*, 523 F.3d 702, 707-08 (7th Cir. 2008). Furthermore, courts had established that § 1341 was a specific intent crime, requiring a deliberate intention to defraud. *See, e.g.*, *United States*



However, its history reveals the intangible right to honest services originated without direct congressional guidance or approval.<sup>163</sup> In light of this, the Court’s succinct nullification of the intangible rights doctrine in *McNally* was first and foremost a reminder Congress is responsible for identifying crimes. *McNally* observed that fraud usually entails a loss of property by the victim, and neither the language of § 1341 nor the congressional record indicate otherwise.<sup>164</sup> The Court then held, by the rule of lenity, ambiguity in the statute must be interpreted in favor of the defendants absent explicit congressional intent.<sup>165</sup> Since it was unclear if § 1341 criminalized fraudulent conduct without property loss, and it would be more lenient towards defendants if it held property loss as a necessary condition, the rule of lenity led the Court to invalidate the intangible right.<sup>166</sup> The Court then indicated that if Congress wished to include such behavior in § 1341, it must “speak more clearly that it has”.<sup>167</sup>

While *McNally* struck down a deliberative anticorruption law, it did so while applying well-established interpretive principles. The Court did not appraise the inherent legitimacy or

---

v. Warner, 498 F.3d 666, 691 (7th Cir. 2007) (“Mail fraud is a specific intent crime, and so defendants are entitled to introduce evidence of good faith or absence of intent to defraud.” (citing *United States v. Longfellow*, 43 F.3d 318, 321 (7th Cir. 1994))); *United States v. Alkins*, 925 F.2d 541, 549-50 (2d Cir. 1991) (noting that “[g]ood faith is a complete defense” to mail fraud because an individual must have the “requisite intent to defraud”). The specific intent requirement narrowed the scope of the honest services offenses, but also demonstrated § 1341’s concern with motive, the main focus of deliberative anticorruption.

<sup>163</sup> The fact that Congress failed to address § 1341’s growing reach says little (at least before its affirmation by § 1346). See EINER ELHAUGE, STATUTORY DEFAULT RULES 169 (2008) (observing that there is “no effective lobby for narrowing criminal statutes”, and thus that expansive readings of criminal laws usually go uncorrected by the legislature). Some had observed even before *McNally*, however, that § 1341 was exceptional in its breadth. Rakoff, *supra* note 153, at 771 (speaking as a white-collar prosecutor, described § 1341 as “our Stradivarius, our Colt 45 [sic], our Louisville Slugger, our Cuisinart—and our true love” in reference to its ability to reach a broad array of crimes).

<sup>164</sup> *McNally v. United States*, 483 U.S. 350, 358-59 (1987) (“As the Court long ago stated, however, the words ‘to defraud’ commonly refer ‘to wronging one in his property rights by dishonest methods or schemes,’ and ‘usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.’” (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)).

<sup>165</sup> *McNally*, 483 U.S. at 359-60 (“The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language . . . . There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute.”) (internal citations and quotations omitted).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 360.

efficacy of honest services or its deliberative character, but only noted criminal sanctions (presumably whether deliberative or competitive) must be specified by Congress. The principles cited by the Court were potentially inauspicious for deliberative anticorruption, insofar as they favor clarity<sup>168</sup> and narrowness in judicial interpretation, perhaps to provide defendants with constitutionally mandated fair notice.<sup>169</sup> Thus these principles favor the crisply defined laws of competitive anticorruption and hamper the breadth and underspecification often characteristic of deliberative anticorruption.<sup>170</sup> Yet because *McNally* does not substantively address corruption law, it does not reveal the full impact of these principles on the competitive-deliberative conflict.

Congress acted the next year on *McNally*'s invitation to "speak more clearly", preserving honest services with its deliberative qualities intact. 18 U.S.C. § 1346 restored § 1341 to its pre-*McNally* state without any elaboration upon the concept of honest services.<sup>171</sup> Legislative history suggests Congress considered a bill that defined honest services offenses in more detail, but ultimately chose to validate the pre-*McNally* state of the law without adornment.<sup>172</sup>

---

<sup>168</sup> *Id.* at 360 (declining to leave the "outer boundaries [of § 1341] ambiguous").

<sup>169</sup> The Court has held in the past that the rule of lenity reflects due process concerns regarding notice. *See, e.g.*, *United States v. Lanier*, 520 U.S. 259, 266 (1997) (holding that "rule of lenity[] ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered"); *United States v. Bass*, 404 U.S. 336, 348 (1971) (finding that "'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.'" (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931))). *See also* Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 471 (1989) (classifying the rule of lenity as the "most celebrated" due process principle that ensures rule of law). For a description of the constitutional roots of the fair notice doctrine, *see Bouie v. City of Columbia*, 378 U.S. 347, 350-52 (1963). Others have suggested the rule of lenity is not actually a fair notice doctrine, but serves other principles. *See, e.g.*, Dan Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345 (1994) (suggesting lenity is actually an incarnation of a non-delegation principle); ELHAUGE, *supra* note 163, at 168-76 (arguing the rule of lenity is designed to elicit legislative preferences).

<sup>170</sup> It is a difficult theoretical question — touched on briefly, *infra* section V, but in full beyond the scope of this article — if the role of courts in interpreting law and creating legal rules necessarily undercuts establishment of a deliberative regime. This is a question ultimately of the nature of legal interpretation. *See generally* Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109 (2008) (discussing the Hart-Fuller debate and the determinacy of rules).

<sup>171</sup> The law states in full, "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346 (1988).

<sup>172</sup> *See* The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (1988). Congressional testimony indicated the Senate wished to pass a more extensive bill, the "Anti-Corruption Act of 1988," which described honest services offenses in more detail. At least one version of the bill debated in the Senate imposed the

Congress's restoration of honest services to its original form suggests a conscious commitment to deliberative anticorruption.<sup>173</sup> Congress retained the breadth and flexibility of the law, allowing enforcement agents and courts to adaptively inquire into the motives of public officials. This incorporated of shifting norms into the enforcement and legal regime.<sup>174</sup> Thus Congress ensured honest services would remain a fruitful deliberative forum for norm-assessment and promotion of public-regardingness.

After this resurrection, the intangible right to honest services endured harsh criticism on the grounds it was unconstitutionally vague, failed to provide fair notice, and gave excessive discretion to prosecutors.<sup>175</sup> When the Court finally addressed these criticisms in *Skilling* more

---

requirements of either gain to the offender, or an intention to cause loss or harm to the affected organization. 134 CONG. REC. 23,954 (1988) (statement of Sen. Biden). However, other points of debate in the Senate suggested that Congress did have the consistent intention of passing a broad law. *Id.* at 15,046 (statement of Sen. McConnell) (endorsing language designed to include a broader array of offenses in legislation designed to return honest services to the ken of § 1341). And early in the legislative process, advocates of overturning *McNally* evidently had in mind using § 1341 to guarantee good government and public integrity, rather than narrowly define crimes. 133 CONG. REC. 32,959-61 (1987) (testimony of Rep. Conyers, suggesting it is the constitutional duty of Congress to protect the polity from all forms of corruption). Regardless, analysis of the pressures that shaped the bill remain somewhat speculative — this legislation did not receive attention as extensive as the 1974 FECA — but by the time it was discussed in the House, the bill had been reduced to a bare overturning of *McNally*. 134 CONG. REC. 33,296-97 (1988) (testimony of Rep. Conyers).

<sup>173</sup> This is especially true if the general hypothesis put forth by ELHAUGE, *supra* note 163, at 168-76, is correct and the purpose of the Court's use of the rule of lenity in *McNally* was to elicit congressional preference.

<sup>174</sup> Following the passage of § 1346, lower courts turned to pre-*McNally* jurisprudence to define the law. *See supra* note 162. Those attempting to defend the law pointed to this to argue for § 1346's specificity in the face of vagueness claims. *See* Brief for the United States at 13-35, *Weyhrauch v. United States*, No. 08-1196 (U.S. Oct. 29, 2009), *available at* 2009 WL 3495337. However, the legislative history does not itself suggest Congress simply wished to statically instantiate pre-*McNally* litigation into law, as opposed to permit for the continual evolution of anticorruption law. *See supra* note 172.

<sup>175</sup> *Sorich v. United States*, 555 U.S. \_\_\_, \_\_\_, 129 S. Ct. 1308, 1310 (2009) (denying cert.) (Scalia, J., dissenting) (“[Section 1346] invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct.”) (Scalia, J., dissenting); *cf.* *Skilling v. United States*, 561 U.S. \_\_\_, \_\_\_, 130 S. Ct. 2896, 2935 (2010) (Scalia, J., dissenting) (repeating the claims and calling for § 1346 to be struck down as unconstitutional). *See also* Transcript of Overcriminalization and the Need for Legislation Reform, Testimony Before the H. Subcomm. on Crime, Terrorism, & Homeland Security at 507 (2009) (statement of Dick Thornburgh, former U.S. Attorney General), *available at* <http://judiciary.house.gov/hearings/pdf/Thornburgh090722.pdf>; Moohr, *supra* note 159 (suggesting honest services violates federalism, separation of powers, and the First Amendment); George Brown, *Should Federalism Shield Corruption? -- Mail Fraud, State Law and Post-Lopez Analysis*, 82 CORNELL L. REV. 225, 299 (1997) (arguing, either presciently or causally that “the federalism problem can be greatly alleviated by looking to state law to define the content of honest services”) (Scalia cites this article in his *Sorich* dissent, 555 U.S. at \_\_\_, 129 S. Ct. at 1310); Gregory Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137, 170 (1990) (arguing that if the courts or Congress do not define honest services post-*McNally*, that “federal prosecutors

than twenty years later, it hobbled honest services, citing in particular constitutional due process concerns. However, defying honest services' harshest critics, the Court declined to hold § 1346 unconstitutionally vague<sup>176</sup> and instead observed there was clear congressional intent “to refer to and incorporate the honest-services doctrine recognized in the Court of Appeals’ decisions before *McNally*” into the meaning of § 1341.<sup>177</sup> The Court noted that principle federal statutes should be saved, when possible, through limited construction.<sup>178</sup> It then applied this practice by paring honest services down to its “solid core.”<sup>179</sup> It identified this core by consolidating the pre-*McNally* appellate holdings. Because the Courts of Appeals were unanimous that “bribes [or] kickbacks” constituted honest services offenses,<sup>180</sup> the Supreme Court interpreted only that area of unequivocal agreement as statutorily validated by § 1346. By so holding § 1346 to reach only bribery, *Skilling* reduced honest services to a narrowly competitive anti-bribery measure.

As in *McNally*, the Court did not make a substantive statement regarding the appropriate form of corruption law; formally, *Skilling* was an interpretation of congressional intent via the pre-*McNally* appellate case law. The Court acknowledged that the pre-*McNally* case law included conflict of interest violations as well as bribery, but dismissed the body of law as “amorphous”.<sup>181</sup> Yet the real driver of the Court’s reasoning appeared to be due process concerns, particularly

---

should develop guidelines clearly delineating the criteria for federal intervention in the prosecution of governmental and corporate corruption”).

<sup>176</sup> *Skilling*, 561 U.S. at \_\_\_, 130 S. Ct. at 2929-30. The Court did acknowledge that pre-*McNally* honest services appellate jurisprudence suffered from “occasion[al] disagreement”, *id.* at \_\_\_, 130 S. Ct. at 2930, and that the constituent cases were “not models of clarity or consistency”, *id.* at \_\_\_, 130 S. Ct. at 2929.

<sup>177</sup> *Id.* at \_\_\_, 130 S. Ct. at 2928.

<sup>178</sup> *Id.* at \_\_\_, 130 S. Ct. at 2929 (“It has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to limiting construction.”).

<sup>179</sup> *Id.* at \_\_\_, 130 S. Ct. at 2930.

<sup>180</sup> *Id.* at \_\_\_, 130 S. Ct. at 2933. For the Court’s definition of bribery, see *id.* at \_\_\_, 130 S. Ct. at 2927 (citing *United States v. McNeive*, 536 F. 2d 1245, 1249 (8th Cir. 1976)); *United States v. Procter & Gamble Co.*, 47 F. Supp. 676, 678 (Mass. 1942)). Here, the Court uses the language of fraud in describing an offense similar to bribery. “When one tampers with [the employer-employee] relationship for the purpose of causing the employee to breach his duty [to his employer,] he in effect is defrauding the employer of a lawful right.” *Skilling*, 561 U.S. at \_\_\_, 130 S. Ct. at 2926 (internal citations and quotations omitted).

<sup>181</sup> *Skilling*, 561 U.S. at \_\_\_, 130 S. Ct. at 2932.

vagueness.<sup>182</sup> The Court was concerned § 1346 did not criminalize self-dealing and conflict of interest violations through a clear enough legislative mandate. The Court furthermore indicated that the identification of these type of conduct lacked sufficient “definiteness and specificity”.<sup>183</sup> It was the potential breadth of these prohibitions that granted § 1346 a deliberative flexibility. The Court further indicated it was generally dubious of deliberative anticorruption measures on due process grounds; the Court went so far as to impute hypothetical legislative intent, speculating that if Congress had known a broader form of § 1346 would risk rendering the measure “impermissibly vague . . . Congress, we believe, would have drawn the honest-services line, as we do now, at bribery and kickback schemes.”<sup>184</sup> The Court verified this decision by citing the rule of lenity to hold that given the lack of explicitness in § 1346, it must be construed narrowly.<sup>185</sup> The analysis concludes by confidently asserting that by limiting § 1346 to bribery offenses, the Court has resolved any vagueness or due process concerns, as bribery is clearly defined, well-established criminal conduct.<sup>186</sup>

Thus, the Court’s interpretation of § 1346 was driven by a desire to ensure constitutional viability as well as to reconstruct congressional intent (or perhaps to creatively interpret

---

<sup>182</sup> *Id.* at \_\_\_, 130 S. Ct. at 2931 (“Reading the statute to proscribe a wider range of offensive conduct [than bribery and kickbacks] . . . would raise the due process concerns underlying the vagueness doctrine.”). For a judicial bibliography of the constitutional roots of the vagueness doctrine, see *Kolender v. Lawson*, 461 U. S. 352, 357-58 (1983) (“As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”). See generally H. PACKER, *THE LIMITS OF CRIMINAL SANCTION* 91-94 (1968). As with the rule of lenity, some have challenged the interpretation and justification of the vagueness doctrine that have been traditionally offered, including by the Court. See generally, e.g., Tony Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (discussing the inconsistencies among the holdings in cases where the Court used the “vagueness” standard to invalidate laws); John Calvin Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 195-97 (1985) (discussing the role of the vagueness doctrine in criminal law).

<sup>183</sup> *Id.* at \_\_\_, 130 S. Ct. at 2933, no.44 (providing an extensive list of questions the government proposal would have to resolve).

<sup>184</sup> *Id.* at \_\_\_, 130 S. Ct. at 2931, no.42.

<sup>185</sup> *Id.* at \_\_\_, 130 S. Ct. at 2932-33.

<sup>186</sup> *Id.* at \_\_\_, 130 S. Ct. at 2933 (holding that with fair notice and arbitrary prosecution concerns addressed, §1346 pass constitutional due process muster) (citing *Kolender v. Lawson*, 461 U. S. 352, 357 (1983)).

congressional intent in a manner that permitted such viability). Yet the Court elided any evidence in § 1346's construction or its legislative history that the measure was meant to be deliberative. Moreover, the Court implied that even if Congress explicitly established broad honest services offenses, but failed to specify the elements of the offenses with clarity and precision, the law would have had fatal vagueness defects. This is a well-established application of the vagueness doctrine, but nonetheless demonstrates that the Court's interpretation of due process principles requires anticorruption laws to assume a competitive format.

*Skilling* is the clearest demonstration of the conflict between deliberative anticorruption and due process. The Court suggested that anticorruption measures must be precisely articulated to avoid vagueness defects. Because deliberative anticorruption law relies upon breadth, flexibility, and discretion — the core defects of vagueness — it appears the Court will require anticorruption laws to adhere to a competitive format. Furthermore, in light of *Skilling* and *McNally*, both based in lenity and recognizing constitutional protection of fair notice, it now appears a predecessor claim that due process will prevent deliberative anticorruption. The parallel with campaign finance is clear: years after cases that established the theoretical foundations for their recent decisions, the Court has recently — and more definitively — demonstrated that its treatment of individual rights is antithetical to deliberative anticorruption.

#### *B. Trends in Corruption: Official Corruption before the Supreme Court*

The substance of anticorruption law has been the Court's primary concern in neither of the main case lines considered so far. In the honest services context, the impact on anticorruption was indirect; in the campaign finance context, anticorruption was addressed only insofar as it was balanced against free speech. However, three modern cases — *McCormick*, *Evans*, and *Sun-*

*Diamond* — have addressed the specific substance of public anticorruption.<sup>187</sup> While the cases do not comprise an especially coherent narrative and address fairly narrow black-letter questions, they provide some clarification of the Court’s view of corruption. The decisions suggest the Court conceptualizes of politics as a market driven by self-interest (a position intimated in *Buckley* and openly expressed in *Citizens United*); therefore elected or appointed officials behave acceptably when they engage in private-regarding action, so long as they do not transgress explicit conditions of public service.

*McCormick*, the earliest of the three cases, overturned the conviction of a state representative for receiving bribe-like contributions on procedural grounds, but its ultimate reasoning demonstrated the Court’s broadly competitive view of politics. A state representative was convicted under the Hobbs Act<sup>188</sup> for soliciting a contribution from a special interest group.<sup>189</sup> The appellate court concluded he was clearly soliciting a bribe rather than a legitimate campaign contribution and upheld his convictions. In reversing the Court of Appeals and remanding the case,

---

<sup>187</sup> A number of other cases have dealt with corruption, but have not involved on the substance of public corruption law. The most notable is the line of federal jurisdiction cases, described in detail, in *supra* note 149. Other cases have dealt with the connotations of the word “corrupt” as a modifier for a particular act, (i.e. corrupt persuasion), but have referred to a general state of evil-mindedness rather than specific betrayal of fiduciary trust. See *United States v. Aguilar*, 515 U. S. 593, 599-600 (1995).

<sup>188</sup> 18 U.S.C. § 1951 (1994). The relevant part of the Act prohibits “extortion . . . under color of official right.” The Hobbs Act was an addition to the Anti-Racketeering Act of 1934, a measure directed against organized violence, and specifically designed to expand its reach to violence by unions. Courts have, over the past fifty years, generally permitted it to be used against any economic crime, and its prohibition of extortion under “official right” has become a main federal anti-bribery tool. See *McCormick v. United States*, 500 U.S. 257, 266-67 (1991) (describing the expansion of the “color of official right” prong). See Michael McGrail, Note, *The Hobbs Act After Lopez*, 41 B.C. L. REV. 949, 959-66 (2000) (providing a detailed history of the Hobbs Act). It is long accepted at common law that bribery and extortion are equivalent crimes. *Evans v. United States*, 504 U.S. 255, 260-62 (1992). *But see id.* at 280-82 (Thomas, J., dissenting) (suggesting that extortion and bribery were not seen as analogous crimes). See generally James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695 (1993) (ultimately holding it is logical to view bribery and extortion as overlapping crimes).

It is curious that the Court has permitted the federal government to expansively use the Hobbs Act while curtailing § 1341, though the conservative wing of the Court has questioned this expansion. See *McCormick*, 500 U.S. at 277 (Scalia, J., concurring); *Evans*, 504 U. S. at 290-91 (Thomas, J., dissenting). This may be explained by the Court’s willingness to permit expansive anticorruption jurisdiction even as it constrains anticorruption substantive law. The Hobbs Act may provide jurisdictional reach, but the targeted behavior is basically bribery.

<sup>189</sup> *McCormick*, 500 U.S. at 259-60. For a more incriminating reading of the facts, see *id.* at 281-82 (Stevens, J., dissenting).

the Court pointed to a procedural defect: the appellate court had affirmed the official had accepted a bribe on the basis of a factual determination that was never properly before a jury.<sup>190</sup> The deficiency of the jury instruction was a failure to define *quid pro quo* with sufficient narrowness. In order to convict an elected official under the Hobbs Act for what is claimed to be a campaign contribution, the Court held such payments must be made “in return for an explicit promise or undertaking by the official to perform or not to perform an official act” such that “the official asserts that his official conduct will be *controlled* by the terms of the promise or undertaking.”<sup>191</sup> The Court further indicated “proof of a *quid pro quo* would be essential” for conviction.<sup>192</sup> While leaving it “not . . . impossible” for candidates to commit bribes while seeking campaign contributions,<sup>193</sup> *McCormick* raised a strikingly high standard for Hobbs Act prosecutions where an official can claim the offering was a campaign contribution,<sup>194</sup> particularly given the surreptitiousness or implicitness of much corrupt conduct.

*McCormick*'s test for bribery is the epitome of narrowly competitive anticorruption law.

The Court's justifies the holding by presenting a fundamentally competitive theory of politics:

Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, “under color of official right.” To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election

---

<sup>190</sup> *Id.* at 269-70.

<sup>191</sup> *Id.* at 273 (emphasis added). The holding in this case was limited to the question of when Hobbs Act bribery convictions are not bribes because they are campaign contributions, and did not reach cases where such an exemption was not claimed. *Id.* at 268.

<sup>192</sup> *Id.* at 273.

<sup>193</sup> *Id.*; *Cf. supra* note 142 and accompanying text (explaining that some favoritism and influence is unavoidable in a democratic system premised on responsiveness).

<sup>194</sup> *See supra* note 33 and accompanying text, for a discussion of evidentiary difficulties. *See also* *Evans v. United States*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring) (“[Anti-bribery] law’s effect could be frustrated by knowing winks and nods.”).



campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation. It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion.<sup>195</sup>

This is a straightforward articulation of competitive democracy. Public duty is defined by the aggregative preference — which can be, in effect, purchased — of constituents, rather than the collective good or holistic norms. Moreover, the Court characterizes politics as a reciprocal market: politicians wish to be elected, and constituents wish to have governmental action taken on their behalf, so the two groups bargain to satisfy their preferences.<sup>196</sup> And it bears note that there is some irony in *McCormick*'s call for more explicit statutory language following *Citizens United* and *Skilling*. As this chapter has demonstrated, the Court has struck down on other grounds attempts to broaden anticorruption efforts.

Within a year, the Court faced a remarkably similar fact pattern, and came to a substantively diametrical, if not formally contradictory, conclusion.<sup>197</sup> In *Evans v. United States*, a federal undercover agent made a contribution to a public official, who never openly demanded the money. The public official reported some of this money as a campaign contribution,<sup>198</sup> but was nonetheless convicted of violating the Hobbs Act.<sup>199</sup> The narrow legal question before the Court was if an official must have “demanded or requested the money, or . . . conditioned the performance of any official act upon its receipt” to violate the Hobbs Act, or if passive acceptance

---

<sup>195</sup> *McCormick*, 500 U.S. at 272-73.

<sup>196</sup> The dismissive remark on ethical obligations and the invocation of the ‘real’ practice of historical politics elicits the brand of competitive democracy described by Judge Posner, in *supra* note 6.

<sup>197</sup> LOWENSTEIN, *supra* note 46, at 130, (“[W]hether *Evans* actually modifies *McCormick*, and if so to what degree, is unclear.”). See also Steven Yarbrough, *The Hobbs Act in the Nineties: Confusion or Clarification of the Quid Pro Quo Standard in Extortion Cases Involving Public Officials*, 31 TULSA L. J. 781, 816 (1996) (describing post-*Evans* Hobbs Act public official jurisprudence as “in disarray”). It is tempting to read the cases in a legal realist mold, and focus on the swings in individual justices: the justices who dissented in the respective cases formed two mutually exclusive groups.

<sup>198</sup> See *Evans*, 504 U.S. at 296 (Thomas, J., dissenting) (chastising the majority for failing to address evidence the transfer was a campaign contribution).

<sup>199</sup> *Id.* at 257-58.

can suffice to prove quid pro quo.<sup>200</sup> Based on the common law definition of extortion,<sup>201</sup> the Court affirmed the conviction, concluding that passive acceptance is sufficient. The Court also held that an official need not fulfill the pro quo to commit the offense.<sup>202</sup> Furthermore, the Court rejected the requirement that an official must actively “induce[]” a party in order to extort it; the very possession of public power granted coercive power to the illicit official action.<sup>203</sup>

On its face, *Evans* merely established the minimum conditions to sustain an official’s bribery conviction under the Hobbs Act — the trier of fact must find that the “public official has obtained payment to which he was not entitled, knowing that payment was made in return for official acts.”<sup>204</sup> While subtle, the Court’s focus on motive gives the opinion deliberative drift. So long as the official acted in a manner that the trier of fact believes to demonstrate an intention to exchange public action for illicit private gain, a Hobbs Act violation stands. The Court, in essence, concluded the trier of fact should generally assess the official’s state of mind. Yet *Evans*’ black-letter holding reveals the even when the Court faced clearly illicit corrupt behavior, permitted the conviction only by contorting the idea of quid pro quo to fit the facts. Thus, even if *Evans* hinted at a substantive deliberative theory of anticorruption, the Court insisted upon formal quid pro quo to support the conviction. This suggests the Court’s discomfort with abandoning the foundation of competitive anticorruption.

The most recent federal case to substantively address corrupt behavior endorsed a competitive structure to anticorruption law. In *Sun-Diamond*, a high-ranking federal official was accused of accepting gifts from a trade organization the official regulated,<sup>205</sup> thus violating the

---

<sup>200</sup> *Id.* at 258.

<sup>201</sup> *Id.* at 259-67.

<sup>202</sup> *Id.* at 268.

<sup>203</sup> *Id.* at 266.

<sup>204</sup> *Id.* at 268

<sup>205</sup> *United States v. Sun-Diamond*, 526 U. S. 398, 400-01 (1999). The donor was also charged in the case, and is the named defendant.

illegal gratuity provisions of 18 U.S.C. § 201.<sup>206</sup> The specific question before the Court was if a conviction for illegal gratuities receipt required the payoffs to the official to be connected to the performance of specific public acts. The Court concluded a gratuity must be connected to an “official act” performed by the public official, not merely the official’s office or generalized “capacity to exercise governmental power or influence in the donor’s favor.”<sup>207</sup> The Court suggested that a broader interpretation would clash with a natural reading of the statute and might have “peculiar results”, such as criminalizing trivial or sentimental tokens given to public officials.<sup>208</sup> The Court further indicated that more precise statutory language would be necessary to criminalize such broad swaths of behavior. Pointing to the wide array of corruption statutes that define other offenses, the Court concluded Congress would have spoken more precisely if it wished to criminalize the general receipt of gifts while in public office.<sup>209</sup>

*Sun-Diamond* offered a convincing reading of the illegal gratuities statute, insofar as “official act” and “official position” are not interchangeable concepts. Its holding resulted in a law that sweeps more narrowly, but this seems attributable to accurate judicial interpretation. That said, the case saw no impropriety in the receipt of substantial gifts by a high-ranking federal official who was to assess matters relevant to the donor, suggesting the Court was broadly tolerant of self-interested behavior by public official. Implications of the gifts’ triviality aside, the donee in *Sun-*

---

<sup>206</sup> 18 U.S.C. § 201 (1994) defines two crimes, bribery and the less severe crime of giving or receiving unlawful gratuities. Both prohibit the “corrupt” transfer of a payoff to a public official with the intent to influence official action by that official, and in parallel prohibit the receipt of such by the public official. For gratuities, the nexus between the act and the payoff need not be as well-established; while a bribe requires a direct quid pro quo relationship between gift and act, an illegal gratuity only requires that the gift act as a reward for a future or past action. *Sun-Diamond*, 526 U. S. at 404. See generally Lowenstein, *supra* note 33, at 796-97 (breaking down the law on bribery and unlawful gratuity); LOWENSTEIN, *supra* note 46, at 130-35 (analyzing the law on both bribery and illegal gratuities). Brown, *supra* note 147, at 1372, argues the statute is poorly drafted and confusing.

<sup>207</sup> *Sun-Diamond*, 526 U.S. at 405-06 (emphasis and internal quotations omitted).

<sup>208</sup> *Id.* at 406-07 (suggesting that a broader reading of 18 U.S.C. § 201 would criminalize a baseball cap given to a U.S. Cabinet member by a visiting high school principal).

<sup>209</sup> *Id.* at 408-12 (“[A] statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.”).

*Diamond* received thousands of dollars in gifts. However the Court’s broader competitive perspective is most apparent in its structural description of corruption law. The Court indicated the statute at issue “is merely one strand of an intricate web of regulations . . . governing the acceptance of gifts and other self-enriching actions by public officials”;<sup>210</sup> each law ought to be interpreted as a “scalpel” rather than a “meat axe” so the “regulatory puzzle” fits together.<sup>211</sup> This description of an anticorruption regime is seminally competitive: corruption laws should be crisp and precise, defining specific offenses. Such a view curtails the possibility of broad or adaptive laws suited for general inquiry into motives or broad-based promotion of public-regardingness.

*McCormick*, *Evans*, and *Sun-Diamond* are a sufficiently diverse set of cases to render any generalizations tentative, at least on the holdings. *McCormick* is the most easily integrated into the existing narrative this chapter has constructed, providing additional evidence that the Court conceives of democratic representation as a self-interested driven, market-style dynamic. However, *Evans*’ contrary holding in the context of such a similar fact pattern complicates any conclusion drawn from *McCormick*. At a broader level, the most striking pattern may be the more ambitious, structurally oriented, and ultimately normative accounts of law and politics offered by the competitive-outcome decisions. *McCormick* (in its defense of transactional relationships between officials and voters) and *Sun-Diamond* (in its depiction of a precisely woven anticorruption regime) both offered broader visions than *Evans*, which engaged in a narrow reconstruction of a particular term in the context of a single statute (and ultimately retreated to the definition of *quid pro quo* to support a corruption conviction). As such, the competitive view may have more theoretical momentum than any deliberative anticorruption sentiment in the Court.

---

<sup>210</sup> *Id.* at 409.

<sup>211</sup> *Id.* at 412.

This point is particularly trenchant in the context of the fate of honest services. The Court's holdings reflected commitment to some of the most fundamental principles of individual rights protection and statutory interpretation. As a result, even if the subsequent effect on anticorruption law — pushing it towards narrowly competitive molds — was inadvertent, it was founded in well-entrenched judicial principles. The force of the Court's claims in *McCormick* and *Sun-Diamond* — reflective of core views on law and politics — reinforce this sense that this competitive tendency has powerful theoretical roots.

### Part Three: Theoretical Analysis and Policy Implications

The conflicts over campaign finance and official corruption demonstrate a subtle but long-standing conflict between Courts and Congress over anticorruption legislation. This section pursues three interpretive questions: why has this conflict occurred, what are the practical implications, and what is the appropriate direction for future policy? The first of the following sections considers possible underlying judicial motivations for ardently advancing a competitive anticorruption regime. The Court has generally played the role of spoiler in the conflict, thwarting deliberative legislation. While this chapter has observed a correlation between the protection of constitutional rights and the Court's antideliberative holdings, it is helpful to consider deeper structural reasons for the Court's position. The second section considers the implications of this struggle for the nature of democratic governance and the effects of various future efforts to reform anticorruption on such governance.

## V. A Unified View of the Institutional Struggle

### A. *The Generalized Picture: Balancing the Public and the Private*

The two lines of law analyzed in this chapter reveal a distinct pattern in the judicial treatment of anticorruption.<sup>212</sup> When Congress has passed competitive measures,<sup>213</sup> the Court has typically taken no action. When, however, Congress has passed deliberative anticorruption measures, the Court has, by interpretation or outright invalidation, nullified them for violating various constitutionally protected individual rights.

The direct impact has been straightforward: American anticorruption law is a competitive regime and facilitates competitive democratic practices.<sup>214</sup> Since neither Court nor Congress has provided a comprehensive account of what makes conduct corrupt, fully unpacking this position requires consideration of the baseline definition of corruption as the unacceptable influence of private motives on public decision-making.<sup>215</sup>

---

<sup>212</sup> It is possible to discuss the perspective of Supreme Court anticorruption jurisprudence with a degree of coherence unavailable for congressional anticorruption legislation. Congress has passed a wide variety of legislation designed to fight corruption, ranging across the competitive-deliberative spectrum and unreflective of a single coherent regime or plan. *See supra* note 148. Consequently, making generalizations about congressional posture is difficult. However, this article has not claimed that Congress has adopted, either consciously or effectively, a specifically deliberative or competitive approach to anticorruption, or even chosen to assume a particular point on a spectrum between them. This article merely observes that, whenever Congress has, for whatever reason, chosen to pass deliberative anticorruption legislation, the Court has inevitably opposed it in favor of a competitive approach. This article can treat Congress as a black box which outputs various anticorruption measures, and the claim regarding judicial conduct has the same force.

That is not to say it is impossible to speculate as to why Congress has continued to pass deliberative legislation even in the face of judicial disapproval. Legislating against crime is always popular with the constituency, particularly legislation that will purportedly increase public accountability. In this respect, public corruption is low-hanging fruit: it is politically popular yet uncontroversial. Deliberative legislation, cutting in broad swaths, can be particularly robust or powerful, or at least appear so. This is an especially compelling explanation when there are historical pressures, such as Watergate. Secondly, without the particular constitutional interests of the Court, Congress just might be more willing to try a broad variety of measures, and some of these happen to be deliberative. Finally, Congress can use deliberative corruption legislation to punish its worst members and it can trust norms will not target the majority. Therefore, the majority of politicians wish to prevent a worse minority from exploiting formalist loopholes (essentially preventing internecine parasitism), and might do so through deliberative anticorruption laws.

<sup>213</sup> Many congressional anticorruption laws are competitive in nature, attacking quid pro quo bribery or similar crimes with bright-line prohibitions. *See, e.g.*, 18 U.S.C. § 201 (2006); 18 U.S.C. § 666 (2006); 18 U.S.C. § 1951 (2006) (the Hobbs Act). Likewise, as demonstrated above, the competitive elements of 1974 FECA were left standing, and the honest services doctrine was converted to a competitive anticorruption law.

<sup>214</sup> *See supra* Sections I.A, II.C.

<sup>215</sup> *See supra* Section II.A.

Since competitive democracy conceives of government as a particular arena in which individuals fulfill their individual preferences, the status of a political motive as private does not inherently vitiate it. Indeed, there are no truly “public” motives in competitive democracy, merely private ones<sup>216</sup> advanced in the political context. However, motives are condemned when they violate the rules of the public decision-making framework; this is necessary to protect the system’s structural integrity. Yet the implication is that corrupt motives are unacceptable not because they violate norms of public-regardingness, but because, by disrupting the implementation of governance, they can harm the private individuals who constitute the polity. Corruption impairs the ultimate goal of politics: the accurate translation of aggregate private interest into governmental action. Competitive anticorruption laws are bulwarks against breaches of this system. Because their straightforward purpose allows them to be crisply delineated, they have tended to survive judicial review and its focus on vagueness and overbreadth.

Yet the Court’s preference for competitive anticorruption is not coincidental. Because it conceptualizes corruption’s harm in individual terms, competitive anticorruption is intelligible to an institution focused on the protection of individual rights. The Court has a foundational mandate to protect certain individual rights enumerated in the Constitution. These rights demand government non-interference with certain zones of private conduct — much as competitive anticorruption seeks to ensure that governmental processes adequately reflect constituents’ private interests. Thus competitive anticorruption measures and individual rights share the same end: ensuring that governmental processes benefit (or do not illegitimately harm) private individuals.<sup>217</sup>

---

<sup>216</sup> Motives and preferences may, of course, be altruistic or collectively oriented, and thus normatively public. Whether they are from a philosophical or moral perspective is not relevant for the purpose of competitive democracy.

<sup>217</sup> The Court’s protective posture towards individual rights also manifests in its underlying normative justification for a competitive regime. In many of its decisions, the Court has suggested politics is a market determined by self-interested exchanges between citizens and electorate, and criticized deliberative anticorruption because it seeks to interfere with this dynamic. *See McCormick v. United States*, 500 U. S. 257, 272-73 (1991) (“[T]o hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering

Conversely, deliberative corruption is defined by collective public norms. In ideal deliberative democracy, individuals would justify their conduct through discursive engagement with other citizens. Conduct would be corrupt when its motivations are unacceptable to the polity. While in practice deliberative anticorruption can only simulate idealized discursive engagement, corruption at root is still defined by failure to satisfy shared standards. By prioritizing collective norms over the impact on private individuals, deliberative anticorruption assumes a position that is alien to the Court's mandate. The Court has a structural obligation to protect individual rights, but has no particular obligation to advance these standards of public service.<sup>218</sup> Thus, when faced with a deliberative anticorruption law, the Court will have a strong tendency to strike it down or convert it to a competitive form.

Of course, democracies inevitably blend competitive and deliberative aspects, and in practice target corruption on both deliberative (norm-protecting) and competitive (private-individual-protecting) grounds. Deliberative anticorruption enforcement instantiates public values, punishing conduct that violates shared norms. Competitive anticorruption targets behavior that directly threatens the adequate provision of government service to citizens. Congress's deployment of both competitive and deliberative measures illustrates this diversity of aims. The competitive elements of 1974 FECA were designed to prevent legislators from falling under influences that

---

the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment . . . ."); *Citizens United v. FEC*, 558 U. S. \_\_\_, \_\_\_, 130 S. Ct. at 904-06, 909-10 (2010) (The Court goes at length to state that corporate influence in politics will not cause voters to distrust the political process. "The appearance of influence or access... will not cause the electorate to lose faith in our democracy."). The political-participant-as-market-actor model is a logical outgrowth of the focus on individual rights; both establish a bright boundary of non-collective interference around individual conduct. However, this alignment has the ancillary effect of coordinating the Court's view of politics with the foundational assumptions of competitive democracy, which imagines individuals as self-interested preference-satisfiers. *But see* Sunstein, *supra* note 8, at 50-51 ("[M]uch of modern constitutional doctrine reflects a single perception of the underlying evil: the distribution of resources or opportunities to one group rather than another solely because those benefited have exercised the raw power to obtain governmental assistance.").

<sup>218</sup> *Cf. infra* Section V.B.ii (discussing the Court's emphasis on protecting individuals against harm from political bodies while neglecting to provide protections to the political bodies themselves).



would make them prejudiced public servants; the deliberative elements were designed to create an electoral atmosphere that was more broadly public-regarding.<sup>219</sup> The various simple bribery measures prevent the conversion of public goods into illicit private gain;<sup>220</sup> the honest services doctrine protected not just the waste of government resources, but the character of public service.<sup>221</sup>

The Court's imposition of an exclusively competitive anticorruption regime has been to deny one of these aspects of anticorruption. The standing judicially mandated regime is one attentive to the potential of anticorruption law to serve citizens' private welfare, but that has little room for advancing shared norms or protecting uniquely public goods.

### *B. Beyond Individual Rights: Systemic Explanations for the Court's Position*

The subsequent question is why the Court has approached democratic practice and individual rights so as to favor competitive anticorruption law. This section provides possible structural explanations for the rejection of deliberative democracy and use of individual rights.<sup>222</sup>

---

<sup>219</sup> See *supra* Section III.A.

<sup>220</sup> See, e.g., *supra* note 149 (describing 18 U.S.C. § 666 which is essentially designed to protect federal funds from being embezzled by corrupt recipients).

<sup>221</sup> See *supra* Section III.A. (discussing the disjunctive reading of honest services as criminalizing fraudulent conduct even without material harm).

<sup>222</sup> There is one explanation this essay will not explore: that the Court's internal politics, and in particular, its conservative drift in the past few years, are responsible for its competitive stance. Political explanations fail on several fronts. They lack sufficient explanatory power. To characterize the Court as having a certain partisan political stance may map on to certain holdings, but it does not map on to the broad sweep of competitive anticorruption over either time or topic. *Citizens United* may have been a partisan decision (though *Buckley*, or at least the holding, was not), but the relevant holding in *Skilling* was unanimous in judgment; and if *Citizens United* can be claimed to demonstrate a relationship between the conservative wing and a stronger defense of competitive democracy, other cases contradict it. See, e.g., *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 489 (1995) (Rehnquist, C.J., dissenting) (as dissenting minority, Chief Justice Rehnquist, and Justices Thomas, and Scalia would uphold broad federal prophylactic measures and generally defer to federal anticorruption efforts). Secondly, even if a partisan position by the Court, or a dominant partisan bloc within it, seems to be facially responsible for competitive corruption holdings, this explanation alone is under-determinative. Positions on corruption can fall anywhere on the political scale. For example, an interest in defending individual rights can be seen as traditionally liberal, and cut against broad, deliberative anticorruption measures; yet constraining the power of the federal government can have the same effect, but be classified as a traditionally conservative concern.

This reveals other stakes in the anticorruption debate and points to a more unified explanation for the Court's stance.

*i. Adversarial Procedure and Rights Protection*

The American judicial system has a strong commitment to adversarial procedure, the idea that fair process requires the opportunity to confrontationally contest issues before a neutral arbiter.<sup>223</sup> The adversarial process is seen as an especially important mechanism for protecting individual liberty, including the particular rights at issue in central corruption narratives — rights to speech and association<sup>224</sup> and to due process.<sup>225</sup>

However, a strong commitment to adversarial procedure is difficult to reconcile with deliberative democracy. Deliberative politics are mutualist, non-hierarchical, and consensus-preferring; adversarial procedure is binary, winner-take-all, and resolved by an authoritative figure. Moreover, the character of deliberation — collaborative engagement and empathetic discourse — does not mesh well with the zealous self-interested advocacy characteristic of adversarial confrontation. Resorting to adversarial procedure suggests that deliberative politics have failed. Moreover, the specific goals of deliberative anticorruption are not ideally suited to adversarial mechanisms. Deliberative anticorruption encourages good motives in order to create publicly minded officials, not merely the coercive enforcement of tolerable behavior. It does not, as it were, seek only an outcome, but a transformative process.

In practice, the adversarial critique of deliberative anticorruption has more bite. Deliberative laws restrict individual behavior without the clarity of the adversarial/competitive

---

<sup>223</sup> See generally, e.g., BOB KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001) (arguing that the adversarial system imposes significant costs in terms of time, money, and predictability); David Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CAL. L. REV. 1051 (2005) (arguing the adversarial approach regulates markets efficiently).

<sup>224</sup> See, e.g., Henry Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518-520 (1970) (“[C]ourts have lately come to realize that procedural guarantees play an equally large role in protecting freedom of speech.”).

<sup>225</sup> See KAGAN, *supra* note 223, at 61-81.

approach. Broad prophylactic restrictions, designed to ensure public-minded conduct, do not give constrained parties the opportunity to advocate for the acceptability of their conduct. Likewise, laws that define self-serving behavior in a vague manner can prevent the prosecuted party from knowing exactly what to defend against, or even what specific behavior to avoid.

Deliberative anticorruption's practical incompatibility with the adversarial process can be seen as the root of the Court's rejection of such measures. The tension is obvious in the context of due process rights — vaguely defined laws place regulated parties at a serious disadvantage when confronting accusations brought by prosecutors. More subtly, the competitive, market-oriented democratic theory<sup>226</sup> underlying some of the Court's decisions produces an adversarial conception of politics. Competitive democracy involves adversarial confrontation between opposed candidates or parties, with voters acting as arbiters. The Court has endorsed an idea of politics that vets candidates and positions through the 'marketplace of ideas', and struck down regulations that impair this process.<sup>227</sup> The apparent concern is that government intervention will prevent the adversarial resolution of political disagreement. Thus, in defending individual rights — whether in the criminal or electoral context — courts guarantee citizens the opportunity to robustly contest legal and political decisions in an adversarial context. The Court's favoring of competitive anticorruption law is a consequence of this investment in the adversarial process.

The Court's commitment to an adversarial resolution may be further traced to the Court's own practices and purpose. Courts, insofar as they are mechanisms for adversarial confrontation, will conceptualize fair dispute opportunities in those terms. Supervising and resolving adversarial confrontation — at least in common law countries — is what courts do. Approaches that redefine

---

<sup>226</sup> See *supra* note 217 (discussing the Court's focus on protecting individual rights and the resulting outgrowth of seeing the political landscape as a competitive realm populated by self-interested actors).

<sup>227</sup> See *Citizens United v. FEC*, 558 U.S. \_\_\_, \_\_\_, 130 S. Ct. 876, 914. See also DWORKIN, *supra* note 9, at 357 (discussing differing views of democracy).

such resolution both challenge the concept of fairness underlying traditional judicial review and threaten the status of the court as a basic mechanism for dispute resolution.<sup>228</sup> Thus, Court's ardent defense of the adversarial resolution may relate not only to its efficacy, but to the Court's own nature.

*ii. The Judicial Concept of Politics and the Priority of the Individual*

The Court's preservation of the adversarial process may protect individual rights in the face of government intrusion. This posture, however, reflects particular institutional commitments of the Court. Guided by a constitutional mandate, federal courts have performed two main roles in public law: defending individuals against government interference<sup>229</sup> and enforcing federalism and the division of power to ensure government bodies do not metastasize beyond their constitutionally established boundaries.<sup>230</sup> Conversely, the Court's public law jurisprudence has not been attentive to the need for internal government regulation, including the need for effective anticorruption. This may be unsurprising, as there is neither a constitutional mandate for nor a strong tradition of courts performing such monitoring.<sup>231</sup> Yet perhaps because the values of state integrity receive no unique weight and other values do, the Court has adopted principles that are prejudiced against effective internal government regulation. One manifestation is that the Court

---

<sup>228</sup> See KAGAN, *supra* note 223, at 242-50.

<sup>229</sup> There are some questions related to this issue that the Court has always had to attend to in the plain text of the Constitution — what is free speech, what is cruel and unusual punishment? — and based on the level of ambiguity, resolve the question more or less creatively. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 16 (1980). In the past century, the battleground over *where* rights exist has expanded to new territory, particularly substantive due process and the nature of equality. Perhaps the most famous comment on this is Justice Jackson's footnote 4 in *U.S. v. Carolene Products*, 304 U. S. 144, 152-53 n.4 (1938), as it proposes a theory for when the government should be more willing to intervene to protect individual rights (that is, when the individuals at issue may be uniquely politically disempowered due to their status as discrete and insular minorities).

<sup>230</sup> That the Court plays a fundamental role in enforcing the division of powers between branches of the government, and between the federal government and the states, is apparent in the cases from the Court's early jurisprudence that are still of the greatest relevance today, *Marbury v. Madison*, 5 U.S. 137 (1803), and *Maryland v. McCulloch*, 17 U.S. 316 (1819).

<sup>231</sup> As this essay has observed, some have argued such a constitutional mandate exists — it has just been neglected. See *supra* note 79.

has come to favor bright-line, competitive-style rules — forms of law well-suited to protecting individual rights and structural boundaries, but less apt at encouraging inherently reliable governance. Consequently the Court is attentive to the harm political bodies may inflict on individuals and other governmental institutions — but pays little heed to the needs and pressures within the political bodies themselves.

This feature of the Court's jurisprudence emerges from the same characteristic that poses corruption law's unique challenges. When a corrupt individual violates a polity's expectations of trust and loyalty, he betrays a collective of which he is part.<sup>232</sup> Corruption thus raises the difficult problem of how to assess and prevent such internal bad acts.<sup>233</sup> However, both types of traditional public law address conflicts between distinct entities — either between individuals and the government, or between discrete governmental bodies. The Court's public law jurisprudence usually does not address the types of problems raised by membership of the citizenry in the polity and the attendant responsibilities.

Of course, an individual facing restriction of his rights or charged with a criminal offense will likely assume a defensive oppositional posture, even if the individual originally assumed a voluntary role in the shared project of politics. And from the perspective of competitive theory, such an adversarial approach is universally appropriate, for competitive politics presumes every individual in the political structure is self-interested. Yet if politics has distinctly collective obligations, the Court systematically distorts anticorruption by ignoring this collective character while prioritizing other values. Such a distortion ultimately restricts deliberative anticorruption measures.

---

<sup>232</sup> In a related vein, some academic commentators have indicated the need for Madisonian public virtue to sustain democratic governance. See Sunstein, *supra* note 8; Gardner, *supra* note 79.

<sup>233</sup> This harkens back to the concept of corruption. See *supra* note 29.

*iii. The Court Deliberative: Institutional Self-Preservation and Judicial Uniqueness*

A third, most speculative explanation for the Court's posture towards corruption originates from judicial self-preservation, rather than from any normative alignment. By curtailing internal deliberative anticorruption, the Court maintains for itself a uniquely deliberative role in the current political landscape. If other elements of the government begin to operate deliberatively, they supplant the interpretive function currently fulfilled by the Court.

If the elected branches of federal government — the legislative and executive — are presumed to operate competitively, then actors in the judicial system occupy a uniquely deliberative niche. Juries are expected to consider evidence, engage in debate, and reach consensus as a decision-making process.<sup>234</sup> Judges, even acting alone, engage in a similar process of contemplation and reflection, albeit often considering issues of fact rather than law.

In a recent case, the Supreme Court suggested that careful reflection reminiscent of deliberative democracy is obligatory, rather than aspirational, for judges. *Caperton v. Massey* held an elected state supreme court justice violated a litigant's right to fair trial when he failed to recuse himself from a case directly affecting the interests of a major contributor to the judge's campaign.<sup>235</sup> From a legal perspective, *Caperton* was the inverse of the cases that have been discussed in this chapter. Because the harmed party may have had his right to a fair trial violated by corrupt conduct, individual due process served a vehicle of anticorruption, rather than a potential barrier to regulation or prosecution. If one takes the judicial investment in protecting individual rights at face value, this may explain the outcome of the case.

Yet *Caperton* was a de facto anticorruption inquiry: what motives (or apparent motives) taint conduct by a public official? In concluding the judge may have been improperly influenced,

---

<sup>234</sup> See *supra* note 160.

<sup>235</sup> 556 U. S. \_\_\_, 129 S. Ct. 2252 (2009).

the Court thoughtfully considered the psychology of motivation, bias, and objectivity.<sup>236</sup> Even though the form of the influence was perfectly legal and there was no formal impropriety, the Court held that an inference — albeit compelling — of influence necessitates recusal. Indeed, the Court’s ruling might be seen as anti-democratic: it nullified the decision-making of an elected judge for potentially being biased, even though the bias was presumptively validated by the electorate.<sup>237</sup> *Caperton* thus runs counter to the treatment of democratic self-determination the Court has so assiduously advanced in the campaign finance context. The holding deployed a far more restrictive approach to anticorruption than the Court has permitted to the federal government in other political contexts.

*Caperton* preserved the deliberative integrity of the judiciary through a broad-based and subtle assessment of a public servant’s motives. Yet when the government has sought to use anticorruption tools that make possible the same deliberative inquiries, the Court’s decisions (albeit premised on principles distinct from theories of corruption) have proven an inflexible barrier. The Court thus implies that the judicial system must be kept especially free of unacceptable influences in a manner that other areas of government need not be — indeed, *may not* be. If the broader pro-competitive, anti-deliberative arc of the Court’s holdings is treated as a conscious pattern, the implication is that the Court is protective of the judiciary’s unique deliberative role.

---

<sup>236</sup> *Id.* at \_\_\_, 129 S. Ct. at 2262-64. The Court observes, “Following accepted principles of our legal tradition respecting the proper performance of judicial functions, judges often inquire into their subjective motives and purposes in the ordinary course of deciding a case. This does not mean the inquiry is a simple one . . . . Nothing could be farther from the truth.” *Id.* at \_\_\_, 129 S. Ct. at 2263 (internal citations and quotations omitted). The Court further noted, “Much like determining whether a judge is actually biased, proving what ultimately drives the electorate to choose a particular candidate is a difficult endeavor, not likely to lend itself to a certain conclusion. This is particularly true where, as here, there is no procedure for judicial factfinding and the sole trier of fact is the one accused of bias.” *Id.* at \_\_\_, 129 S. Ct. at 2264.

<sup>237</sup> Lawrence Lessig, *What Everybody Knows and What Too Few Accept*, 123 HARV. L. REV. 104 (2009), criticizes *Caperton* on related grounds. Observing that the corrupting influence of money is popularly held to be rife in elected government and that the justice at hand should have recused himself, Lessig holds the Court to be acting in a unique — and thus unjustified — manner to protect the ostensible integrity of the judiciary by suggesting that this particular instance of financial influence was unacceptable.

## VI. Anticorruption in the Future: Political Implications and Directions for Policy

The Court's rulings on anticorruption have had an immediate impact upon black letter law — only competitive laws are left standing. Yet more significantly, the form of permitted anticorruption regimes shapes the nature of governance.<sup>238</sup> It is this broader impact on political life that demonstrates the full impact of the competitive-deliberative divide, and ought to be most decisive in guiding future reform.

### *A. The Practice and Theory of Anticorruption*

Since the specific content of anticorruption law does not depend on its form as competitive or deliberative, the immediate legal implications of the Court's competitive allegiance are subtle. The current state of corruption law requires Congress to narrowly tailor anticorruption legislation if it is to survive judicial review. This raises costs for the creation of anticorruption legislation — drafting convincingly justified laws that target behavior with sharp precision demands significant institutional effort. The Court's requirement regarding the form of the law, however, does not itself prevent regulation or criminalization of any particular conduct. Yet for certain measures — regulation of campaign finance expenditures, for example — even crystalline drafting and forceful articulation of underlying norms might not overcome the Court's constitutional objections (though such a clear statement of congressional intent would starkly illustrate the institutional conflict over the norms of corruption). Such a firm constitutional bar demonstrates that the competitive effects of the Court's holdings do, at some point, bleed into substantive positions.<sup>239</sup>

---

<sup>238</sup> Much of the discussion of the impact of anticorruption laws has relied on economic modeling, but it is clear there is a broader impact on political behavior. *See, e.g.,* ROSE-ACKERMAN, *supra* note 28, at 52-69 (discussing if and how anticorruption laws can deter bribery).

<sup>239</sup> If Congress passed a law explicitly premised in a carefully articulated view of politics and anticorruption, but that challenged the Court's defense of rights, it would demonstrate that at some level the Court's holdings evince a certain view of politics and the relationship between state and individual, at least in the context of corruption enforcement. This is, again, a difficult theoretical question regarding the relationship between law and political substance. *See supra* note 170.



However, anticorruption enforcement also reflects the political values that underlie a regime.<sup>240</sup> Competitive and deliberative anticorruption measures promote the qualities of their respective regimes and shape the behavior of political participants. Deliberative anticorruption law has the potential to encourage greater public-mindedness; conversely, exclusive reliance on competitive laws may establish a political culture based on self-interest.<sup>241</sup> While certainly not the sole or dominant determinant of political culture, anticorruption law is both a signpost and a constituent part.

However, deliberative anticorruption enforcement can have substantial side-effects — indeed, these effects have driven the Court’s position. As anticorruption measures become more deliberative — that is, as they become more flexible, expansive, and discretionary — the greater the risk they will infringe upon the individual rights of these figures (and, since donors as well as recipients of bribes are usually culpable, the private rights of those who attempt to sway political conduct). Deliberative measures that investigate motive are little more than vague grants of discretion to enforcement agents; deliberative measures that seek to preemptively exclude private interest from politics will inevitably intrude upon legitimate private action. Thus, by exposing the intentions and deep mental states of individuals to greater state scrutiny, deliberative anticorruption risks eroding the zone of truly private action.

Yet this indictment of deliberative anticorruption presumes a relationship between private and public action affiliated with competitive democracy. Private and public rights are treated as mutually exclusive and hydraulic — the expanded public sphere required for deliberative

---

<sup>240</sup> See generally THOMPSON, *supra* note 29, at 166-70 (describing the relationship between corrupt behavior and general political practices, including enforcement of ethical norms).

<sup>241</sup> See, e.g., Alexander, *supra* note 53, at 683-707 (arguing that there should be greater concern for protecting politicians’ time so that they can focus on their public duties rather than fundraising efforts); Issacharoff & Karlan, *supra* note 76, at 1711 (observing that the current (competitive) state of campaign finance produces leaders who are obsessed with fundraising).

anticorruption necessarily lessens the extent of private liberty. This assessment of anticorruption is perfectly compatible with the competitive assumption that individual participation in politics is oriented around self-interest. From such a perspective, the basic question in anticorruption enforcement is balancing the competing goods of government integrity and private rights.

Deliberative democracy, however, associates good faith political involvement with the possible enhancement of an individual's private life. When individuals participate in politics, they gain benefits beyond the private receipt of state-allocated goods.<sup>242</sup> In the most ideal case, political participation can be transformative, and at a minimum it should be somewhat enriching. In this view, assessment of anticorruption efforts requires a more subtle calculation. Properly tuned, the motive-transformation that underlies deliberative anticorruption can make individuals better citizens, as well as prevent leaders from engaging in self-enrichment. If legitimate, the deliberative theory of politics undermines — or at least complicates — many of the objections to the anticorruption measures which have not survived judicial review.<sup>243</sup>

Thus, the desirable future direction of anticorruption policy depends upon the preferred democratic principles. The types of anticorruption measures permitted by a polity that conceptualizes of political obligation as founded in self-interest will differ dramatically from one that that is founded in democratic discourse and mutual endeavor.

Of course, theoretical investments must be balanced against practical concerns. In particular, deliberative anticorruption measures can lend themselves to abuse by those in power. Because of their breadth, deliberative anticorruption laws grant more opportunities for discretionary action; lack of integrity by enforcement agents can thus make anticorruption itself a vehicle of corruption. This is most direct in the honest services context, where some claimed the

---

<sup>242</sup> See *supra* Section IB.

<sup>243</sup> This is also true of the Court's investment in adversarial process, described in *supra* Section VB.

potential for and reality of prosecutorial abuse.<sup>244</sup> Some have argued that restriction of independent campaign contributions are likewise motivated by corrupt self-interest: by limiting opportunities for outside communication, campaign finance restrictions can protect incumbents.<sup>245</sup> In light of these risks, the Court's competitive holdings on anticorruption can be reframed as protection of individual rights from unscrupulous government action; a competitive anticorruption regime is necessary to prevent corruption law itself from being corruptly used. Of course, in terms of achieving genuine integrity in government, adherence to the competitive approach poses a paradox: while decreased trust in standing public figures may make it less prudent to trust them with deliberative anticorruption tools, deliberative anticorruption is more effective at promoting genuine public spiritedness. Competitive anticorruption is less liable to abuse, but also less effective at genuinely transforming the character of public leadership.

*B. Policy Reform: Capitulation, Circumvention, or Coercion*

The future direction of federal anticorruption enforcement will necessarily be shaped by the Court's indirect but forceful establishment of a competitive anticorruption regime. Because the competitive regime emerges from protection of constitutionally recognized rights, the costs of directly rejecting the Court's position and imposing deliberative measures is high. There are alternatives — either redefining anticorruption jurisprudence with acceptably competitive measures, or developing anticorruption strategies that do not infringe upon the Court-defined rights — but they would struggle to replicate the impact or cultural effect of deliberative anticorruption

---

<sup>244</sup> See *supra* note 175 (describing Scalia's attack on honest services as giving prosecutors excessive discretion); Beale, *supra* note 149, at 719 (describing the potential for political abuse in honest services). See generally Sandra Caron George, *Prosecutorial Discretion: What's Politics Got to Do With It?*, 18 GEO. L.J. LEGAL ETHICS 739 at 740 (2005) (discussing whether prosecutorial discretion aids in "rein[ing] in public corruption" and hypothesizing whether politics can appropriately play a role in this context); HARVEY SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009).

<sup>245</sup> See *supra* note 53 (describing Scalia's argument that campaign finance restrictions are a form of incumbency protection).

achieved by the coercive power of criminal law and government regulation. The ultimate decision must advert to substantive political values. A robust deliberative regime would require either rejecting the Court's prioritization of individual rights, or redefining politics such that deliberative anticorruption and individual rights are not at odds.

The path of least resistance for Congress would be to capitulate to the Court and only pass anticorruption measures in a narrow competitive mold: criminalize behavior through crisp, bright-line rules, primarily target offenses that resemble illicit quid pro quo exchanges, and impose restrictions that do not substantially interfere with individual rights, even among public figures. Explicit self-limitation to such measures could encourage Congress to more precisely define what types of behavior it wishes to prohibit; however, given the institutional hurdles such well-drafted legislation might face, the result might simply be less anticorruption legislation altogether. Regardless, if the deliberative approach were abandoned wholesale, anticorruption would no longer be available to generally shift political culture or encourage broader public-mindedness. Competitive anticorruption is not suited to seeking such wide-ranging goals.

Conversely, Congress could challenge the normative and interpretive legitimacy of the Court's antideliberative holdings. The most extreme approach would be to seek a constitutional amendment explicitly granting anticorruption unique standing. The amendment could indicate that anticorruption efforts should be granted equal weight as other constitutional concerns, or it could explicitly address particular anticorruption goals, such as campaign finance and general self-enrichment by public figures. Alternatively, Congress could apply oblique institutional pressure, such as attempting to marginalize the Court by passing legislation that has a popular mandate and clear deliberative intent. Either approach, however, would cost enormous political capital. It would

pit a less trusted political institution (Congress) against one of the more trusted ones (the Court),<sup>246</sup> ironically enough on the subject of integrity. Furthermore, the attack would, at some level, insinuate that the Court was working too vigorously to protect individual rights from government regulation. In the absence of a clear crisis because of the inadequacy of such regulation, challenging such practice is politically difficult and normatively suspect.

Finally, Congress could seek the broader goals of deliberative anticorruption without directly challenging the Court. This would involve continued reliance on competitive anticorruption measures for formal enforcement and regulation, but promotion of a broadly deliberative political culture through measures that do not infringe on individual rights.<sup>247</sup> If these measures are successful they would create more direct accountability for public officials, encourage greater citizen involvement in government, and strengthen the ties between constituents and leaders — ultimately creating a political culture in which leaders are more public-minded and the expectations of the polity are a guiding influence. However, while these measures might confer benefits, they do not seem properly classified as anticorruption laws, and it is unclear if they will have the same efficacy in preventing self-serving conduct by officials. Deliberative measures without the coercive potential of criminal or regulatory law are less likely to catch or rectify the conduct of the most self-aggrandizing politicians — whom are the least likely to be swayed by softer deliberative programs.

As indicated in the previous section, the appropriate solution will depend upon foundational political values, shaped by practical context. If the public wishes to achieve a broadly

---

<sup>246</sup> See Lydia Said, *Congress Ranks Last in Confidence in Institutions*, GALLUP, July 22, 2010, <http://www.gallup.com/poll/141512/Congress-Ranks-Last-Confidence-Institutions.aspx>; *Distrust, Discontent, Anger and Partisan Rancor*, PEW CTR., Aug. 18, 2010, <http://people-press.org/report/606/trust-in-government>.

<sup>247</sup> For a list of such proposals — mini-publics, deliberative polling, and so forth — see *supra* notes 24-25. Other alternatives could involve intensified disclosure regimes wedded to efforts to more broadly publicize the results of such disclosure. However intensive, mandated disclosure itself may raise First Amendment issues. See Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 326-327 (1998).

deliberative political culture, anticorruption laws that serve those values will provide a necessary tool. However, in the absence of a near-consensus regarding the desirability of such a cultural shift, the risks of deliberative anticorruption — as the Court has indirectly suggested in its jurisprudence — may be excessive. The accepted forms of anticorruption law may be so intimately tied to dominant political norms that broadly changing anticorruption policy without parallel shifts in political culture may be futile. In this respect, the form of anticorruption law may be more valuable as a bellwether of broader political values than as an independent target of policy change.

### Conclusion

The core of this chapter is a modest descriptive claim: the Supreme Court's modern holdings in corruption cases have, citing constitutionally protected individual rights, tended to overturn or constrain congressional anticorruption laws that are broad or flexible. To elucidate this analysis, I have deployed a theoretical distinction between competitive and deliberative anticorruption law, with the Court's decisions demanding strict adherence to the competitive approach. I have finally speculated that the Court's indirect imposition of a competitive anticorruption regime is not merely the serendipitous result of its treatment of individual rights, but reflects deeper, perhaps constitutionally-inspired, commitments to adversarial procedure and individual-oriented politics. Thus, the Court's own institutional tendencies have inclined it toward competitive democratic theory and thus competitive anticorruption, even if these allegiances have not openly appeared in the corruption jurisprudence.

These claims are linked, and hopefully mutually reinforcing. Yet they also stand alone, if necessary. The observation there is an institutional conflict over corruption could be modeled with a rubric other than competitive/deliberative democracy; or the Court's own tendencies may ultimately be attributable to forces other than the constitutional pressures this chapter has observed.

Each of these claims has distinct significance and this chapter suggests further investigation of both institutional action and democratic theory is necessary to make real progress in the development of a coherent understanding of anticorruption law.

## Chapter 3: Judicial Perceptions of Electoral Psychology and the Deep Patterns of Campaign Finance Law\*

### Introduction

The current campaign finance regime, originating in *Buckley v. Valeo*<sup>1</sup> and most recently re-affirmed by *McCutcheon v. FEC*,<sup>2</sup> is a mess. It fails to prevent wealthy donors from dominating campaign discourse,<sup>3</sup> it has engendered a wildly erratic series of opinions,<sup>4</sup> and it has conceptual foundations that are widely recognized as unstable.<sup>5</sup> Myriad reasons have been offered for such failures of campaign finance law. A raft of criticisms asserts that the disputed regulatory provisions do not address the type of political corruption of concern to the judiciary or the legislature.<sup>6</sup> Some argue that the Court's starting premises suffer from various flaws,<sup>7</sup> and

---

\* This chapter is forthcoming (November 2016) as an article in the Connecticut Law Review. Please ensure any citations are to the latest available version of that article.

<sup>1</sup> 424 U.S. 1 (1976). *Buckley* passed judgment on the Federal Election Campaign Act of 1974 (hereinafter, "FECA"), Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431-55 (Supp. 2002)). 1974 FECA amended the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972). *Buckley* is the "fountainhead of modern U.S. campaign finance jurisprudence." Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 585 (2011).

<sup>2</sup> *McCutcheon v. FEC*, 572 U.S. \_\_\_, 134 S.Ct. 1434, 1445 (2014) (declining to question *Buckley*'s core doctrinal contribution/expenditure divide).

<sup>3</sup> See Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 6 (2012). See also Samuel Issacharoff and Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1706 (1999) ("A quarter-century after FECA [as truncated by *Buckley*], the conventional view is that American politics is more vacuous, more money driven, more locked up than ever.").

<sup>4</sup> See, e.g., Hasen, *supra* note 1; Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31 (2004).

<sup>5</sup> See, e.g., Burt Neuborne, *Money and American Democracy*, in *LAW AND CLASS IN AMERICA*, 37, 47 (Paul D. Carrington & Trina Jones eds., 2006) (inquiring if, with regards to the uncomfortable coexistence of the expenditures/contributions divide that is the current linchpin of the doctrine, "If *Buckley* is a rotten tree just waiting to be pushed over, the question is: which way will it fall?").

<sup>6</sup> See, e.g., David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369 (1994) (arguing campaign finance restrictions must be about inequality and the structure of democracy, not corruption); Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 903 (1998) (arguing campaign finance regulation is really only a problem if one accepts the existence of "civic slackers"). See also Kathleen Sullivan, *Two Concepts of Freedom of Speech*, 124 Harv. L. Rev. 143, 161 (2010) (observing complexities in the relationship between free speech as equality and free speech as liberty in the campaign finance context).

<sup>7</sup> See, e.g., Samuel Issacharoff, *Throwing in the Towel: The Constitutional Morass of Campaign Finance*, in *PARTY FUNDING AND CAMPAIGN FINANCE IN INTERNATIONAL PERSPECTIVE*, 183, 190 (K. D. Ewing & Samuel Issacharoff eds., 2006); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L. J. 1001, 1002 (1976).



others suggest that the peculiar circumstances of the law's genesis have had doctrinal consequences.<sup>8</sup> The debate has only grown more fevered with time: even as elections are characterized by dizzying campaign expenditures<sup>9</sup> and special interests appear to be leveraging their financial power into increased influence over officials,<sup>10</sup> the Supreme Court continues to dismantle the campaign finance regulatory apparatus.

This chapter comprehensively explains the unfortunate condition of campaign finance jurisprudence by chaining together three levels of analysis. It first considers the tensions that have long-plagued campaign finance jurisprudence, focusing on the doctrinal fulcrum: the infamous *Buckley* balancing test that weighs anti-corruption efficacy against constitutional rights.<sup>11</sup> Through this analysis the chapter demonstrates that campaign finance law necessarily derives from democratic theory, a reality the Court has never explicitly acknowledged.

The chapter then parses seminal<sup>12</sup> cases to observe that while the Court has not explicitly invoked democratic theory to develop its campaign finance doctrine, democratic principles have

---

<sup>8</sup> Richard L. Hasen, *The Untold Drafting History of Buckley v. Valeo*, 2 ELEC. L. J 241 (2003).

<sup>9</sup> See, e.g., Nicholas Confessore et. al. *The Families Funding the 2016 Presidential Election*, N.Y. Times, Oct. 10, 2015, <http://www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html> (observing 158 families and their controlled corporations have provided nearly half the early money to fund presidential elections, and the demographic anomalies represented thereby); Ian Vandewalker, *Wealthy Shadow Campaigns Will Fund 2016 Elections*, Newsday, Aug. 7, 2015, <http://www.newsday.com/opinion/oped/wealthy-shadow-campaigns-will-fund-2016-election-1.10715735> (observing the ability of 'shadow donors' to overwhelm disclosed donations in the campaign process).

<sup>10</sup> See generally Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73 (2004); LAWRENCE LESSIG, *REPUBLIC, LOST* (2011).

<sup>11</sup> *Buckley*, 424 U.S. at 26; 45; *McConnell v. FEC*, 540 U.S. 93, 134-136 (2003); *McCutcheon*, 134 S.Ct. at 1444-45 (describing the *Buckley* balancing test).

<sup>12</sup> As reflected in sections I(B) through III *infra*, this article concerns itself primarily with cases of the central campaign finance narrative. In general these cases either touch on core federal statutes such that they either shaped the dominant arc of campaign finance law, or most recently expressed this arc (*Buckley*; *McConnell*; *Citizens United v. FEC*, 558 U.S. 310 (2010); and *McCutcheon*); or they are historical touchstones that remain debated to the present time (*First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)). Some of the cases that are not discussed are, from the perspective of this analysis, folded into later cases. For example, the significance of *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000) is reflected in *McConnell* and the significance of *FEC v. Wisconsin Right to Life, Inc.* 551 U.S. 449 (2007) (hereinafter *WRTL II*) in *Citizens United*. Insofar as one case complicates the analysis, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. \_\_\_, 131 S.Ct. 2806 (2011) reflects an unusual thematic variation on the typical conservative position; as discussed variously *infra*, however, it broadly fits into the analysis.

still indirectly determined the law. The unfolding of campaign finance jurisprudence, and in particular the bitter partisan dispute, is most accurately understood as a shadow battle over the nature of democracy.<sup>13</sup> The conservative wing holds that the electorate's informed decision-making autonomy is the bulwark of democracy – perhaps the only bulwark necessary – and thereby vindicates elections with minimal restriction of speech and spending. This interpretation (designated 'organicist') condemns any campaign finance regulation that can be interpreted as obstructing political speech. Conversely, the liberal wing intimates, but does not expressly articulate, a belief that additional spending and even additional speech can taint decision-making by the electorate, by candidates, and by elected officials. This understanding (designated 'interventionist') is far more sympathetic to efforts that shape the character of campaigns.

This partisan divide originates in a subterranean dispute – present in the Court's opinions only through glimmering suggestions – regarding cognitive and social assumptions. Each wing manifests distinct attitudes towards how voters think (particularly their susceptibility to distortive outside influence); whether elections that follow minimally regulated campaigns are a 'purifying' force in politics; whether candidates and donors are sophisticated manipulators of politics, or earnestly forthright participants; and whether Congress's management of the electoral process should be trusted as citizen self-protection or condemned as institutional self-dealing.

This chapter then works through implications of the organicist-interventionist divide and the related assumptions regarding cognitive characteristics. The deep patterning upon which the

---

<sup>13</sup> Heather Gerken has observed that "Judges usually maintain a studied agnosticism in election law cases, claiming that they have no theory about the way democracy should work. It may seem strange that a group constantly making rules about how the game of politics is played should admit that they have no view on why we play it and how we win. But it is quite consistent with long-standing judicial norms that judges are the neutral enforcers of individual rights, not quasi-legislators making discretionary policy judgments." *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 514 (2006). This is in no way inconsistent with the argument of this article, which does not argue any member of the Court consciously advances a political theory in the campaign finance jurisprudence, merely that they are present and influential.

divide rests elucidates the campaign finance doctrine, but it also reveals that the organicist and interventionist positions suffer from internal tensions and vulnerability to external critiques. The chapter concludes by adumbrating how social science can helpfully inform judicial treatment of democratic realities, and thereby guide the revision of campaign finance jurisprudence.

By identifying the central role played by competing democratic theories in the existing doctrine, this chapter makes a multifaceted contribution with which scholars must engage. It draws on prominent literature to identify central challenges, in particular by thinkers who have recognized that the campaign finance case law raises unanswered questions about the nature of democracy and the challenge the judiciary faces in defining politics.<sup>14</sup> However, this chapter demands a significant revision of this inquiry by demonstrating that the Court already deploys sophisticated, if flawed, competing democratic worldviews. Recognition of the presence and significance of these theories in the current case law thus enables a more informed and forceful advancement of the doctrine than the scholarship has thus far undertaken.<sup>15</sup>

### I. Campaign Finance before the Supreme Court

The Supreme Court's campaign finance doctrine has long suffered from internal tensions, manifesting most transparently in the case law's sharply partisan evolution. As this section observes, characteristic puzzles are more subtly woven throughout the doctrine, and express the Court's problematic engagement with democratic theory.

---

<sup>14</sup> See, e.g., Strauss, *supra* note 6, at 1370 (identifying the corruption interest as in reality directed towards “inequality, and the nature of democratic politics”); Gerken, *supra* note 13; Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy* 111 MICH. L. REV. 1385 (2013); Lori Ringhand, *Defining Democracy: The Supreme Court's Campaign Finance Dilemma*, 56 HASTINGS L. J. 77, 80 (2004) (*Buckley* requires an inquiry into the definition of democracy). The specific contributions of these thinkers are discussed *infra*, particularly in Section I. Section IV(C), meanwhile, explores why many contemporary critiques fall upon deaf ears before the current Court.

<sup>15</sup> Section IV(C) *infra* in particular shows why many contemporary critiques have little force given the principles that animate conservative thinking.

*A. A Brief History of Modern American Campaign Finance Law*

This section offers a succinct historical review<sup>16</sup> of the modern battle regarding government regulation of money in campaigns. It emphasizes the test by which regulations rise and fall: the weighing of anti-corruption effect against indisputably precious First Amendment rights.<sup>17</sup>

1. Illusions of order: *Buckley* and *Bellotti*

*Buckley* continues to determine the course of contemporary finance law by setting the terms of judicial analysis, even as the evolving legal and political landscape has supplanted its regulatory impact. *Buckley* partially pruned FECA's attempt to reshape campaign practice. The Court struck down expenditure limitations upon candidates and their advocates while leaving standing limitations upon direct contributions by donors to candidates. The Court's reasoning has become the lodestone of campaign finance jurisprudence, and at first impression it is straightforward enough: to assess if governmental regulation of money in campaign finance is permissible, the Court balances the legitimate goal of preventing candidate corruption<sup>18</sup> against First Amendment rights. Expenditure limitations significantly infringe perhaps the most essential political right, the ability to express ideas free of government interference, and also impact

---

<sup>16</sup> For another such account, see Hasen, *supra* note 1, at 585-91.

<sup>17</sup> See Hellman, *supra* note 14, at 1386 ("The main front in the battle over the constitutionality of campaign finance laws has long focused on defining corruption"). Even those committed to the most extensive protection of free speech, such as Kathleen Sullivan and Bradley Smith, advance their cause by attacking the validity of the anti-corruption rationale, rather than by heightened theorizing or elevation of First Amendment rights. See, e.g., Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 *Yale L. J.* 1049, 1067 (1996) (attacking the idea that campaign finance reform has anti-corruption benefits as a central argument against campaign finance reform generally); Kathleen Sullivan, *Political Money and Freedom of Speech*, 30 *U.C. DAVIS L. REV.* 663, 678 (1997).

<sup>18</sup> In arguing that Congress's sole interest was the prevention of candidate corruption alone, *Buckley* seems to elide the breadth and ambition of the FECA, and its desire to root out a more broadly conceived type of electoral corruption. See Jacob Eisler, *The Unspoken Institutional Battle over Anti-Corruption: Citizens United, Honest Services, and the Legislative-Judicial Divide*, 9 *FIRST AMEND. L. REV.* 363, 390-91 (2011).

associational rights. The primary impact of contribution limits, conversely, is only bounded impairment of associational rights.<sup>19</sup>

To ascertain if a regulation advances the cause of anti-corruption, the Court turns to “the primary interest served by the limitations and, indeed, by the Act as a whole[:] the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office.”<sup>20</sup> The Court suggests that corruption can be identified with *quid pro quo* arrangements<sup>21</sup> when it strikes down independent expenditure provisions for failing to “pose dangers of real or apparent corruption comparable to those identified with large campaign contributions”,<sup>22</sup> because such expenditures do not offer the same practical ability to be traded for political favors due to a lack of “prearrangement”.<sup>23</sup> Corruption, as generally characterized by the *Buckley* Court, is

---

<sup>19</sup> *Buckley*, 424 U.S. at 19-23 (reviewing the impact of the measures on First Amendment rights).

<sup>20</sup> *Id.* at 25. *See also id.* at 26 (“[FECA’s] primary purpose [is] to limit the actuality and appearance of corruption resulting from large individual financial contributions”).

<sup>21</sup> Whether *Buckley* adopts as a firm statement that corruption is limited to *quid pro quo* is debated in Section I(B)(i) *infra*, and the complexities of granting ‘appearance’ almost equal weight are discussed in Section I(B)(ii) *infra*. However, a holistic reading of the opinion does suggest the Court identifies corruption with *quid pro quo*, even if at points its unhelpfully ambiguous language implies a fuzzier concept of corruption. *See id.* at 26-27 (“To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.”); 27 (introducing that the appearance of corruption will justify regulation by identifying it “[o]f almost equal concern as the danger of *actual* quid pro quo” (emphasis added)); 45 (suggesting that even the hypothetical validity of independent expenditure restrictions would require that they “pose the same dangers of actual or apparent quid pro quo” arrangement.).

<sup>22</sup> *Id.* at 46.

<sup>23</sup> *Id.* The Court’s reasoning on this point is nigh-incoherent, *seriatim* praising and denigrating the capacity of donors to covertly offer bribe-like expenditures to candidates. In deeming independent expenditures could not be of use as *quids*, it suggests that the expenditures “may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive” and that this lack of prearrangement impairs the value of independent expenditures and reduces their facilities as *quids*. *Id.* However, the prior paragraph concludes that limiting independent expenditures is futile because any limitation would need to be clearly constitutionally bounded, and “[i]t would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat by nevertheless benefited the candidate’s campaign.” *Id.* at 45. One plausible explanation is that the Court sought a justification for striking down the expenditure restrictions (which more heavily burdened the First Amendment) while retaining some consistency towards corruption.

behavior that might allow for bribery-like control of candidates, or lead to the perception that they might be bribed.

By such reasoning, the Court’s conclusions follow naturally enough.<sup>24</sup> Expenditure limitations both materially restrict speech and associational rights and do not directly comprise a donation to candidates that might have the effect of a bribe.<sup>25</sup> Conversely, contribution limitations have a less weighty constitutional impact, and interdict a direct transfer to a candidates.<sup>26</sup> Thus contribution limits survive, and expenditure limits fall.<sup>27</sup>

In a campaign environment of limited complexity, where the interactions between candidates, donors, and voters could be neatly classified and there were few opportunities for circumvention, this framework might possess some analytic resilience. Indeed, *Buckley* aspires to exhaust the universe of regulated campaign finance conduct through its dispositive categories. Perhaps most notably, the Court validates its decision to strike down limitations on independent expenditures on behalf of a candidate (a type of expenditure limitation) by observing that its definition of ‘contribution’ includes expenditures that, while perhaps nominally independent, still pose a risk of having a bribe-like effect on candidates. It accomplishes this by “constru[ing] [the] term [‘contribution’] to include not only contributions made directly or indirectly to a candidate, political party, or campaign committee, and contributions made to other organizations or individuals but earmarked for political purposes, but also all expenditures placed in cooperation

---

<sup>24</sup> *Id.* at 58-59 summarizes the comparative reasoning. The opinion then goes on to discuss and permit reporting and disclosure requirements, which have been of relatively little controversy as the campaign finance law has evolved.

<sup>25</sup> *Id.* at 48; 53-54; 56-57.

<sup>26</sup> *Id.* at 29; 33.

<sup>27</sup> The dislike of this doctrinal half-measure is described throughout this article; the characteristic sentiment of scholars is captured by Neuborne, *supra* note 5. See also Issacharoff and Karlan, *supra* note 3, at 1711 (“The effect is much like giving a starving man unlimited trips to the buffet table but only a thimble-sized spoon with which to eat: chances are great that the constricted means to satisfy his appetite will create a singular obsession with consumption.”). It has also been attacked analytically, in particular by observing that contribution limitations are not *really* an anti-corruption measure. See section I(B)(iii) *infra*.

with or with the consent of a candidate. . . .”<sup>28</sup> It thus maintains fidelity to the contribution/expenditure divide by classifying as contribution certain types of what are, from a commonsensical perspective, expenditures. This move is representative of *Buckley*’s de facto method: having committed to a conceptual (balance speech and corruption) and doctrinal (the only type of regulation that can justify rights infringement is that with an anti-bribery effect) framework, the Court makes the necessary interpretive maneuvers to locate the subject matter at issue within that framework.<sup>29</sup>

Applying *Buckley* to the diversity of possible campaign finance spending scenarios has engendered a winding lineage of cases, some of which retain particular contemporary resonance. The earliest such conceptual anchor is *First National Bank of Boston v. Bellotti*,<sup>30</sup> which struck down expenditure restrictions imposed on corporations during a popular referendum. *Bellotti* has been taken to stand for the proposition that as expenditures cannot corrupt the electorate directly, corruption can only occur if a public figure is swayed by a donation. Broadly, it extends *Buckley*’s legacy, with the legitimacy of regulations hanging on if they can be interpreted as preventing bribe-like corruption of candidates. *Bellotti* is thus a favorite of those who wish to define corruption narrowly as the prospectively bribery-like control of candidates.

The dispositive reasoning of *Bellotti* supports such an interpretation, generally advancing the proposition that corruption in campaign finance consists only of illicitly ‘purchased’ control over candidates. “The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence

---

<sup>28</sup> 424 U.S. at 78; *see also id.* at 24; 44 (explaining the construal of 18 U.S.C. §§608(b), (e) to support this interpretation).

<sup>29</sup> See, for example, the classification of payment of incidental expenses by volunteers, *id.* at 36-37, which places them into the expenditure or contribution bucket based on if they are “made to the candidate’s campaign or at the direction of the candidate or his staff.”

<sup>30</sup> 435 U.S. 765 (1978).

the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it...<sup>31</sup> However, dicta in *Bellotti* complicate the seemingly straightforward application of *Buckley*'s principles. The opinion states that sufficient evidence *could* demonstrate that independent expenditures corrupt candidates,<sup>32</sup> a proposition *Buckley* rejected unconditionally. Speculative dicta in *Bellotti* deviate from *Buckley* more radically in suggesting that sufficient evidence might prove speech to impact the electorate directly in a manner that might legitimize rights-restricting regulation.<sup>33</sup> As tentatively expressed dicta these propositions create no precedential problems, but rather foreshadow the crisis of campaign finance law. While the Court articulates the framework of *Buckley*'s balancing test with muscular confidence, it wavers when faced with a difficult application of the principles.

*Bellotti*'s prescient insecurities aside, the contours of *Buckley* present a seemingly clear path for campaign finance jurisprudence. Campaign finance regulation will survive if the constitutional cost is not too great and the regulation serves a sufficiently powerful anti-corruption purpose. Corruption, for the purposes of campaign finance jurisprudence, is potential bribe-like swaying of candidates through direct contributions (or support coordinated so that it has the effect of direct contributions), whereby public officials might relinquish control over their public decision-making.<sup>34</sup>

---

<sup>31</sup> *Id.* at 790-792 (internal citations omitted).

<sup>32</sup> *Id.* at 788 n.26. *See also* Hasen, *supra* note 1, at 587.

<sup>33</sup> 435 U.S. at 789. *See also id.* at 791-92 ("a restriction so destructive of the right of public discussion, *without greater or more imminent danger to the public interest than existed in this case*, is incompatible with the freedoms secured by the First Amendment.") (emphasis added).

<sup>34</sup> Such an understanding appears akin to the seminal social science definition offered by J. S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 419 (1967), identifying corruption as "formal deviation from the public role because of...private-regarding pecuniary or status gains."



## 2. Expanding the concept of corruption: *Austin* and *McConnell*

The *Buckley* formula and theory remained generally decisive for the next decade and a half.<sup>35</sup> *Austin v. Michigan*, however, heralded a transformation of the jurisprudence, both doctrinally and in molding the partisan lines of the debate. In condoning a state regulation that prohibited independent expenditures from corporations' general treasury funds during a candidate election, *Austin* states that the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas"<sup>36</sup> pose a sufficient threat to justify such a spending restriction. At a policy level, *Austin* asserts it is permissible to regulate campaign spending by institutions that hold disproportionate economic power.<sup>37</sup> This approach breaks with *Buckley* on several levels: it rejects the conceptual formula (weighing candidate corruption against First Amendment rights), the subsequent doctrinal divide (generally permitting contribution limitations but striking down expenditure limitations), and the specific point of law (by letting stand a direct ban of independent expenditures).

---

<sup>35</sup> For example, in *Federal Election Commission v. National Conservative Political Action Committee* (hereinafter, *NCPAC*), 470 U.S. 480, 497 (1985), the Court seemingly defined corruption with crystalline precision in striking down limitations on independent expenditures: "Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors." *Cf. e.g., FEC v. National Right to Work Comm.*, 459 U.S. 197 (1982) (upholding limitations on the circumstances in which a corporation may solicit contributions, because placing demands on the form of such solicitation only burdens associational rights); *FEC v. Mass. Citizens For Life*, 479 U.S. 238, 259 (1986) (hereinafter, *MCFL*) (striking down a measure that limited a corporation's ability to engage in independent expenditures, on the grounds that the corporation was specifically incorporated "to disseminate political ideas, not to amass capital", and thus did not pose the threat of serving to amass wealth that could corrupt politics); *NCPAC*, 470 U.S. at 492-497 (striking down a conditional limitation on independent expenditures by political action committees, because such non-coordinated expenditures are unlikely to serve as *quid pro quo* are vital for communicating ideas to the populace).

<sup>36</sup> 494 U.S. 652, 664 (1990). The Court notably emphasized the "state-conferred advantages of the corporate structure," specifically their "legal advantages [that] enhance[e] their ability to accumulate wealth", to justify additional regulation of corporate spending. *Id.* at 665. That the government may manage politically fabricated entities prefigures an underlying interventionist principle: elections are itself artificially produced by the structural framework that surrounds elections.

<sup>37</sup> *See id.* at 658-659; *id.* at 671 (Brennan, concurring) (relying on the reasoning but not the holding of precedents to justify preventing the amassing of wealth by corporations from overly influencing elections).

*Austin* does little to articulate its ‘distortion’ conception of corruption,<sup>38</sup> but its impact is clear: it broaches the possibility that the Court could openly identify corruption in campaign finance as broader than bribery-like conduct. *Austin* thereby anticipates the heated split of contemporary campaign finance law between those who accept that campaign finance restrictions can pass constitutional muster if it protects general political integrity, and those who reject such regulation as invasive paternalism.

Thirteen years passed before the Court fully contemplated the implications of *Austin*. In *McConnell*, the Court addressed the constitutionality of the reforms adopted by Congress in the Bipartisan Campaign Finance Reform Act of 2003 (BCRA).<sup>39</sup> These measures were designed to address the creative responses of donors and politicians to the various funding restrictions imposed by the post-*Buckley* remnants of FECA. BCRA targeted two types of spending in particular: “soft money” given to parties which could then be funneled into campaigns;<sup>40</sup> and independent electioneering advertising (“issue ads”) that would not qualify as express advocacy by *Buckley*’s lights, but which *McConnell* determines could have the same corrupting effect upon

---

<sup>38</sup> *Austin* has been savaged as a poorly reasoned opinion, most relevantly by the Court in *Citizens United* itself. 558 U.S. at 363. Critics have also argued that its ‘distortion’ rationale lacks compatibility with a meaningful idea of corruption. See, e.g., Sullivan, *supra* note 17, at 675-678 (distortion rationale is ultimately incompatible with a view of democracy that sees the people as having autonomous sovereignty); Hasen, *supra* note 4 at 41-42 (observing *Austin*’s status as an outlier, stating that *Austin*’s claim that it continued to rely on an anti-corruption rationale was “incorrect”, and questioning if the case “retained any vitality” as case law trudged on); Strauss, *supra* note 6, at 1369 n.1 (*Austin* claims to abjure an anti-corruption rationale, but in reality it defines corruption to be the same as inequality). Cf. Stephen G. Breyer, *Our Democratic Constitution*, 77 NYU L. REV. 245, 252 (2002) (advancing a view of democracy and First Amendment interpretation in the campaign finance realm oriented around greater public participation).

<sup>39</sup> *McConnell* and BCRA produced a cottage industry of literature. See generally, e.g., Hasen, *supra* note 4; Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 ELECTION L.J. 147 (2004) (describing, and generally approving of, the Court’s reasoning); Bruce Cain, *Reasoning to Desired Outcomes: Making Sense of McConnell v. FEC*, 3 ELECTION L.J. 217 (2004) (criticizing *McConnell* as overly political and offering reverse-engineered rationales).

<sup>40</sup> 540 U.S. at 95-96.

candidates as coordinated expenditures.<sup>41</sup> *McConnell* largely<sup>42</sup> left BCRA's restrictions of these practices intact, concluding that influence via either of these mechanisms could allow private donors to unduly control candidates.<sup>43</sup>

To support its conclusions, *McConnell* offers an 'influence' theory of corruption, which it identifies as the judicial progeny of *Buckley*.<sup>44</sup> *McConnell* remains committed to the weighing of the anti-corruption interest against constitutional rights,<sup>45</sup> and confirms that expenditures and contributions are assigned differing constitutional weight.<sup>46</sup> However it significantly softens *Buckley*'s assertion that only prevention of bribery satisfies the anti-corruption interest, instead synthesizing precedent to conclude that corruption includes "the broader threat from politicians too compliant with the wishes of large contributors"<sup>47</sup> and the harmful ability of targeted expenditures to "influence federal elections".<sup>48</sup> The *McConnell* majority relies upon the same principles as the *Buckley* Court, but the opinion redefines the corruption side of the balancing test. Rather than holding corruption is only satisfied in the presence of a contribution that exerts

---

<sup>41</sup> *Id.* at 193-194.

<sup>42</sup> The Court did invalidate §213, which forced parties to elect either limited independent express advocacy or coordinated expenditures when supporting candidates, as placing an additional and unjustifiable burden on express advocacy. *Id.* at 215-223.

<sup>43</sup> *Id.* at 150-153 (parties "peddl[e] access" to candidates in exchange for soft money, and thus donors can use campaign finance donations that are not direct contributions to exert excessive political influence); at 221-223 (the ability to extract generalized type of compliance or cooperation is the critical feature of corrupting expenditures).

<sup>44</sup> See Hasen, *supra* note 4 (describing the lineage of cases that lead to *McConnell*).

<sup>45</sup> 540 U.S. at 205 (valorizing the importance of constitutional rights).

<sup>46</sup> *Id.* at 134-37. Conservatives have attacked the statement in *McConnell* that contribution limits actually face less demanding scrutiny than expenditures, but the substantive effect of *Buckley*'s differentiation seems to remain. See note 98 *infra*.

<sup>47</sup> *Id.* at 143 (quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 389 (2000)), at 196. Notably, the Court relies on ambiguities in *Buckley* (its language of 'improper influence' and 'opportunities for abuse') to justify the broadening of this conception, but it is difficult to deny the Court expands the facial doctrinal treatment of corruption offered by *Buckley*, even if it does so by leveraging the precedents' moments of linguistic sloppiness. 540 U.S. at 193-96 describes the relevance of the anti-corruption interest in justifying the modification of the express advocacy line to allow regulation of electioneering communications ("*Buckley*'s express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption... 'abuse of the present law [permits donors] to influence federal elections... while concealing their identities from the public") (quoting *McConnell v. FEC*, 251 F.Supp.2d 176, 237 (D.D.C, 2003)).

<sup>48</sup> 540 U.S. at 196.

specific control over a donor, *McConnell* posits that corruption occurs when candidates are (excessively) responsive to the wrong types of generalized influences; among the influences to which they ought not respond are the prospect of electioneering communication or the sway of soft money. To support this it must reject *Buckley*'s conclusion that corruption in the context of campaign finance consists only of bribe-like acts.

### 3. The reactionary straitening: *Citizens United* and *McCutcheon*

When Justice Alito replaced Justice O'Connor, the 5 justice majority flipped. Subsequently, the Court has rejected *McConnell*'s broadened idea of corruption in favor of a hardline *quid pro quo* conception.<sup>49</sup> In *Citizens United*, the Court considered the electioneering provisions of BCRA in the context of a corporate-funded advertisement directed toward a candidate (in effect, a prolonged attack sponsored by corporate money). In ruling the restriction of the advertisement unconstitutional, the Court unequivocally rejected *Austin*'s anti-distortion rationale and *McConnell*'s anti-influence rationale. The most recent significant Supreme Court campaign finance case, *McCutcheon*, further emphasizes the current majority's commitment to a narrower interpretation of corruption, striking down long-standing aggregate limits on campaign contributions (limits that not only cap a donors' contributions to a single candidate, but place an aggregate ceiling on total contributions to multiple candidates in an election) for the reason that aggregate donations are an ineffective vehicle for bribes.<sup>50</sup>

The current majority locates this doctrinal shift in *Buckley*'s declaration that "Congress may only target a specific type of corruption – *quid pro quo* corruption."<sup>51</sup> This commitment to

---

<sup>49</sup> The first inklings of this transformation were apparent in *FEC v. Wisconsin Right to Life*, 450 U.S. 449, (2007), a case that addressed an as-applied challenge to §203 of BCRA, the prohibition prohibits electioneering communication by corporations. The case interpreted the requirement that an electioneering ad be "the functional equivalent of express advocacy" in order to be regulated very narrowly and thereby nullified much of the practical effect of the BCRA. 450 U.S. at 457. See also Hasen, *supra* note 1 at 590.

<sup>50</sup> *McCutcheon*, 134 S.Ct. at 1460.

<sup>51</sup> *Id.* at 1450 (quoting *Buckley*).

pre-arranged *quid pro quo* as the hallmark of corruption necessarily entails rejecting the ‘influence’ theory of *McConnell*.<sup>52</sup> The Court thereby radically revises the content of one half of the *Buckley* equation. The ‘corruption’ side of the equation is now only satisfied if the conduct the regulation targets could feasibly operate to bribe a candidate, obtaining precise private control of their public decision-making. Only a narrow range of campaign finance conduct can pass this straitened test – contributions made by donors as direct gifts to candidates, such that the contribution could be imagined as one side of a transaction that corresponds to an illicitly ‘purchased’ official action. Thus, with the exception of narrow contribution limits, most finance regulations are deemed insufficiently preventative of corruption to justify restriction of prized constitutional rights.

*Citizens United* and *McCutcheon* both cast themselves as the heirs of *Buckley* – as does *McConnell*. Both sides agree campaign finance regulation should be assessed by weighing “the permissible goal of avoiding corruption in the political process” against “the impermissible desire simply to limit political speech.”<sup>53</sup> The now-sharply-drawn partisan battle has rather evolved into a dispute over the legacy of the seminal case, specifically how to weigh the content of each side of the balancing question. The current majority describes the adoption of a narrow *quid pro quo* vision as a return to the salubrious wellspring of *Buckley* and the rejection of the dangerous undervaluation and restriction of political rights that it perceives in the reasoning of *Austin* and *McConnell*.<sup>54</sup> The current dissenters (and former *McConnell* majority), conversely, see in *Buckley* and subsequent cases indications that corruption can legitimately be imagined to

---

<sup>52</sup> *Citizens United*, 558 U.S. at 359 (only *quid pro quo* qualifies as corruption; “[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt” as “favoritism and influence are unavoidable in representative politics.”) (quoting *McConnell*, 540 U.S. at 297 (Kennedy, dissenting)).

<sup>53</sup> *McCutcheon*, 134 S.Ct. at 1441.

<sup>54</sup> While not as specifically indicted, the Court’s position entails rejection of the germane dicta in cases that anticipated this now-disfavored reasoning, such as *Bellotti* and *MCFL*.

touch upon a broader array of conduct, and indeed can include general harm to the environment in which campaigning and elections occur.

*B. The Persistent Crises of Campaign Finance Law*

A critical account of this narrative reveals persistent tensions in the doctrine. Some have become the contended issues in the partisan battle; others the Court has studiously avoided acknowledging. This section offers a brief summary of the most salient of these problems in order of increasing conceptual breadth.

1. Does *quid pro quo* corruption have special status?

As the analysis above reveals, if there is a single blackletter question that characterizes the vociferous dispute over campaign finance,<sup>55</sup> it is if corruption in the *Buckley* equation is limited to *quid pro quo*. The initial challenge is that *Buckley* itself is not *wholly* clear on if it intends this limit to be absolute; and the subsequent opinions do not offer robust justifications for their interpretations. This omission leaves a theoretical question unanswered: what is the special characteristic of *quid pro quo* political control through campaign finance contributions that makes it uniquely problematic?

Firstly, despite the insistence of the majorities in *Citizens United* and *McCutcheon*, *Buckley* does not definitively state that the domain of campaign finance corruption is exhausted by *quid pro quo*. Precisely read, it identifies large financial *quid pro quo* as one *type* of conduct of enough concern to balance First Amendment rights, and, in its own analysis of FECA, only weighs *quid pro quo*. While the Court *implies* that neither inequality nor the presence of vast amounts of money flowing through the campaign ecosystem can qualify as corruption that could

---

<sup>55</sup> The Court's characterization of corruption as limited to *quid pro quo* has also been a favorite target of scholarly brickbats. See, e.g., Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009); Kang, *supra* note 3.

justify a burden on First Amendment rights,<sup>56</sup> these positions do not equate to a declaration that *quid pro quo* is necessarily the exclusive set of such sufficiently corrupt acts.<sup>57</sup>

The doctrinal crisis of campaign finance can be traced to this ambiguity. *Buckley* can be taken as standing for either of two mutually exclusive, competing propositions: that *quid pro quo* is the *only* type of corruption that permits constitutional rights-infringing legislation; *or* that only corruption that rises to a certain level of iniquity justifies regulation, and *quid pro quo* exchange is one type of corruption that rises to such a level. If the former, more restrictive view is taken, it seems only contributions (which can directly serve as *quids*) could possibly satisfy the corruption side of the *Buckley* balancing test. Until *Citizens United*, the Court wavered on this question; even *Bellotti* states that sufficient evidence *could* demonstrate that independent expenditures corrupt candidates,<sup>58</sup> a proposition *Buckley* rejected unconditionally.

As described above, *Austin* and *McConnell* both reject the limited view of corruption as only *quid pro quo*. Unfortunately, even the broader view of corruption in *McConnell* does not offer a sufficiently clear alternative definition of corruption. If the general mandate of *McConnell* is that campaign influences may be corrupting in a manner beyond bribing candidates, the seminal characteristics of corrupting influences are never defined. A bribe or bribe-like transfer is corrupting because it involves formal relinquishment of political responsibility in exchange for direct gain by the candidate.<sup>59</sup> Yet democratic representation inevitably involves *some* level of

---

<sup>56</sup> 424 U.S. at 48-49 (the equalization rationale cannot satisfy the burden upon First Amendment rights and ergo must not have force as an anti-corruption rationale); at 57 (the same for reducing the “skyrocketing” amount of money in elections).

<sup>57</sup> Indeed, this is the very form of the argument raised by the *McConnell* majority. *See supra* note 44.

<sup>58</sup> 435 U.S. at 788 n.26. *See also* Hasen, *supra* note 1, at 587.

<sup>59</sup> This is not to say that interpretation even of this uncontroversial case is without its difficulties. *See generally* Daniel H. Lowenstein, *When is a Campaign Contribution a Bribe?* in PRIVATE AND PUBLIC CORRUPTION 127, 136-40 (William C. Heffernan & John Kleinig eds., 2004) (identifying the aspects of a campaign finance contribution that are bribe-like can comprise a challenge); Daniel Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 786-87 (1985) (bribery is identified by ‘shades of grey’). This is a more general theoretical problem that afflicts identification of corruption. *See generally* see SUSAN ROSE-ACKERMAN,

responsiveness to constituent influence, and this influence often can be communicated to public officials through a wide array of channels (be it votes, volunteering, or other supportive conduct). The appropriate query is the characteristic that brands an influence as corrupt. *McConnell* never clearly addresses this question, and consequently its idea of corruption is deeply *underspecified*.<sup>60</sup> The only clear takeaway from *McConnell*'s treatment of corruption is that politicians should respond to some influences<sup>61</sup> and not others (even as some of the electioneering influences it condemns, such as independent expenditures, can only be understood as exerting first-order influence upon voters).<sup>62</sup>

The current Court celebrates its return to a narrow *quid pro quo* definition as clarifying the doctrine.<sup>63</sup> However, merely because the strict *quid pro quo* definition is narrower does not entail that it has more normative clarity. By maintaining that no type of access to, influence over, or privileged relationships with politicians other than direct contributions can qualify as corruption, the Court generates a conceptual problem.<sup>64</sup> It appears arbitrary that *quid pro quo*

---

CORRUPTION AND GOVERNMENT 91 (1999) (locating corruption in the cross-over between the public and private, but likewise observing that these categories themselves depend upon an idea of appropriate and inappropriate).

<sup>60</sup> Gerken, *supra* note 13, at 515, characterizes *McConnell*'s reasoning as "mechanical and unreflective." This can perhaps be attributed to the opinion's need to manage a multiprong piece of legislation piecemeal. This article, however, suggests that these flaws can be more satisfactorily explained by the *McConnell* majority's unwillingness to acknowledge its grounding in a particular theory of democracy.

<sup>61</sup> This approach has both its contemporary champions and critics. Most prominent among the champions is Larry Lessig, whose idea of "dependence corruption" is precisely that some influences are categorically bad influences. See Lessig *supra* note 10; Lawrence Lessig, *What Everybody Knows and Too Few Accept*, 123 HARV. L. REV. 104 (2009). Most prominent among the critics are Sullivan, *supra* note 17, at 681 (enforcing a particular view of democracy in campaign finance violates viewpoint neutrality), and Einer Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L. J. 31 (1991) (questioning if judicial review is an effective way of managing interest group pluralism).

<sup>62</sup> See Section I(B)(iv) *infra*. This position is vulnerable to a type of theoretical attack, including one raised by a *McConnell* dissenter. See 540 U.S. at 297 (Kennedy, dissenting) ("It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.").

<sup>63</sup> For the seminal description of this tone, see Hasen, *supra* note 1.

<sup>64</sup> *Id.* at 615-617 observes this problem. Others have focused on the definitional narrowness as a broader problem. See Heather Gerken, *The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties*, 97 MARQ. L. REV. 903 (2014); Lawrence Lessig, *Democracy after Citizens United*, BOSTON REV., September/October 2010, <http://new.bostonreview.net/BR35.5/lessig.php>. These claims by Gerken and Lessig



direct campaign contributions – which, as discussed *infra*, are only of political use and can only be traded for votes – comprise corruption, but that no other assistance to politicians’ campaigns, regardless of the favors the donor subsequently receives, so qualifies. It places enormous pressure upon the *pro* component. A beneficial act taken on behalf of a candidate, accompanied by general language of political expectation but without any specific demand and then followed by otherwise inexplicably favorable conduct by the candidate towards the donor, would not qualify as corruption; yet a slight tweaking of the language to suggest an expectation of reciprocity (perhaps accompanied by an indication of assent by the candidate-recipient) would so qualify.

The leaf-thin frailty of this distinction<sup>65</sup> is especially problematic in light of the underlying purpose of campaign finance regulation. *Buckley* identified direct contributions as legitimately regulated through explicit capping because such contributions threaten democratic governance. In *Buckley*’s view, such bald trades of electoral money for political decisions threaten to make candidates servants of donors’ wills, and lead voters to believe they do not exert final authority over representatives. Yet by adopting the *quid pro quo* definition and unequivocally rejecting the influence argument, the *Citizens United* Court concludes that such higher-order goals are sufficiently served *only* when regulations target formally prearranged donations. Yet the Court never explicates the special normative characteristics of prearrangement, nor are any such special characteristics facially obvious. With this omission the Court’s current position slides towards incoherence. Anti-corruption measures such as direct contribution limitations are an instrumental good; they protect political integrity. Yet the Court

---

ultimately rest upon particular normative assumptions – ones that mark them as interventionists as described below – and thereby are beyond the ken of this particular narrow critique.

<sup>65</sup> The *McCutcheon* opinion itself, 134 S.Ct. at 1451, appears to acknowledge this frailty: the line between *quid pro quo* and influence “may seem vague at times”.

does not advance any argument to support the idea that power over an official exerted by formal prearrangement damages such integrity, whereas when exerted by anything short of formal prearrangement – say through absolute generalized influence exerted by an overweening donor over a grateful candidate – does not pose an equivalent threat. The question – a thorn in the side of the doctrine since *Buckley* – is what comprises, and thereby what can damage, democratic integrity. *Quid pro quo* is not a magical category; it only has relevance within a framework where such integrity is defined.

## 2. Why is the ‘appearance of corruption’ a problem?

Any semblance of order that the identification of corruption with *quid pro quo* would bring to the law is further disrupted by another facet of the campaign finance jurisprudence: the Court’s consistent identification of both corruption and the *appearance* of corruption as justifying restriction of First Amendment rights.<sup>66</sup> That the appearance of corruption might undermine the confidence of the electorate is a central reason that the *Buckley* does not restrict anticorruption measures to “bribery laws and narrowly drawn disclosure requirements”.<sup>67</sup> The ‘appearance of corruption’ justification suggests that corruption needs to be combatted not only where officials and donors *do* act badly, but where the electorate *suspects* that they act badly (even where the political actors are entirely innocent).

This treatment of the appearance of corruption complicates the reasoning of *Buckley* (and in particular its conservative interpretation) at two levels. Firstly, *Buckley*’s indication that “public awareness”<sup>68</sup> of the possibility of corruption can independently justify such restrictions

---

<sup>66</sup> “Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.” *Buckley*, 424 U.S. at 27. Even the current conservative majority continues to so identify the status of appearance of corruption as justifying regulation. *McCutcheon*, 134 S.Ct. at 1450; *Citizens United*, 558 U.S. at 343.

<sup>67</sup> *Buckley* at 424 U.S. at 27.

<sup>68</sup> *Id.*

breaks with the foundational doctrinal point that only candidate misconduct can legitimize restriction of constitutional rights. Secondly, the ‘appearance of corruption’ argument has force only if a valid purpose of government regulation is to address voters’ perceptions of the political environment and the character of political culture. Yet *Buckley* apparently rejects justification of regulation by protection of political culture.<sup>69</sup> This tension evinces inconsistency in the broader political logic of *Buckley* upon which the balancing test, the expenditure/contribution, and the emphasis on *quid pro quo* depend. If it is legitimate to permit *some* rights-restricting regulation that primarily benefits the electorate’s political perceptions, why are the lines drawn where they are? The validity of such a justification for campaign finance regulation could prospectively enable a much broader array of measures (including expenditure limits).

### 3. Should regulation target candidate corruption or impact upon the electorate?

The ‘appearance of corruption’ justification is the most obvious expression of a problem threaded throughout the campaign finance jurisprudence: is the sole permissible function of regulation to prevent candidate corruption, or does the Court – perhaps unknowingly – also let regulation stand when it can only be explained by modulating the impact of spending upon the electorate?

Firstly, the survival of the ‘appearance of corruption’ prong suggests *Austin*’s much-maligned anti-distortion rationale may not be the doctrinal black sheep the current Court and many critics have suggested. Like the appearance rationale, *Austin*’s anti-distortion rationale concedes the validity of using regulatory mechanisms to shape the broader electoral

---

<sup>69</sup> See note 55 *infra* (summarizing rejection of non-quid-pro-quo rationales). As discussed *passim*, the liberal Court appears less uncomfortable with such culture-oriented justifications.

environment, in particular the electorate's perception of politics. The same theme is expressed in *Bellotti's* more peculiar dicta.<sup>70</sup>

Moreover, there is a well-developed scholarly argument that *all* campaign finance regulation is about the impact on the electorate, and specifically advancing the goal of equality<sup>71</sup> in campaign spending. Because campaign finance dollars can only be used to seek additional votes, campaign finance spending is only a probabilistic (and thus inferior) proxy for additional votes.<sup>72</sup> That a candidate could be 'corrupted' by a campaign finance contribution as by a private bribe is erroneous: the goal of the candidate is to obtain the approval of voters, not to (directly) self-enrich. The campaign finance contribution merely permits the candidate to try to sway voters with additional resources, which themselves, under the force of a criminal threat, cannot take the form of bribes to voters.<sup>73</sup> The culminating force of a campaign finance contribution or expenditure by a participant in the political system can only be to *provide additional speech to other participants* – in the case of a direct contribution, it merely passes through the hands of a candidate. Limiting flows of money among entities in this system is an attempt to equalize the amount of speech that some participants can provide to other participants.

Yet the *Buckley* Court itself rejected the idea that campaign finance regulation could ever legitimately seek to equalize voice.<sup>74</sup> Without further explanation of how campaign finance money damages political relationships, no disclosed campaign finance support, not even *quid pro*

---

<sup>70</sup> 435 U.S. at 789 (internal citations omitted) (asserting that “corporate advocacy threatened imminently to undermine democratic processes” by drowning out other voices in campaigns).

<sup>71</sup> Strauss, *supra* note 6, at 1373 offers the seminal treatment. See also Sullivan, *supra* note 17, at 678. OWEN FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996), at 11 makes the point more softly. An important ancillary note to this reasoning is made by Ortiz, *supra* note 6, insofar as ‘civic slacking’ indicates the anticorruption rationale devolves into an inequality rationale if voter faculties are respected.

<sup>72</sup> ‘Ideally’ a campaign ‘supporter’ would deliver votes via Tammany-Hall style machine politics.

<sup>73</sup> See 18 U.S.C. § 597 (2006) (criminalizing exchanges of votes for money).

<sup>74</sup> 424 U.S. at 48-49 (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”).

*quo* exchanges, can justify regulation, so long as the currency of any *quid* remains wholly in the campaign finance realm. This poses a particular problem for the continued survival of contribution limits given the explicit narrowing of the corruption rationale adopted by *Citizens United*. If the real force of campaign finance – to affect voters through additional speech – is recognized, campaign finance contributions limitations should fall as well.

However, the equality problem creates parallel difficulties for the more liberal treatment of corruption exemplified by *McConnell*. All of the sophisticated political mechanisms targeted by BCRA ultimately do no more than present the electorate with more campaigning (either directly through electioneering ads or indirectly after being funneled through parties). Thus to prohibit specific a campaign practice merely cuts off an avenue by which the electorate may receive additional information (which can, of course, produce corresponding changes in behavior by candidates). For example, when a candidate reacts to the prospective power of electioneering communication and thus adjusts her positions, she is only adjusting her position *because the speech influences the voting decisions of the electorate* (the ‘bribe’ has the form of changing voters’ minds). The only mechanism by which such influences can be understood as ‘corrupting’ is as follows: inequalities in wealth (or, more precisely, inequality in willingness to spend money on campaigning) can be converted into political influence directly upon voters through campaign efforts, and that by responding to the impact of such influence upon voters, candidates are corrupted.

Yet such corruption only occurs if voters themselves are somehow waylaid by campaign finance expenditures, because otherwise such ‘donations’ would be utterly worthless to the candidate (there would be no opportunities for subtle or shadow conversion as with direct bribe-like transfers). Such a complaint about the unfolding of democracy in the presence of money –

necessary to support *McConnell*'s reasoning – does not indict candidates for being directly corrupted by money (which, per *Buckley*, is the extent of the anti-corruption rationale), but rather voices concerns about the impact of disproportionate spending on voters. Thus the harm soft money or electioneering communications wreaks upon politics must indict the inability of voters to operate in a media- and influence-rich environment, a concern directed towards “the nature of democratic politics.”<sup>75</sup>

The equality argument proves problematic for the Court so long as it continues to deploy *Buckley*'s interpretive structure. The Court could, of course, address the equality challenge by showing that direct contributions have harmful effects that are analogous to private bribes. It could argue that sufficiently large contributions may serve as shadow demonstrations of private gain<sup>76</sup> or the future prospect thereof, perhaps contributing to revolving-door politics and private capture of government. More broadly, it could vindicate campaign finance regulation by articulating how money corrupts politics in a manner that operates beyond prospective candidate bribery (as the *McConnell* Court seems to, albeit imperfectly, as described *infra*). It does neither, and thus adds another wrinkle to theoretical problems of campaign finance: if the real concern over corruption is candidate conduct, why permit contribution limits in light of the fact that campaign finance contribution cannot actually operate as bribes? But if the real concern is systemic distortion of politics through wealth (a belief that has evidently remained in some form since *Buckley*, as demonstrated by the survival of the appearance of corruption argument), why so thoroughly limit campaign finance regulation? Ironically, by striking down much of the

---

<sup>75</sup> Strauss, *supra* note 6, at 1370.

<sup>76</sup> Interestingly enough, in a seminal ordinary corruption cases a corrupt official sought a check specifically earmarked for campaign spending. *US v. Evans*, 504 U.S. 255, 258 (1992). The revolving door character between the private and public sectors that some have identified as contaminating American politics reinforces this concern. See Lessig, *supra* note 10.

regulatory apparatus but leaving contribution limitations standing, the Court since *Buckley* has committed to a position in doctrine that it rejects in principle.

#### 4. Is the private market a threat to politics?

The equality problem is merely a particular facet<sup>77</sup> of a deep theoretical challenge that the Court has neglected (or evaded): does the impact of private market forces pose a problem for ‘healthy’ campaign finance and electoral integrity, and if so, how does it have this destructive effect? *Buckley* implies that it cannot, instead affirming that “[d]emocracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues.”<sup>78</sup> *Austin* offers the most direct – albeit questionably developed – assertion that private market forces could threaten electoral integrity;<sup>79</sup> *McConnell* tries to nuance this position with arguments that market forces could pervasively influence candidate conduct. *Citizens United*, of course, swings the pendulum back to the idea that only the most pernicious participation in political ‘markets’ (that is, the sale of political power by officials to private parties through the medium of bribes) justifies campaign finance regulation.

This would appear to be a straightforward if unpleasantly contentious partisan debate, if not for the persistence of the ‘appearance of corruption’ justification and the equality critique, both of which suggest campaign finance is *inevitably* a negotiation of the relationship between

---

<sup>77</sup> Another facet of the market dispute, if money is speech, was pivotal to the early debates regarding the campaign finance regime but has fallen out of vogue. *See, e.g.* J. Skelly Wright, *supra* note 7. The idea that speech cannot occur without money is evoked to defend treatment of the use of money as a speech right, *see Buckley*, 424 U.S. at 16; at 19, n.18, and *McConnell*, 540 U.S. at 250 (Scalia, J., concurring in part and dissenting in part) and some, such as the retired Justice Stevens, insisted that money should not be given the protection of speech automatically, *see, e.g., Nixon*, 538 U.S. at 398, but in general the dispute has migrated onward. Even some who favor robust regulation of spending concede that money is speech. *See, e.g., Fiss, supra* note 71, at 14 (money used to enable speech should have the same status as speech itself).

<sup>78</sup> *Buckley*, 424 U.S. at 49 n.55.

<sup>79</sup> Corporations can be subject to special regulation because otherwise they may “use the resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace.” 494 U.S. at 659 (quoting *MCFL*, 479 U.S. at 257) (internal quotations omitted).

private market forces and democratic governance.<sup>80</sup> While the campaign finance regime is founded in the principle that the touchstone of democracy is the “unfettered interchange of ideas”,<sup>81</sup> and the conservatives have interpreted this to support the proposition that elections should be left a self-regulating “uninhibited marketplace of ideas”,<sup>82</sup> rigorous analysis reveals that *any* regulation of campaign finance comprises intervention into the relationship between private markets and democratic elections. By even permitting contribution limitations to survive, conservatives must grudgingly concede that government regulation of the impact of markets is necessary to protect electoral integrity.<sup>83</sup>

Of course, it has been observed that few are still committed to *Buckley*’s actual contributions/expenditure divide, which may survive only due to *stare decisis*. Even if the tensions of the *Buckley* framework are set aside, however, the Court faces a deeper problem: its unwillingness to acknowledge the intersection of private market inequality and the public equality of voting.<sup>84</sup> Liberals have simply failed to address the bald form of this question. Conservatives, conversely, brush the concern aside by periodically invoking interest group

---

<sup>80</sup> There has been robust interrogation of the Court’s impact on this fundamental question. See Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1398-99 (1994) (observing “*Buckley* replicates *Lochner*” in striking down expenditure limits because such limits deprive some of their ability to legitimately deploy their private sector wealth, and thereby posits the idea that good politics must treat as inviolable the free market; and indeed “*Buckley* is in one sense more striking” than *Lochner* in that it applies this sacred quality of the market to politics rather than merely to employment). In taking such a stance the Court took a position on the nature of politics, and in particular rejected a view of politics founded in what many have identified as republicanism, thereby failing to correct for the possibly deleterious impact of the self-interest that drives market. See generally Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1692 (1984) (hereinafter, Sunstein, *Preferences*); Teachout, *supra* note 52 (applying this concept of virtue to corruption); Lawrence Lessig, *What an Originalist Would Understand “Corruption” to Mean*, 102 CAL. L. REV. 1 (2014). For an alternate consideration of the relationship between politics and markets, see Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998) (arguing that government should seek to prevent oligopolistic partisan domination or excessive incumbent entrenchment).

<sup>81</sup> *Buckley*, 424 U.S. at 14.

<sup>82</sup> *Citizens United*, 558 U.S. at 335.

<sup>83</sup> Of course, some scholars reject such regulation. See Smith, *supra* note 17; Sullivan, *supra* note 6, at 167 (contribution limits should be invalidated, as they do not aid in preventing actual quid pro quo corruption).

<sup>84</sup> See Lessig, *supra* note 80 (offering a specific narrative of how the disparity occurs). Neuborne, *supra* note 5, at 42-48 (spending practices produce enormous and unnecessary inequality in political influence); Overton, *supra* note 10, at 77 (wealth disparities result in disparities of political power).



pluralism – in a democracy, some groups (usually well-organized wedge blocks associated with victorious candidates)<sup>85</sup> are always disproportionately favored.<sup>86</sup> Yet to apply this interpretation simpliciter to campaign finance ignores that, unlike political pluralism, private market influence shapes democracy through the unequal accumulation of money by specific persons (who are nominally equal citizens). As discussed below, the current majority adopts a political philosophy that obviates this concern, yet this suggests unequal wealth in democratic process is either a trivial or non-existent problem – an interpretation at odds with the broader literature on wealth disparities, corruption, and democracy.<sup>87</sup>

#### 5. Can the constitutional and anti-corruption interests be disentangled?

If the failure of the Court to engage with the real question of campaign finance – how unequal private markets and (nominally) equal democratic politics interact – shows the substantive deficiency of campaign finance jurisprudence, this deficiency is matched, and perhaps caused by, a flawed interpretive framework. As discussed *supra*, *Buckley* engendered a test (to which the Court has nominally adhered) that weighs constitutional rights against corruption. However, as the case law has marched on, the Court’s treatment of these concepts has grown increasingly muddled, and the location of the boundary between constitutional rights and the anti-corruption interest is no longer clear.

This state of affairs can be traced to *Buckley* itself, which does a poor job articulating the contours of the anti-corruption and constitutional values it weighs. *Buckley* broadly lionizes the First Amendment in its discussion of constitutional rights, but does not translate this encomium

---

<sup>85</sup> For a description of the operation of this in politics, see generally Sunstein, *Preferences*, *supra* note 80 and Cass R. Sunstein, *Interest Groups in America Public Law*, 38 STAN. L. REV. 29 (1985).

<sup>86</sup> See *Citizens United*, 558 U.S. at 359.

<sup>87</sup> See, e.g., RYAN K. BALOT, *GREED AND INJUSTICE IN CLASSICAL ATHENS* (2001) (describing the use of social convention to manage the presence of inequality in ancient Greece); MICHAEL JOHNSTON, *SYNDROMES OF CORRUPTION: WEALTH, POWER, AND DEMOCRACY* (2005) (describing the manifestation of corruption across a range of democracies).

into clear theory of governance. The Court observes that the electorate is sovereign in a democracy, and must be able to engage in robust speech about politics,<sup>88</sup> but specifies nothing more detailed. Corruption, meanwhile, is conceptualized *ad hoc* midway through the opinion.<sup>89</sup> This allocation of analysis enhances a strength and neglects a lacuna. The First Amendment has a robust tradition of case analysis and legal scholarship,<sup>90</sup> yet *Buckley* fabricates the law of corruption in campaign finance out of hastily sketched intuitions.<sup>91</sup>

These shaky foundations are reflected in later cases, particularly through failing to clearly differentiate the First Amendment interests from the anti-corruption interest in the implementation of the balancing test. In the later cases this blending is almost explicit. *Citizens United*, for example, grudgingly acknowledges that independent expenditures *may* result in representative malfeasance, but states “it is our law and our tradition that more speech, not less, is the governing rule”<sup>92</sup> to justify striking down the regulation at issue. Rather than balance the possible validity of a measure in preventing corruption against a speech interest, the case lets the First Amendment interest overdetermine the analysis: a measure that restricts speech in a certain way *cannot*, by definition, legitimately combat corruption. The liberal approach, meanwhile,

---

<sup>88</sup> 424 U.S. at 14-16.

<sup>89</sup> 424 U.S. at 26-27.

<sup>90</sup> *See, e.g., infra* note 98; *see generally* GEOFFREY R. STONE ET. AL., CONSTITUTIONAL LAW (2009), 1022-1028 (adumbrating the philosophy underlying the free speech doctrine).

<sup>91</sup> Moreover, the law of ‘ordinary’ corruption has been little used to inform the law of campaign finance corruption, though there have been a few forays in the literature. *See generally* George Brown, *Applying Citizens United to Ordinary Corruption* 91 N. D. L. REV. 127 (2016); Lowenstein, *supra* note 59, at 136-40; Eisler, *supra* note 18.

<sup>92</sup> *Citizens United*, 558 U.S. at 361. The full passage shows a sort of plaintive ambivalence:

When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing quid pro quo corruption.

blends the speech and anti-corruption interests explicitly: “the interests the Court has long described as preventing ‘corruption’ or the ‘appearance of corruption’ are more than ordinary factors to be weighed against the constitutional right to political speech. Rather, they are interests rooted in the First Amendment itself. They are rooted in the constitutional effort to create a democracy responsive to the people – a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects.”<sup>93</sup> The intermingling of the two aspects of the test also infiltrates the general treatment of constitutional concepts. Conservatives assert the First Amendment is premised on “mistrust of government”<sup>94</sup>, whereas liberals identify it as validating a regime that “foster[s] a healthy, vibrant political system full of robust discussion and debate.”<sup>95</sup> The very idea of good governance that anti-corruption seeks to defend is contained within the competing understandings of constitutional rights.

### *C. The Real Crisis of Campaign Finance Doctrine: the Nature of Democratic Governance*

Such a ‘bleeding’ together of the First Amendment and corruption interests may be unsurprising, because both protection of political speech and anticorruption measures ultimately serve the same end: facilitation of the electorate’s self-determination.<sup>96</sup> Whether approached

---

<sup>93</sup> *McCutcheon*, 134 S.Ct. at 1468 (Breyer, dissenting); see generally Daniel Lowenstein, *The Root of All Evil is Deeply Rooted*, 18 HOF. L. REV. 301, 340 (1989) (regulation of campaign finance ultimately comes down to differing views of politics, which express in differing views towards “the government’s rights and obligations regarding the political process” – either an obligation to avoid interference with open political participation, or an obligation to smooth out structural differences that may impair “effective participation” by all). See also Fiss, *supra* note 67; Cass Sunstein, *Free Speech Now*, 59 CHI. L. REV. (1992) 255.

<sup>94</sup> *Citizens United*, 558 U.S. at 340.

<sup>95</sup> *Bennett*, 131 S.Ct. at 2830 (Kagan, dissenting). For an analysis of the First Amendment that is a family relationship to this interpretation of the conflict, see Sullivan, *supra* note 6, at 148; 156 (differentiating “egalitarian” (speech rights aid those who would otherwise have faint voices) and “libertarian” treatments of First Amendment rights (speech rights interdict government interference with expression)).

<sup>96</sup> Some disagree that corruption in campaign finance evokes the nature of democracy as does the First Amendment. See Hellman, *supra* note 14, at 1417. However, this point can be challenged on various grounds. Functionally, the factions of the Court have shown a tendency to adjust both their views of corruption and their views of the First Amendment. Theoretically, both the question of corruption and of First Amendment constitutional rights attempt to

from the perspective of corruption or First Amendment rights,<sup>97</sup> the core inquiry of campaign finance considers the impact of government intervention upon citizen autonomy. Anti-corruption legislation tries to prevent disjunction of electoral will with representative action, thereby ensuring that voters' decisions (as translated through representatives) are appropriately realized as government action. The political value of the First Amendment, meanwhile, is to defend expression of thought that, in various ways, manifests political freedom.<sup>98</sup> Subsequently, judicial assessment of campaign finance regulation converges upon one question: does the regulation at issue facilitate political freedom and citizen-actualizing governance?<sup>99</sup> The Court, however, has declined to adopt a unified approach to the question of campaign finance.

The unity of this question shows the *deep* theoretical fragility of the *Buckley* test, which operates on the presumption that the anti-corruption interest and constitutional interests can be

---

coordinate the constituent citizens of a polity and the elected. Normatively, the goal of both is to advance citizen autonomy and representative responsibility.

<sup>97</sup> The First Amendment perspective entails one distinctive doctrinal element through the differing standards of review, but these have evolved into a forum for substantively debating the political questions at hand. *See, e.g., McConnell*, 540 U.S. at 182, 251 (Scalia, J., concurring in part and dissenting in part), 264 (Thomas, J., concurring in part and dissenting in part). Thus, the ostensible clarity provided by standards of review only introduces an additional layer to the same dispute. *See* Hasen, *supra* note 4, at 31 (observing that the *McConnell* majority condoned an antidistortion or equalization rationale for regulation not by directly modifying the balancing test, but by, *inter alia*, “relax[ing] the level of scrutiny applicable to reviewing campaign finance regulation”); Hasen, *supra* note 1, at 617 (the differing standards of review applied to expenditure and contribution divides “stack[] the deck”).

<sup>98</sup> Scholars dispute whether the value of free speech is as a non-instrumental vehicle for self-actualization, or as an instrument for goals such as self-governance. *See* Sunstein, *supra* note 93, at 258-59 (defining the divide between absolutist and reasonable regulation attitudes toward the First Amendment); Fiss, *supra* note 71, at 13 (differentiating between unrestricted speech as a first-order good and as producing better social outcomes). Some argue modern politics requires state intervention to enjoy the full benefit of the First Amendment. *See* OWEN FISS, *THE IRONY OF FREE SPEECH* (1996), at 19, 23 (state action enables full benefits of the freedom of speech); Sunstein, *supra* note 93, at 274 (“[T]he First Amendment...has positive dimensions...of a command to government to take steps to ensure that legal rules according exclusive authority to private persons do not violate the system of free expression.”). Some have observed a paradox in requiring government intervention *in order* to enjoy freedom. *See* Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1131 (1993) (“Managerial structures locate citizens within the constraints of instrumental reason, assuming therefore that citizens are object of regulation, subject to the laws of cause and effect.”). *See also* J.M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 39 DUKE L. J. 375, 382 (1990) (such a governmental role erodes citizen autonomy).

<sup>99</sup> In addition to the intimations of this by the partisan wings of the Court *supra*, scholars have made this point from varying perspectives. *See* Sunstein, *supra* note 93; Fiss, *supra* note 93; Teachout, *supra* note 55 (observing the Constitution contains an anti-corruption principle that should be afforded similar weight). *Cf.* Sullivan, *supra* note 6 (differing ways of interpreting the First Amendment itself reflect differing political visions).

cleanly separated and assessed. *Buckley* itself takes pains to enable this by trying to cabin the definition of corruption as much as possible; but as the sections above demonstrate, the effort experienced progressive failure as the case law evolved. The most fundamental form of this failure has been the ultimate breakdown in the blackletter law of the separation of the anti-corruption and First Amendment interests.

Yet a consolidated consideration of the crises in campaign finance jurisprudence recounted above shows that they all can be most incisively understood as inquiring into democratic theory. The question of the legitimacy of limiting corruption to *quid pro quo*, and the interpretation of that concept, comes down to the level of objectivity and disinterest that should be expected from representatives (that is, to what degree does responsible governance require service to the political good or the entirety of the polity, as opposed to political conduct that serves a particular constituent subset to whom a representative feels partiality?). If ‘appearance of corruption’ alone can justify regulation inquires into whether the state may legitimately manage the electorate’s perception of political integrity to facilitate governance. Whether the concept of corruption in campaign finance should be limited to candidate malfeasance or encompass broader shaping of the electoral environment is a generalization of this question regarding the need for government to intervene in the popular experience of politics. The issue of the relationship between private markets and democratic governance cuts to the thorny question of how the inequalities of the private market and the formal equality of democratic citizenship can be reconciled – a basic challenge to any liberal democratic regime.

Thus the various crises of campaign finance can be traced to the absence in the Court’s reasoning of a sufficiently well-developed view of democracy that can be used to inform blackletter outcomes. That campaign finance jurisprudence inevitably devolves upon this

question poses a tremendous challenge: it demands an idea of good politics.<sup>100</sup> This approach has its attendant danger: any such inquiry into the nature of politics becomes one of “implicit normative baselines”.<sup>101</sup> As many bright minds have observed, there are significant challenges in such an undertaking.<sup>102</sup> Judicial declarations on proper political procedures intrude upon the structuring of democratic politics – seemingly a question that should be left to the polity. Much criticism directed against *Buckley* targets its ham-fisted imposition of political norms, as the Court made determinations out of whole cloth regarding how the polity and its representatives should interact.<sup>103</sup>

Yet the Court’s intervention can be defended as a matter of necessity: once the campaign finance regime was litigated in *Buckley*, the Court had no choice but to take a stand on the nature of politics.<sup>104</sup> To abstain from intervening as a first principle would have abjured the Court’s obligation to protect First Amendment rights; to strike down the entire regime as violating protected constitutional norms would have assumed a stance no less political than any other.

---

<sup>100</sup> For the most incisive treatments of the topic in legal scholarship, see Hellman, *supra* note 14, at 1391 (identifying corruption as derivative from a concept of democracy); Ringhand, *supra* note 14, at 80 (*Buckley* conceals a sort of “democracy-defining dilemma”); Lowenstein, *supra* note 59.

<sup>101</sup> Elhauge, *supra* note 61, at 34.

<sup>102</sup> *See id* at 48-49 (judiciary intervention to prevent interest groups from applying targeted political pressure entails a view of political process); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 31, 39 (2004) (“constitutional law currently lacks a general structure that would properly organize the emerging ‘law of politics.’”); Gerken, *supra* note 13 (observing that recent election law has struggled onward in an individual-rights mode even as it requires a structural interpretation of politics to support it). Some have applied this observation to specifically critique the speech-restricting implications of campaign finance regulation. *See* Sullivan, *supra* note 17, at 680 (“selecting one vision of good government is not generally an acceptable justification for limiting *speech*, as campaign finance limits do.”).

<sup>103</sup> *See, e.g.*, Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 119 (2010) (characterizing the *Buckley* test and its progeny as “in fact a regulatory structure created by the Court”).

<sup>104</sup> *See* Hellman, *supra* note 14, at 1411-12 (describing both vision-of-democracy neutrality reasons that suggest the Court should not define corruption and thus implicitly avoid opining on campaign finance regulation, and “process-protecting” anti-entrenchment reasons to prevent incumbents from overly favoring their own re-election through campaign finance limits).

## II. The Court's Two Views of Democratic Governance

Perhaps impelled by such necessity, the Court has not declined to enter the political thicket in campaign finance. This chapter's central argument is that the partisan battle over campaign finance is best conceived of as a shadow conflict between two distinct theories of politics, of which various crises noted above are merely secondary expressions (distorted, as described in Section IV(A) *infra*, by the contortions required to adhere to *Buckley*'s formal framework). Each case has adopted positions regarding human psychology, the intrinsic tendency towards the abuse of power, and the nature of responsible democracy. This unacknowledged debate has determined the nature of American democracy and the nature of elections.

The remainder of this chapter unpacks the unrecognized patterns of democratic theory in the Court's opinions. This section delves into the recent cases to extract the underlying theories of each wing. This interpretation goes beyond the doctrinal and thematic disputes – *quid pro quo* v. influence and access; candidates as only corrupted by direct donations v. candidates corrupted by systemic donations; governmental regulation as the greatest threat to electoral freedom v. money in politics as the chief ill – to expose the subterranean but determinative political principles.

### A. *The Organicism of the Conservative Wing*

The current conservative majority has clear principles regarding healthy democracy: the “open marketplace of ideas protected by the First Amendment”<sup>105</sup> must operate without

---

<sup>105</sup>*Citizens United* at 558 U.S. at 354, internal citations omitted; *see also id.* at 339 (“The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”); *McConnell*, 540 U.S. at 265 (Thomas, dissenting).

distortive government interference. The bedrock characteristic of a free republic is that “the people have the ultimate influence over elected officials.”<sup>106</sup>

As the vociferous dispute over campaign finance reveals, this freedom can be multifariously interpreted. The conservative wing unwaveringly asserts that political freedom requires minimal interference with voters' ability to receive information: “political speech must prevail against laws that would suppress it, whether by design or inadvertence.”<sup>107</sup> Democracy succeeds when members of the polity can express and receive *as much information as possible*, maximizing the informed autonomy of voters. It is for “the people to judge what is true and what is false.”<sup>108</sup>

In the conservative wing's view, any measure that directly or indirectly restricts speech offends the “individual dignity and choice upon which our political system rests”.<sup>109</sup> As Scalia perhaps most forcefully states, “the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source. If that premise is wrong, our democracy has a much greater problem to overcome than merely the influence of amassed wealth.”<sup>110</sup> Any other position fatally compromises the validity of democracy itself, by paternalistically conceding that the electorate, left alone, will not arrive at the 'right' conclusion. This is related to the conservative faith in the 'marketplace of ideas' as the best<sup>111</sup> path to good governance.<sup>112</sup> In sum, to permit speech

---

<sup>106</sup> *Citizens United*, 558 U.S. at 360.

<sup>107</sup> *Id.* at 340.

<sup>108</sup> *Id.* at 354.

<sup>109</sup> *McCutcheon*, 134 S.Ct. at 1448.

<sup>110</sup> *McConnell*, 540 U.S. at 258-59 (Scalia, dissenting).

<sup>111</sup> This view can be understood as founded in one of two assertions (or in both), with differing meanings of the word ‘best’. The ‘market place of ideas’ may lead to the objectively best outcomes (a utilitarian justification); or the only relevant criterion for successful governance is that the people get what they want (based on a deontological principle of self-determination).

<sup>112</sup> *See, e.g., McConnell*, 540 U.S. at 247 (Thomas, dissenting) (“Apparently, winning in the marketplace of ideas is no longer a sign that the ultimate good has been reached by free trade in ideas, or that the speaker has survived



restrictions undermines the core principle of constitutional jurisprudence: that citizen autonomy is the basis of democracy.

Conservative doctrine flows from this theory. The real threat to democracy in campaign finance comes from any measure that restricts output of speech into the electoral ecosystem. Consequently, straightforward protection of First Amendment rights overdetermines the conservative wing's treatment of campaign finance, including its interpretation of political corruption.<sup>113</sup> Government regulation impairs electoral autonomy, and the most fevered conservative rhetoric suggests that regulation of campaign finance spending tends to anti-democratic or totalitarian outcomes.<sup>114</sup>

The rejection of any vague corruption-via-influence tracks this view. If citizens are informed of politicians' actions and candidates' receipt of funds, their votes will designate 'influence' as undesirable. The wisdom emergent from the electorate's participation in the marketplace of information trumps all other protective mechanisms. If a politician is overly controlled by a donor short of bribery, then the electorate will assess her conduct as failing to accord with the electorate's will and remove the figure through political procedures. The principle that "influence is not avoidable in representative politics" fits well with this reasoning; insofar as wedge group influence is central to democratic practice, it is the responsibility and

---

the best test of truth by having the thought get itself accepted in the competition of the market. It is now evidence of corruption. This conclusion is antithetical to everything for which the First Amendment stands." (internal citations and ellipses omitted).

<sup>113</sup> See, e.g., *id.* at 273-74 (Thomas, dissenting) (rejecting *Austin's* conception of corruption because it is at odds with the First Amendment). See also *supra* note 92 (Kennedy's mingling of First Amendment and corruption rationales, ultimately guided by the First Amendment rationale).

<sup>114</sup> See *id.* at 283 (Thomas, dissenting) ("outright regulation of the press"); *id.* at 263 (Scalia, dissenting) ("The first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech.").

right of the electorate to determine which candidates respond to the right influences and offer the best blend of policies. The conservative approbation<sup>115</sup> of disclosure rules also follows logically: disclosure rules *increase* available information. The conservative view of democracy also explains the specific criticism of enhanced campaign finance regulation (i.e., BCRA) as incumbent protection.<sup>116</sup> Constraining the free flow of speech impairs the electorate's knowledge of the candidates, thereby granting greater electoral advantage to those already in office.

In the conservative view, not only is the collective wisdom of the electorate the best tool of democratic governance, it is the only normatively valid one. Any measure that impairs the electorate's ability to obtain new information to process comprises (systemic) corruption. Candidate malfeasance is, in comparison, a minor annoyance, and typically cleansed when a well-informed electorate votes. Measures that address this comparatively minor annoyance are permissible only where there is *de minimis* impact upon speech.<sup>117</sup>

More generally, the most liberated, human-actualizing politics emerges from the unregulated interaction of voters' voices, intellects, and wills. Democracy suffers when the state – with its capacity to impose physical and financial harm – restricts this interaction<sup>118</sup> and its

---

<sup>115</sup> Excepting, of course, Thomas. *See, e.g. id.* at 275 (Thomas, dissenting). Thomas might be described as a sort of anarcho-organicist; such is his suspicion of government regulation that he believes any such intervention is more threatening than the possibility of corruption.

<sup>116</sup> *Id.* at 248-49 (Scalia, dissenting). *See also Citizens United*, 558 U.S. at 372 (“Governments are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make political speech a crime”).

<sup>117</sup> By *Buckley's* logic, such regulation is only permissible upon direct contribution limits where the only constitutional impact is a relatively minor infringement of associational rights.

<sup>118</sup> Indeed, there is a suspicion of *any* government efforts to define campaign dynamics. In *Bennett*, for example, the Court struck down a state legislative provision that gave the opponents of high-spending candidates matching funds, on the ground that state-entailed ‘speech for speech’ measures burden the party who takes the action that triggers a benefit for the opponent. A similar rationale motivated striking down of the ‘Millionaire’s Amendment’ of BCRA. *Davis v. FEC*, 554 U.S. 724 (2008). These cases suggest that the organicists are not merely motivated by a desire to prevent ‘maximization of speech’ but by a belief that any government intervention will harm the polity. As such the organicists would also be opposed to the scholarly trend (see Sunstein and Fiss as discussed in *supra* note 93) suggesting that the First Amendment might require government involvement to enhance free speech rights.

critical denouement, elections. The Court, as the bulwark against state depredation of personal liberty, must treat any material impairment of the marketplace of information with presumptive skepticism. This position explains the state of the law. While direct contribution limitations have survived (perhaps largely as a function of *stare decisis*), the organicists have steadily chipped away at their breadth so that they provide only a frail and easily circumvented<sup>119</sup> anti-bribery measure.

The conservative wing's position – with its commitment to a 'natural' condition of unfettered elections – can be characterized as organicist. Democracy without governmental interference<sup>120</sup> achieves a natural outcome that reflects the 'right' or 'true' nature of politics and the self-realization of human liberty.

#### *B. The Interventionism of the Liberal Wing*

The liberal view of democracy cannot be so neatly summarized. One persistent thread is less faith in the incorruptibility of the electorate, justifying greater government structuring of campaigns. Thus the liberal treatment of democracy can be designated as 'interventionist'. This interventionism manifests in a number of specific positions: too much money in elections can damage the relationship between elected officials and their constituents; infusions of wealth into campaigns can harm both integrity of officials and the electorate's faith in the political system; and citizens should, through the medium of their elected representatives, be permitted to fix these problems. Underlying this is a poorly articulated belief that every aspect of the political system – including the reaction of voters to speech<sup>121</sup> – can be tainted by unequal private influence from

---

<sup>119</sup> See Kang, *supra* note 3.

<sup>120</sup> A question largely unanswered by the organicists is the fact that elections are inevitably structured – through the drawing of districts, the use of quotidian voting procedures, through the judicial protection of the guarantee regarding one person one vote. See generally, e.g., Issacharoff and Pildes, *supra* note 80.

<sup>121</sup> *McCutcheon*, 134 S.Ct. at 1467 (Breyer, dissenting); see also *Citizens United*, 558 U.S. at 469 (Stevens, dissenting) for a description of the crowd-out effect of electioneering communication.

the market. As with the organicists, the threat of campaign finance corruption for the interventionists consists of something far more subtle and potentially malign than bribery or undue direct influence upon candidates. Unlike the organicist fear of government, the interventionist conception of corruption emphasizes the political harm caused by highly inequitably distributed wealth.

The interventionists posit that healthy democracy requires balanced political foundations. This shapes their broader treatment of the First Amendment, as the *McCutcheon* dissent expresses most plaintively:

[W]e can and should understand campaign finance laws as resting upon a broader and more significant constitutional rationale than the plurality's limited definition of "corruption" suggests. We should see these laws as seeking in significant part to strengthen, rather than weaken, the First Amendment. To say this is not to deny the potential for conflict between (1) the need to permit contributions that pay for the diffusion of ideas, and (2) the need to limit payments in order to help maintain the integrity of the electoral process. But that conflict takes place within, not outside, the First Amendment's boundaries.<sup>122</sup>

Unfortunately, the liberal wing does little to excavate the true roots of this holistic conception of corruption. This passage reveals that the interventionists mingle corruption and First Amendment rights in performing the *Buckley* balancing test (as do the organicists, as discussed *supra*). But, because the interventionists do not rigorously articulate this relationship between the First Amendment and corruption, the blackletter law alone must provide evidence of how the two concepts interact.

The interventionist anxiety towards corruption as a structural ill illuminates two central points of contention with the organicists: i) can candidates be corrupted by relationships less unequivocally bribe-like than *quid pro quo* exchanges; and ii) does money in politics somehow corrupt the electorate, the electorate's relationship with the polity, or, generally, democratic process? The first of these comprises the most granular dispute with the organicists: what level

---

<sup>122</sup> *McCutcheon*, 134 S.Ct. at 1468 (Breyer, dissenting).

of direct or oblique contribution of money might justify government regulation?<sup>123</sup> Organicists hold that minimally regulated elections serve to adequately discipline candidates, whereas the interventionists assert a badly managed political environment permits destructive peddling of ‘influence’ and ‘access’ by officials. The underlying question is if the electorate, left to its own devices, is the best entity for policing candidates' conduct.

This question subsides upon the second interventionist concern, which reveals the true theoretical cleavage between the two wings: can the introduction of large amounts of campaign spending (particularly reflecting unequal wealth) harm the electorate itself? Rejecting the organicist principle of impeccable popular autonomy, the interventionists suggest that doubt and malaise can impair such popular autonomy. One goal of campaign finance regulation is to “preserv[e] the integrity of the electoral process, prevent[] corruption, [and] sustain[] the active alert responsibility of the individual citizen in a democracy for the wise conduct of government.”<sup>124</sup> The interventionists never clearly describe the epidemiology of such harm to electoral life (or precisely how much money is necessary to have such a detrimental effect), but their position can be pieced together. When “the corrosive and distorting effects of immense aggregations of wealth...that have little or no correlation to the public’s support for...political ideas”<sup>125</sup> strongly affect electoral speech, the “chain of communication between the people and their representatives” is broken, “the essential speech-to-government-action tie” is derailed, and “the link between public opinion and governmental action” is destroyed.<sup>126</sup> The excessive infusion of spending into campaigns, even if the form of such infiltration is not discrete, illicit

---

<sup>123</sup> See *Citizens United*, 558 U.S. at 450 (Stevens, dissenting) (quoting *McConnell* which in turn cites *Shrink Missouri* to describe the threat of the ability of large donors to “call the tune” of politics).

<sup>124</sup> *Id.* at 440 (Stevens, dissenting) (internal alterations omitted).

<sup>125</sup> *Id.* at 440 (Stevens, dissenting).

<sup>126</sup> *McCutcheon*, 134 S.Ct. at 1467 (Breyer, dissenting); see also *Citizens United*, 558 U.S. at 469-72 (negative impacts for morale of electorate when corporations dominate media and speech related to politics).

public-for-private trades, disrupts the responsiveness of politicians to their constituents and undercuts the ability of constituents to shape their representatives' actions.<sup>127</sup> The *appearance* of the ability of money to disrupt the relationship further exacerbates the impact: a “cynical public can lose interest in political participation altogether”.<sup>128</sup> Once the public perceives that money has undermined democratic responsiveness, one corrosive effect of excessive campaign expenditure has taken its toll.

Because money can so disrupt the electoral ecosystem,<sup>129</sup> the interventionists are relatively lenient in condoning campaign finance regulation with a reasonable anti-corruption purpose. As an aspect of self-governance, the electorate – through Congress – must be able to exercise its “power of self-protection”<sup>130</sup>. When the Court strikes down campaign finance regulation measures that comport with fair democratic practice, it “cripple[s] the ability of ordinary citizens, Congress, and the States to adopt even limited measures to protect against corporate domination of the electoral process”<sup>131</sup> and presumably other undue financial interference with the political process. As discussed *infra*, this manifests in the interventionist's

---

<sup>127</sup> Per the idea that all campaign regulation addresses equality, see Section I(B)(iii) *supra*, this position encounters a sort of first-order problem. Speech in the electoral ecosystem must affect *voters*, and the interventionists should offer a specific theory of how certain levels and types of speech can induce candidates to stop caring about convincing voters and voters to stop caring about electing the right politicians. The interventionists also must engage the organicist argument that voters will simply kick out or not elect in the first place any politician they believe to be excessively 'in the pocket' of unpopular interests. Lessig's offers one such explanation, see Section IV(C) *infra*, in that candidates come to depend on the wrong types of influences before most voters even participate in the decision-making process.

<sup>128</sup> *McCutcheon*, 134 S.Ct. at 1468 (Breyer, dissenting); *but see McConnell*, 540 U.S. at 260 (Scalia, dissenting) (denigrating the actual threat of the ‘appearance’ of corruption).

<sup>129</sup> This marks the interventionists as allies of scholars who believe government intervention can aid realization of First Amendment goals. See discussion of Sunstein and Fiss, *supra* note 93. This also may evolve into a view that mass democracy requires certain types of governmental intervention. For a discussion of how mass structures changes democratic process, see *generally, e.g.*, MARTY COHEN ET. AL, *THE PARTY DECIDES* (2008) at 13, 232, 278 (describing how ‘invisible primaries’ consisting of elites determine democratic process); ROBERT A. DAHL, *ON DEMOCRACY* (2000) at 113 (identifying “bargaining among political and bureaucratic elites” as a critical and often surreptitious part of the political process); CHARLES LINDBLOM, *POLITICS AND MARKETS* (1977) (a classic text on how corporate powers shape politics). For a broad defense of government intervention in decision-making, see CASS SUNSTEIN AND RICHARD THALER, *NUDGE* (2009); CASS SUNSTEIN, *WHY NUDGE* (2014).

<sup>130</sup> *McConnell*, 540 U.S. at 224.

<sup>131</sup> *Citizens United*, 558 U.S. at 474 (Stevens, dissenting).

default tone towards Congress – trusting, empathetic, and willing to presume good faith in legislative efforts.

While the interventionist position does not reflect a single guiding principle – contrary to the organicists' faith in the ineluctable, unconditional wisdom of the electorate – it must subside on a view of the relationship between private wealth and politics. As discussed *supra*, actual restriction of campaign finance expenditures might devolve upon concerns regarding inequality. The interventionists suggest that the true nature of the corrosive effect of wealth in campaigns is to upset the parity of constituent impact that should underlie the constituent-politician relationship. The 'broken chain' of communication that corruption causes is at root a deformation of the chain rather than a breaking of it. Candidates necessarily remain beholden to *some* set of voters; the question is if the determinative level of support comes from a political process that adequately expresses equal citizenship, or if unequal wealth excessively deforms the realization of popular political will.<sup>132</sup> This deformation occurs when differing ability to financially support campaigns evolves into differing level of power over candidates and drastically heightened ability to broadcast media to voters. These powers spring from the ability to convert private economic power (where inequality is not merely tolerated, but a fundamental feature of the system) into political power (where equality of citizens is a baseline principle). The need to restrain such unequal private influence upon public life engenders the definitive policy characteristic of the interventionist approach: a willingness to accept far more intrusive government regulation of campaign financing. As discussed *infra*, whether this willingness to accept regulation comprises objectionable paternalism depends upon the baseline assumptions about the characteristics of political actors.

---

<sup>132</sup> Such intervention of money into the procedure is the basis of the 'Lesterland' hypothetical. See Lessig *supra* note 80.

Broadly speaking, the interventionists suggest that the electorate can only realize its democratic potential under certain conditions, and allows the government to artificially nurture such conditions. Where legislatures enact campaign finance regulations that fairly balance First Amendment liberties with prevention of private market distortion – both interests that ultimately serve to maximize citizen autonomy – the interventionists recognize the regulations facilitate good democratic practice and permit them to survive.<sup>133</sup>

Interestingly, there is one point of near-consensus<sup>134</sup> between the two wings: disclosure requirements enhance democracy. For the organicists, unlike conduct that controls speech, disclosure *increases* the amount of information available to the electorate, and thereby facilitates sovereign political choice. From an interventionist perspective, it may provide the additional benefits of discouraging distortive expenditures (as the recipients will fear appearing corrupt) and encouraging the electorate to contemplate the impact of spending upon electoral conduct.

### III. The Deep Patterns of Campaign Finance

Each wing appears to have made foundational normative commitments. Yet an informed review of the opinions indicates that each wing's political principles (and subsequently their doctrinal treatments of campaign finance) subside upon descriptive assumptions regarding political actors. The true origin of the partisan dispute is the divergence between the wings on these cognitive and behavioral attributes.

---

<sup>133</sup> This attempt to balance manifested most clearly in *McConnell*, where the Court permitted much wealth-regulating regulation, but deemed some insufficient to justify its First Amendment burden. *See McConnell* 540 U.S. at 216-17 (invalidating the provision described *supra* note 42).

<sup>134</sup> Thomas, of course, rejects even disclosure regulations as a threat to liberty. *See supra* note 115.



*A. The Electorate: Detached, Autonomous, and Calculating v. Emotional, Cognitively Bounded, and Reactive*

The organicists posit the electorate has impeccable judgment when presented with information. “The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government.”<sup>135</sup> Scalia's dissent in *McConnell* provides the seminal defense of these assumptions: “The premise of the First Amendment is that the American people are...fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source...Given the premises of democracy, there is no such thing as *too much* speech.”<sup>136</sup> Underlying this is an assumption about how voters *think*: it is posited (perhaps to sustain the validity of democracy) they are detached, cool, rational, and have a tremendous capacity to process and contextualize information from any source.<sup>137</sup> This asserts – in practice or effect<sup>138</sup> – that voters have extensive cognitive resources, and that prior to the act of voting, citizens critically sift and process the information they have received over the course of a campaign, including information that may be biased, vituperative, or highly partisan.

---

<sup>135</sup> *Citizens United*, 558 U.S. at 339.

<sup>136</sup> *McConnell*, 540 U.S. at 259 (Scalia, dissenting). This position is at odds with a certain aspect of *Bennett*, insofar as the law the organicists struck down in *Bennett* would have produced more, albeit government-sponsored speech. However, *Bennett* is best understood as a decision motivated by *distrust* of government (and thus more strongly motivated by prong III(D) *infra*), and, doctrinally, by the need to interdict *any* chilling of speech by private actors. See *Bennett*, 131 S.Ct. at 2824. However, a core principle of the organicists – the ‘heroic’ character of the voters – should suggest that additional speech, whether caused by matching funds or not, should not impair voters; indeed, if disclosed, they should manage it as easily as anything else in the flood of information. Thus *Bennett* shows a tension in the balancing of considerations by the organicists, and may show the strength of the anti-government animus that animates it. However the general characterization of III(E) *infra* remains: organicists believe democracy best operates *without* governmental intervention.

<sup>137</sup> See *McConnell* 540 U.S. at 261 (Scalia, dissenting), (if voters don't like attack ads, they will just vote against candidates who rely on them); *McConnell* 540 U.S. at 274 (Thomas, dissenting) (the only impact of additional spending is to “convince voters to select certain candidates over others”)

<sup>138</sup> It is possible that superior outcomes from unregulated voting is a marketplace effect, a function of a sort of collective invisible hand rather than voters as individuals being rational. But the text alone belies this more cynical interpretation.

The interventionist wing adopts a far more circumspect perspective voters' cognitive faculties. They directly articulate this through two positions: that the public will become 'cynical' regarding the democratic process due to the influx of money and the appearance of corruption<sup>139</sup>; and that voters can be negatively impacted by speech that has a malign origin<sup>140</sup> or that 'distort[ively]' reflects inequitable sourcing.<sup>141</sup> Underlying this belief that voters can become jaded, misled, or disoriented by excessive or toxic speech is a presumption regarding the cognitive fragility of voters, though the interventionists directly allude to this only once.<sup>142</sup> Yet the very idea that the electorate might not be able to adequately parse all information it receives, and that thus there must be some regulatory management of this information, reveals a vastly different posture from the organicists.

This split leads to divergent interpretations of how money can 'corrupt' an election, and leaks into each wing's interpretation of the First Amendment. It also has blackletter ramifications: the organicist position entails that disclosure provides sufficient protection against corruption, because it provides voters with the necessary information to dispassionately assess candidates and the influences that might shape them. Conversely the interventionists accept that the electorate's vulnerability to 'bad' speech provides a compelling justification for regulation.

The dispute regarding voter cognitive capacity has especially dramatic doctrinal implications for regulations that limit application of money *directly to the electorate*. In the context of electioneering communication (the issue at stake in *Citizens United*), if the electorate parses all information without error, no amount of speech can ultimately harm political

---

<sup>139</sup> *McCutcheon*, 134 S.Ct. at 1468 (Breyer, dissenting); *Citizens United*, 558 U.S. at 450 (Stevens, dissenting) (quoting *McConnell*, 540 U.S. at 144; *Shrink Missouri*, 528 U.S. at 390).

<sup>140</sup> *Citizens United*, 558 U.S. at 424 (Stevens, dissenting); see also Hasen, *supra* note 1, at 605.

<sup>141</sup> See *Citizens United*, 558 U.S. at 437 (Stevens, dissenting); see also *id.* at 470 (disproportionate spending may result in the "drowning of voices"). Cf. Ortiz, *supra* note 6 (such effects require 'slacker' voters).

<sup>142</sup> See *McConnell*, 540 U.S. at 127 (effective campaign ads masquerade as issue ads, much like in product advertisement).

outcomes. The electorate simply integrates all information – content of speech as well as its source, including the impact of speech upon candidates – into their political calculus and makes the ‘right’ decision. However, for the interventionists, speech of the wrong type or from the wrong sources either overwhelms the electorate with unhelpful information or produces popular disenchantment with the political process.

The assertion of voters’ cognitive fragility also allows the interventionists to surmount the claim that anti-corruption inevitably serves an equality rationale. If voters suffer alienation and a sense of disenfranchisement when they conclude that campaign speech is dominated by massive private expenditures, they *can* be qualitatively harmed by the ‘wrong’ type of speech. Massive campaign expenditures can wholesale taint the electoral environment, painting elections – events that should be a shared public endeavor – as vicious battles by private forces for governmental control.<sup>143</sup> Through this process, private sector power can harmfully infiltrate political life in a manner distinct from bribery. This is not attributable to inequality, because the very mechanism by which such distortion occurs – increasing cynicism due to an atmosphere of massive spending, control of public discourse by debasing privately-funded media – could not be ‘cured’ by rebalanced spending.<sup>144</sup> Thus, if the electorate possesses certain types of cognitive fragility, the private domination of political discourse may be irreducibly corrupting. For

---

<sup>143</sup> Underlying this is a complex foundational question over democracy’s character. Very briefly stated, the debate is between those, including interest group pluralists, who believe democracy is a battle by various groups for control of government. For a seminal defense of this view, see IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* (2006). For an application of this approach to the campaign finance context, see Bruce Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 122 (1995). Broadly speaking this approach would accept the inevitability of interest group pluralism. Another approach (associated with a republican tradition) interprets democratic process as manifesting a union of public will, manifesting through discourse and creating some sort of unified body politic. See, e.g., Jürgen Habermas, *Three Normative Models of Democracy*, 1 CONSTITUTIONS 1 (1994); RONALD DWORKIN, *SOVEREIGN VIRTUE* (2000) at 357 (describing a vision of “partnership democracy”). That the interventionists are concerned that the electorate will be alienated through the means described herein suggests sympathy with the latter view.

<sup>144</sup> Cf. Strauss, *supra* note 6, at 1371 (proposing that corruption is really about equality, in that it could be fixed by rebalancing of campaign contribution dollars).

organicists, of course, this is an alien argument, as the staunch wisdom of the electorate brushes aside all such concerns.

*B. Candidates and Parties: Passionate and Pliable v. Calculating and Savvy*

The two factions likewise dispute the characteristics of professional political actors. The organicists perceive candidates' responsiveness to campaign support as inevitable, but neither uniquely problematic nor reasonably curable. Conversely the interventionists see politicians as willing to undertake sophisticated, calculating machinations to exploit campaign financing and circumvent fair democratic practice.

The organicists more or less concede the validity of interest group pluralism, subsequently exonerating candidate responsiveness to constituent pressure. "Favoritism and influence are not avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies."<sup>145</sup> Candidates (who later metamorphose into officials) are necessarily inclined to favor certain positions and constituents, and (non-*quid pro quo*) financial support is no different from any other sort of support (including votes). The pliability of candidates to the will of donors is no different – or at least creates no distinctive problems justifying additional regulation – than the ability of wedge interest groups to mobilize blocks of voters. Should the electorate deem a candidate to be 'in the pocket' of bad influences, it will express its disapproval at the ballot box. Other candidates, witnessing the political consequences of accepting support from a disfavored source, will avoid doing so. There is little threat, meanwhile, that candidates will fall sway to the more oblique infiltration of money. The

---

<sup>145</sup> *Citizens United*, 558 U.S. at 359; see also *McConnell* 450 U.S. at 259 (Scalia, dissenting) ("It cannot be denied...[an] officeholder will tend to favor the same causes as those who support him (which is usually *why* they supported him) That is the nature of politics – if not indeed human nature...").

organicists suggest that candidates possess a sort of naiveté in that they are unlikely to be swayed by soft money or independent expenditures, as the mechanisms by which these can benefit or influence candidates are insufficiently direct.<sup>146</sup> As candidates do not have the sophistication or foresight to express gratitude for such support, it cannot corrupt them.

The interventionists instead see candidates, and their broader partisan apparatuses, as savvy, manipulative, and usually willing to take any action to achieve election. Candidates cunningly respond to campaign finance restrictions by “test[ing] the limits of the current law.”<sup>147</sup> The *McConnell* majority opinion details this trend with regards to soft money and electioneering ads, concluding that professional politicians adeptly devise new strategies for campaign expenditures. With regards to soft money, “[i]f the history of campaign finance regulation...proves anything, it is that political parties are extraordinarily flexible in adapting to new restrictions on their fundraising ability”.<sup>148</sup> With regards to electioneering communication, candidates will explicitly obey the letter while defying the spirit of campaign finance laws, using “wink[s] or nod[s]” or “request[s] or suggestion[s]” to secure formally non-coordinated expenditures.<sup>149</sup> Aggressive regulation is a necessary antidote.

This divide between the organicists and interventionists dovetails with their respective views on the electorate. The organicists perceive the electorate as the inviolable first-mover of politics, and the candidates as the passive entity that responds to their demands and wishes. The entry of money into the political system poses no problem from either end: campaign financing cannot impact the ultimate legitimacy of the electoral process, and its influence upon candidates

---

<sup>146</sup> *McConnell*, 450 U.S. at 269 (Thomas, dissenting) (“clumsy method”); *id.* at 290 (Kennedy, dissenting) (without *quids* there can be no corruption).

<sup>147</sup> *McConnell*, 450 U.S. at 144. *See also Bennett*, 131 S.Ct. at 2841 (Kagan, dissenting) (“When private contributions fuel the political system, candidates may make corrupt bargains to gain the money needed to win election.”).

<sup>148</sup> *McConnell*, 540 U.S. at 173.

<sup>149</sup> *Id.* at 221-222.

does no more than instantiate the partiality of politicians that is their essential attribute.

Conversely, interventionists perceive the candidates as seeking to manipulate the polity and interfere with democratic procedure to obtain power through the use of money, and an electorate whose relationship to politics can be tainted by such infusions of cash.

This attitude again shapes the doctrinal stances of each wing. If candidates cannot help but be influenced by those who favor them – including by those who donate money – it would offend democratic process to try to regulate away such influence, so long as it does not descend to de facto bribery. Thus, for example, the organicist majority in *McCutcheon* strikes down the aggregate limits because there is insufficient ability to convert aggregate capped donations among many candidates into direct control over a political figure. Contrarily, interventionists perceive candidates as willing to make political compromises to obtain additional campaign support and covertly defiant of any popular desire to constrain behavior advantageous to campaigning. This validates a regulatory regime that marginalizes financial influence and justifies the anti-circumvention measures exemplified by BCRA.

*C. Donors: Engaged, Responsible Citizens v. Manipulative, Influence-peddling Elites*

Each faction has corresponding perceptions of donors. Organicists characterize donors as innocent<sup>150</sup> participants in the democratic political system.<sup>151</sup> Like voters,<sup>152</sup> they wish to see candidates who agree with their positions elected. This logic operates through both sides of the system. Donors support specific candidates because those candidates have positions that donors

---

<sup>150</sup> Interestingly, the most extreme organicist, Thomas, objects to disclosure on the grounds that it might facilitate the *mistreatment* of donors for supporting unpopular causes; they are a prospectively oppressed class in his view. *See supra* note 115.

<sup>151</sup> *See generally* *McCutcheon*, 134 S.Ct. at 1448-49 (rejecting a defence of aggregate limits that argues donors may merely make smaller donations to a larger number of candidates as “impos[ing] a special burden on broader participation in the democratic process”, and thereby implying that donation to candidates is a fundamentally democratic act. *Buckley* suggests this as well in identifying associational rights affiliated with donation).

<sup>152</sup> Strauss, *supra* note 6, at 1372-73, observes that dollars are like inferior (i.e., less determinative) votes.

prefer; candidates appear receptive to donors' wishes because the donors who support them tend to have aligned policy preferences.<sup>153</sup> Donations are thus an expression of political support, rather than the bending of the candidates' wills through extra-political (i.e., financial) power.<sup>154</sup> Donors are, effectively, particularly avid voters. Such citizens' conduct is not merely necessarily tolerable due to the protections of the First Amendment, but sympathetic and appropriate as the democratic expression of political voice. Insofar as donors might ever attempt to illicitly control politics, anti-bribery laws serve as a sufficient deterrent.<sup>155</sup>

Conversely, interventionists identify disproportionately high-spending donors as a fundamental threat to democracy, willing to use any feasible mechanism to influence candidates and representatives.<sup>156</sup> The *McConnell* opinion extensively documents such practices,<sup>157</sup> suggesting that donors are part of the elite political apparatus that circumvents campaign finance regulation.<sup>158</sup> Donors are the collusive partners of candidates; whereas candidates wish to enjoy officeholding, donors desire power over policy. Donors convert their private wealth into electoral

---

<sup>153</sup> See *Citizens United*, 558 U.S. at 359 (a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors); *McConnell*, 540 U.S. at 259 (Scalia, dissenting) (“corporate (like noncorporate) allies will have greater access to the officeholder, and that he will tend to favor the same causes as those who support him (which is usually *why* they supported him)”). See also *id.* at 271 (arguing that the tendency of major soft-money donors to give money to both parties reflects the fact that parties reflect diverse positions, and donors are likely to share some positions from each party, and that this should be taken as a sign of pre-existing support rather than any attempt to exert undue influence).

<sup>154</sup> *McCutcheon*, 134 S.Ct. at 1453-54 serves as a case study for this view: the organicist majority deems it “implausible” that a donor would undertake the sophisticated steps necessary to get around by aggregate contribution limits, because “it is hard to believe that a rational actor would engage in such machinations.”

<sup>155</sup> *McConnell*, 540 U.S. at 258 (Scalia dissenting).

<sup>156</sup> That wealthier citizens are more politically active, and exert disproportionate political influence, is supported by the social science literature. For a summary and review of the literature, see, Benjamin I. Page, Larry M. Bartels, and Martin Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSP. ON POLITICS 51 (2013).

<sup>157</sup> *Id.* at 124-125, 130 (documenting such practices with regards to soft money); 129 (with regards to issue ads). See also *McCutcheon*, 134 S.Ct. at 1469 (Breyer, dissenting) (characterizing the Congressional report underlying BCRA as “show[ing], in detail...the web of relationships and understandings among parties, candidates, and large donors that underlies privileged access and influence”, and providing further testimonial specifics).

<sup>158</sup> *McConnell*, 540 U.S. at 144.

influence and trade it – through surreptitious or oblique means<sup>159</sup> – to candidates, who reciprocate by granting donors indirect policy-making power. This presumes that the donors targeted by regulation are a plutocratic class<sup>160</sup> with views potentially at odds with popular views and interests.

The two wings' views on donors conform to their broader interpretations of democratic process. By the organicist view, donors pursue an electoral strategy<sup>161</sup> of spending money to see their favored candidates elected; the donors prefer these candidates for naturally holding policies that the donors prefer. The only benefit of this money, of course, is to try to persuade voters to select the preferred candidate – yet this itself provides additional insulation from any charge of corruption, for the incorruptibility of voters ensures such expenditures cannot harm democracy.<sup>162</sup> The interventionists fear that major donors will pursue a far more Machiavellian legislative strategy of attempting to gain sway over candidates, happily selling political favors to gain office. Such transactions comprise a first order of corruption. Yet another, more pervasive form of corruption occurs when major donors, who are inevitably wealthy elites, unnaturally shift electoral discourse by flooding campaigns with their views, thereby alienating and confusing voters and polluting the political environment.

---

<sup>159</sup> See *id.* at 222.

<sup>160</sup> See Overton, *supra* note 10; see also, e.g., *McCutcheon* 134 S.Ct. at 1472 (Breyer, dissenting) (describing various means by which the professional political apparatus can circumvent direct election limits).

<sup>161</sup> See Hasen, *supra* note 1, at 605-610.

<sup>162</sup> The synthesis of this position is advanced, with somewhat awkward phrasing, by *Citizens United*, 558 U.S. at 360: “The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse to take part in democratic governance because of additional political speech made by a corporation or any other speaker.”



*D. Standing Government: Untrustworthy, Power-hungry, and Incumbent-protecting v. the Reasonable Expression of Popular Will*

Each faction, therefore, has an internally coherent view of how voters, candidates, and donors behave. Paradoxically, the level of trust accorded to politicians by each faction flips once the candidates are elected. For the organicists, Congress is of suspect integrity; the interventionists depict Congress's campaign finance regulatory efforts as thoughtful and balanced.

*McCutcheon* summarizes the organicist belief that legislators will manipulate electoral practice to maintain power: “those who govern should be the *last* people to help decide who *should* govern.”<sup>163</sup> This position manifests itself in *Citizens United*,<sup>164</sup> and undergirds the vociferous *McConnell* dissents.<sup>165</sup> Indeed, the ‘corruption’ (as a broader concept of political degradation or the violation of just procedure) that concerns the organicists is the corruption of democratic practice by Congressional self-dealing. Congress stands in an adversarial relationship with the electorate, machinating to prevent fully informed electoral choice by choking off speech from challengers. Steps that reduce campaign speech and thereby impair voter decision-making, rather than influence through campaign finance donations, is the real threat to good governance.

Interventionists instead describe Congress as sensibly legislating to maintain democratic integrity.<sup>166</sup> The default interventionist attitude is deference to Congressional “wisdom and

---

<sup>163</sup> *McCutcheon*, 134 S. Ct. at 1441-42, emphasis in original. Other cases, such as *Bennett*, suggest a similar suspicion of attempts by legislatures (including at the state level) to set the conditions for elections; see *supra* note 118.

<sup>164</sup> *Citizens United*, 558 U.S. at 372: “Those choices and assessments [regarding the benefit or validity of particular speech] are not for the Government to make.” See also generally *id.* at 480 (Thomas, concurring in part and dissenting in part)(deeply suspect of *any* government regulation).

<sup>165</sup> *McConnell*, 540 U.S. at 248; at 263 (Scalia, dissenting) (“this legislation prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice”); at 18-19 (“The first instinct of power is the retention of power”); *id.* at 286 (Thomas, dissenting) (“The press now operates at the whim of Congress”); *id.* at 288 (Kennedy, dissenting) (Congress cannot be trusted “to moderate its own rules for suppression of speech”).

<sup>166</sup> *McConnell*, 540 U.S. at 224 (identifying that it is critical that the electorate be able to legislate “self-protection”).

experience”.<sup>167</sup> This tone pervades the majority's affirmation of most of BCRA, as the *McConnell* Court characterizes Congressional legislation as “a careful legislative adjustment of federal election law”<sup>168</sup> and gives credence to Congressional findings.<sup>169</sup> It further manifests in procedural reasoning, as the interventionists apply a more lenient standard of review to contribution limits in recognition of Congress's “particular expertise” in regulation.<sup>170</sup> (In contrast, the organicists criticize any such easing of the standard of review.)<sup>171</sup> More generally, the interventionists perceive Congress as the *expression* of popular will, perhaps even a virtuous distillation of it.<sup>172</sup> Congress is not merely an ally of the electorate; it is its chosen champion, including for the purposes (within constitutional bounds) of defining democratic procedure.<sup>173</sup>

Though these positions match up with the blackletter positions and political predilections of each wing, they create internal inconsistencies. In accepting the innocence of candidates, the organicists reject the need for heavy regulation; yet once these candidates become Congresspersons, their ruthless desire to retain power threatens democracy.<sup>174</sup> While the interventionists see professional politicians as deviously self-serving in the electoral context, once these professional politicians become Congresspersons, they are trusted as protectors of democracy. It does not require a subtle political mind to realize that the same motivations (a

---

<sup>167</sup> *Citizens United*, 558 U.S. at 462 (Stevens, dissenting) (quoting *Col. Repub. Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996)).

<sup>168</sup> *McConnell*, 540 U.S. at 116; *see also id.* at 188 (deferring to Congress’s practical judgments); 207-8 (deferring to Congress’s incremental legislative response to soft money).

<sup>169</sup> *Id.* at 129 (giving general credence to Congressional committee reports).

<sup>170</sup> *Id.* at 137.

<sup>171</sup> *Id.* at 251 (Scalia, dissenting) (criticizing easing the standard review regarding speech).

<sup>172</sup> The interventionists therefore seem to commit to some sort of theory regarding the virtuous nature of Congress, or the superiority of collective decision-making. That Congress may be such an organ has been a long-standing question of scholarship. *See generally* James A. Gardner, *Madison’s Hope: Virtue, Self-Interest, and the Design of Electoral Systems*, 86 IOWA L. REV. 87, 122-23 (2000) (observing in the Madisonian design of Congress hoped to emphasize virtue over self-interest).

<sup>173</sup> *See McConnell*, 540 U.S. at 205 (observing constitutional protections are most vital in the context of political campaigns).

<sup>174</sup> *See supra* notes 114 and 116 (describing organicist concerns about incumbent protection and the instinct to retain power); *see generally* Issacharoff and Pildes, *supra* note 80.

desire to hold power) and structural actors (parties and the professional political class) continue to have sway once these same individuals have assumed office. Either the members of Congress undergo a near-mystical transformation (for better or worse) when they assume power, or the collective procedures of Congress somehow transmute interests and characters of politicians. While the organicists and interventionists diverge in their substantive views, there is a structural parallel that both treat political actors pre- and post-election with paradoxical inconsistency.

*E. Democracy Itself: A 'Natural' Equilibrium v. a Constructed Electoral Procedure*

The analysis above reveals divergent views regarding the relevant characteristics of political actors. These characteristics point to the contrasting visions of democracy that underlie the competing treatments of campaign finance law.

One view, advanced by the organicists, indicates there is a 'natural' or 'pure' condition of democracy when constituents experience minimal government interference in the context of elections. The "open marketplace of ideas" can only function when it operates "without government interference".<sup>175</sup> The trust of the electorate's decision-making capacity and the natural responsiveness of candidates to popular influences provide the positive undergirding of this view of healthy democracy, while a suspicion of Congress, the looming risk of oppression, and the disastrous consequences of reducing speech discourages regulation. Unnecessary regulation "deprive[s the electorate] of information, knowledge and opinion vital to its functioning."<sup>176</sup> Voters should be left to their own devices.

The interventionists do not privilege such a vision of pristinely self-regulating democracy. Like the organicists, they identify a causal relationship between speech, voting, and

---

<sup>175</sup> *Citizens United*, 558 U.S. at 354 (citations omitted).

<sup>176</sup> *Id.*

governmental action,<sup>177</sup> but one that can be irreparably harmed<sup>178</sup> by speech paid for, or emanating from, the ‘wrong’ sources. Consequently the interventionists undertake a (poorly defined) project of protecting “political integrity.”<sup>179</sup> Though the idea is never well-articulated, interventionist doctrinal outcomes provide some indication of how such integrity can be harmed. The conversion of money into campaign efforts can lead to the ‘wrong’ electoral outcomes (implying that the electorate must be vulnerable to error by speech), and candidates’ ambition is a major source of this threat, as they will defy the spirit of the law to seek additional and distortive campaign resources. Maintaining political integrity in the face of these malign forces requires substantial trust of the regulatory apparatus. Judging the interaction of this complex interplay requires a nuanced perspective. Unlike the organicists, interventionists do not advance a ‘pure’ theory of democracy. They observe corruption “operates along a spectrum”<sup>180</sup>, a conclusion the organicists, at least in doctrinal practice, reject.<sup>181</sup> Correspondingly, the interventionists grant more credence to Congressional efforts to address “grateful[ness]”<sup>182</sup> or “ingratiation”<sup>183</sup> that disrupt the political process without rising to the level of bribery.

---

<sup>177</sup> *McCutcheon*, 134 S.Ct. at 1467 (Stevens, dissenting) (“political communication seeks to secure government action. A politically oriented “marketplace of ideas” seeks to form a public opinion that can and will influence elected representatives.”).

<sup>178</sup> *Id.* at 1468 (describing how candidates can be made beholden and the public made cynical). *See also Citizens United*, 558 U.S. at 423 (Stevens, dissenting) (describing hypothetically corrupting forces). For the organicists, of course, these would pose no problem: the wisdom of the electorate would process, and presumably reject the influence of, hostile propaganda or foreign donations.

<sup>179</sup> *McCutcheon* dissent at 12. The *McCutcheon* dissent is Breyer’s work, and it clearly reflects his interest in a ‘participatory democracy’. See Breyer, *supra* note 38.

<sup>180</sup> *Citizens United*, 558 U.S. at 448 (Stevens, dissenting).

<sup>181</sup> *Cf. McCutcheon*, 134 S.Ct. at 1451 (“The line between *quid pro quo* corruption and general influence *may seem* vague at times”) (emphasis added) *with id.* at 1461 (“there is a clear, administrable line between money beyond the base limits funneled in an identifiable way to a candidate – for which the candidate feels obligated – and money within the base limits given widely to a candidate’s party – for which the candidate, like all other members of the party, feels grateful.”)

<sup>182</sup> *McCutcheon*, 135 S.Ct. at 1472 (Breyer, dissenting).

<sup>183</sup> *Citizens United*, 558 U.S. at 456 (Stevens, dissenting)

While neither faction explicitly discusses the prospective threat to democracy from the infiltration of market power – perhaps because of the mutual decision to formally abjure the equality rationale – in effect the wings diverge on whether elections are naturally immune to such private sector influences. The interventionists fear that the power of the private sector may ‘leak’ into the public outcomes, both by impacting officeholder conduct and by shaping the behavior of voters. The organicists wave away such concern with the claim that in an electorate where each individual vote has the same procedural weight and all voters have unrestricted access to information, the system self-polices. These differing attitudes towards the private-public intersection, however, do not emerge as first-order principles. As this section has demonstrated, they must be traced to attributes each wing assigns to actors in the electoral process.

While this analysis has a normative and theoretical focus, these patterns in the law have tremendous practical consequences. Poor management of elections – whether through excessive government regulation or because of distortive speech from plutocratic donors – leads to an electorate alienated from political participation and deprived of the right mix of information. For the interventionists, a deficient setup also excessively enslaves candidates to private interests. For organicists, deficient campaign finance policy allows the legislature to illegitimately entrench itself. Assumptions about human nature, in short, indicate the terms on which the members of the Court assess just governance.

#### IV. Campaign Finance Doctrine and Scholarship in Light of ‘Deep Patterning’

This analysis of the traits of political actors illuminates contemporary campaign finance law, linking the doctrine to the Court’s theories of corruption and democracy. This section considers how such ‘deep patterning’ based in cognitive and social attributes provides

perspective on both the law and contemporary scholarship. It further evaluates soundness of the baseline political and psychological investments of each partisan faction.

*A. The Doctrinal Disputes as Informed by Deep Patterning*

This analysis reveals that the doctrinal troubles described in Section I(B) are derivative of the organicist-interventionist dispute, and lack of clarity in the realization of the principles.

*Buckley* itself wavers between organicist and interventionist impulses, producing inconsistently hybrid doctrinal positions. Even as *Buckley* emphasizes the unerring primacy of the electorate's decision-making ability and thereby only assigns validity to ostensibly candidate-directed measures, it ultimately condones (through the 'appearance of corruption' justification and, as the equality argument shows, contribution limits themselves) regulatory protection directed towards the electorate itself. The opinion grants Congress leeway in setting contribution limits,<sup>184</sup> yet is hostile to the Congressional assertion that other legislation might have a valid anti-corruption function. And perhaps most openly confused is the Court's position towards the savviness of professional politicians.<sup>185</sup> When discussing independent expenditures, the Court in consecutive breaths identifies independent expenditures as potentially having *little* corrupting potential (evidently due to the clumsiness of donors and beneficiaries) and having *nigh-ineluctable* potential for abuse by candidates and donors.<sup>186</sup>

The resulting opinion lacks clarity on the foundational characteristics of relevant actors, with a subsequently muddled approach to the basic tensions that plague campaign finance. If there is no need to protect the electorate from the depredations of candidates and donors, and if the private market poses no threat to elections, then neither the appearance of corruption

---

<sup>184</sup> *Id.* at 30 ("Congress's failure to engage in such fine tuning does not invalidate the legislation").

<sup>185</sup> For an extended analysis of this incoherent reasoning, see *supra* note 23.

<sup>186</sup> *Buckley*, 424 U.S. at 45.

argument nor the possibility of (disclosed) *quid pro quo* campaign finance contributions should legitimate regulatory intervention. Yet *Buckley* does not take firmly consistent positions on the foundational characteristics of democratic actors, and subsequently does not offer theoretically consistent doctrine.

The doctrinal inconsistencies of recent opinions reflect efforts to integrate firmer democratic theories with the unsound precedent of *Buckley*. With their disdain for the appearance of corruption argument<sup>187</sup> and the narrowing of the conduct which validates anti-corruption regulation,<sup>188</sup> it is clear the conservatives have little love for the limitations *Buckley* tolerates. Indeed, given freedom from the pressure of *stare decisis*,<sup>189</sup> conservatives might reject both the appearance of corruption justification and contribution limits all-together in favor of reducing anti-corruption to criminal bribery laws, and thereby elevating classically anti-government First Amendment protection above anti-corruption concerns.<sup>190</sup> These positions are based upon clear organicist principles – a belief the electorate can adequately self-protect, and a lack of concern that candidates and donors will undertake action threatening to democracy (at least compared to Congress). Regardless, the practical results of the conservative ascendance has been to curtail the efficacy of campaign finance limitations in a manner that realizes organicist principles.<sup>191</sup> Insofar as the doctrinal inconsistencies persist in conservative doctrine, they seem to manifest a hesitancy to explicitly and comprehensively express the organicist premises against *Buckley*'s

---

<sup>187</sup> See, e.g., *McConnell* 540 U.S. at 260 (Scalia, dissenting) (“the Government's briefs and arguments before this Court focused on the horrible ‘appearance of corruption’ . . .”).

<sup>188</sup> This is perhaps clearest in the extensive argument regarding *quid pro quo* articulated in *Citizens United*, 558 U.S. at 357-359.

<sup>189</sup> See generally *McCutcheon*, 134 S.Ct. at 1445, which phrases its approval of the *Buckley* divide in dry, formalist terms, rather than any robust affirmation of the approach.

<sup>190</sup> See, e.g., *McConnell*, 540 U.S. at 267 (Scalia, dissenting) (observing “a broadly drawn bribery law . . . would, in all likelihood, eliminate any appearance of corruption in the system”); see also Hasen, *supra* note 1, at 615; Sullivan, *supra* note 6.

<sup>191</sup> See generally Kang, *supra* note 3.

longstanding precedential force. Until the conservatives take such a coherent posture, however, the inconsistencies of I(B) will remain in their jurisprudence.

The liberal implementation of interventionist principles, conversely, demonstrates an unwillingness to assertively declare substantive values. *McConnell* aggressively interprets the moments of textual ambiguity in *Buckley* to vastly expand the anti-corruption rationale, and the dissents in *Citizens United* and *McCutcheon* have expressed the deep investment in a broader understanding of corruption that underlies such an approach. Yet if the liberals are willing to clearly state the concerns regarding the “peddling of access”<sup>192</sup> that occurs through the machinations of donors, and the malaise that subsequently afflicts the electorate,<sup>193</sup> they have shown a hesitancy to articulate the core interventionist commitments that must underlie such concerns, particularly a belief in the frailty of the electorate. Thus, the persistence of the liberal doctrinal confusion described in I(B) stems from a lack of jurisprudential fortitude. Given their druthers, there is no doubt that liberals would expand corruption far beyond *quid pro quo*, buttress the ‘appearance of corruption’ rationale with recognition of the threat to popular rule from market forces, and advance a general theory of good governance that does not privilege a ‘simple’ view of speech. They have merely failed to affirm the deep interventionist investments with sufficient clarity to permit them to do so.

As with the conservatives, the liberal lack of doctrinal and theoretical consistency can in no small measure be traced to efforts to continue using the framework of *Buckley*. *Buckley*’s own doctrinal confusion has enabled and exacerbated the tendency of conservatives and liberals to avoid explicitly stating their underlying political principles. Each faction continues to obey *stare decisis* with regards to *Buckley* (though is quite willing to use interpretive mechanisms to evade

---

<sup>192</sup> *McConnell*, 540 U.S. at 99.

<sup>193</sup> *McCutcheon*, 134 S.Ct. at 1468.



it), and relies on its framework in expressing their principles and legal views. Yet *Buckley's* is ill-suited for expressing the sort of normative and descriptive commitments – identified in Sections II and III – that actually drive the participants in the partisan battle. The result is opaque and confused expression of the political values that actually drive the case law.

### *B. Evaluating the Baseline Investments*

If the law is to move forward, however, it must do so with awareness of the basic soundness of each position. This section evaluates each position on its own merits.

#### 1. The organicist baseline: A heroic but hollow concept of the citizen

The organicist principles mandate two baseline positions. Firstly, the typical<sup>194</sup> voter in the American political system has a tremendous ability to digest information, discern political intent, and make sound judgments regarding candidates. In the aggregate, enough voters possesses this attribute such that the interplay of unrestricted campaign influences will lead the majority to make the correct decision. This is a ‘heroic’ depiction of the electorate, eminently capable of navigating the maze of modern democracy, typically at the individual level and ineluctably as a collective. Secondly, the interaction of these capable voters leads to the ‘right’ systemic outcomes. Not only are individual voters wise, but the unconstrained “marketplace of ideas”<sup>195</sup> is an effective device for realizing mass democracy.<sup>196</sup>

---

<sup>194</sup> Presumably the conservatives do not mean that *every* individual voter, when exposed to the marketplace of ideas, reaches the ‘right’ position; there are, after all, still voting members of the American Nazi Party.

<sup>195</sup> *Citizens United* at 558 U.S. at 354.

<sup>196</sup> There is a long tradition that mass democracy (and mass modern systems generally) could be implemented without the typical participant being wise. Various thinkers suggest that both markets and democratic politics leverage group effects to achieve beneficial collective outcomes, even without any particular virtue or knowledge of individual voters. The origins of this trait of markets can be traced to BERNARD MANDEVILLE, *THE FABLE OF THE BEES* (1724) and ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1778), though both of these have given birth to a legacy and literature far too vast to recount here. The modern expression of the political expression may be represented by JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1987), suggesting that democracy is best imagined as a competition for votes. For a sympathetic critical discussion of Schumpeter’s ideas, see Shapiro, *supra* note 143, at 55. The organicists, however, posit a “marketplace” that directly benefits both, and generates a causal connection between, the enlightenment of the individual voter and the ultimate achievement of correct democratic outcomes.

The most direct critique of the organicist position is simple: voters and the electorate as a whole might not have the attributes the organicists ascribe to them.<sup>197</sup> If true, this requires that the organicist position be, if not rejected, certainly dramatically revised.<sup>198</sup>

Yet even conceding their descriptive assertions, the organicist position suffers from two internal tensions. Firstly, if voters *are* as capable, savvy, and wise as the organicists believe, why is judicial (that is, undemocratic<sup>199</sup>) intervention necessary to protect them, particularly as it is voters themselves who select the representatives who set the conditions of campaigns and elections? Striking down regulation of spending in campaigns – regulation that must, in the first instance, come from a legislature elected *without* such regulation – deems voters unsuited for managing their own “self-protection”.<sup>200</sup> The organicists must face two particular characteristics of political process that would validate self-regulation. If the legislature did take measures that impaired the decision-making ability of the electorate, a reasonably prudent electorate would react by expelling the legislators responsible from office and electing those who would strike down such restrictions and promise regulation more amenable to popular will (and reiterating this process when necessary as popular views regarding campaign finance and knowledge of regulatory effects evolved). More relevant to the historical realities of campaign finance reform,

---

<sup>197</sup> Indeed, the characteristics of mass democracy described in section V *supra* suggest they are not, else mass democracy would not result in such a loss of power.

<sup>198</sup> It *may* be that the organicist position is something like this: voters *are* frail and influence-susceptible. But the possible deleterious impact of government speech is *so pernicious* that it is better to strike down all speech restrictions and let the deleterious impact of corrupting expenditures have their effect than to risk tyranny. Such an interpretation would explain, *inter alia*, Kennedy’s tortured passage in *Citizens United*, *supra* note 92. The metaphysics of this view, however, must deal with a particularly difficult challenge: showing how the characteristics of persons in the various political roles are such that *no restrictions on money* in the system are legitimate, despite voter frailty; this requires a detailed accounting of the risks of intervention in the electoral system notably absent in the organicist literature.

<sup>199</sup> See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1986), at 16 (discussing the nature of the counter-majoritarian paradox and the potential for anti-democratic action by the Court). *But see, e.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) at 101-2 (arguing the unique role of judicial review is to ensure that representatives represent properly).

<sup>200</sup> *McConnell*, 540 U.S. at 224.

the measures at issue in BCRA (some limitation of electioneering communication and increased regulation of soft money) comprise sufficiently light interference with the overall information mix such that a heroically wise electorate would not see much harm to its decision-making ability. Both of these points, in short, indicate that if the electorate is as powerful as the organicists believe, the aggressive judicial stance of the organicists is superfluous.

Secondly, the organicists imply ambivalence in a manner that leads to a democratic paradox<sup>201</sup> on the question of whether money actually *can* influence elections through direct impact on voters. They concede this fact, albeit somewhat grudgingly, at points.<sup>202</sup> Yet this concession is at odds with the view that voters are stoically self-sufficient and monumentally independent. Moreover, if money *can* impact elections, it seems not unreasonable to expect a polity to wish to regulate such conversion of private market power into influence over political decision-making (thus making the aggressive anti-regulatory stance of the organicists a form of judicial activism). This problem exposes the unresolved question facing the organicists: how does the reasoning power of the voters identified by the organicists actually work in a democracy? Without further explanation, the organicist position is not internally coherent. No vision of eminently responsible citizens seems compatible with a democracy where simply pumping out additional campaign spending changes the outcomes of elections. If democratic outcomes are so pliable to wealth, robust campaign finance regulation seems prudent and the Court should be less aggressive in striking it down. Conversely, if voters are autonomous, they should have enough knowledge to responsibly vote without the massive infusions of cash permitted by independent expenditures and soft money, and the organicist anxiety regarding the

---

<sup>201</sup> In many ways this paradox is the inverse of the ‘civic slacker’ paradox posed by Ortiz, *supra* note 6.

<sup>202</sup> See *Citizens United*, 558 U.S. at 360 (conceding “corporation[s] [are] willing to spend money to try to persuade voters” in order to invoke voter sovereignty in *defense* of deregulation).

effects of governmental restriction of campaign information is unnecessary (particularly as the electorate itself will police the legislation enacted regarding campaigns). In any case, the organicist position is self-defeating.

## 2. The interventionist baseline: A challenge to democratic autonomy

The interventionist failure to adequately specify the character of citizens and of democratic procedure has already been described. Ultimately more damning is a deeper problem: how can the validity of democratic sovereignty be reconciled with an electorate that must *ex ante* be protected from certain types of campaigning?

This problem requires return to the central goal of campaign finance spending: to influence the electorate to vote for particular candidates. The interventionists *must* posit (as the organicists seems to concede) that spending<sup>203</sup> can influence – and corrupt – the electorate. The interventionists, accepting a view of citizens as *somewhat* frail, then take the logical step of permitting regulation to prevent exploitation of this frailty. Yet how can a frailty so severe that the electorate must be shielded from certain campaign influences be reconciled with a meaningful idea of citizen autonomy (a basic normative premise of democracy<sup>204</sup>)? The need for the state to implement speech-restricting legislation to save citizens from being corrupted implies the necessity of paternalism. These ominous implications of the interventionist position are reinforced by the manifestations of electoral corruption they identify: cynicism, drown-out effects due to excessive media, malaise. These are forms of psychic weakness, not rational exit. Once citizen rationality is suspect, so is the entire democratic apparatus.

---

<sup>203</sup> Indeed, some adept thinkers raise concerns that the nature of interest group pluralism alone may fundamentally distort democracy. See Sunstein, *Preferences*, *supra* note 80; Gardner, *supra* note 172.

<sup>204</sup> See, e.g., Dahl, *supra* note 129 (identifying freedom as a necessary precondition of democracy). The parallel for First Amendment jurisprudence is identified by Post, *supra* note 98, in his discussion of the implications of '[m]anagerial structures' in the debate over the proper interpretation of the First Amendment.

Campaign finance regulation can arguably be vindicated as a precommitment device by which a polity corrects for its own weaknesses. Yet this is where one of the stronger critiques of BCRA – that it is incumbent protection in the guise of campaign finance reform<sup>205</sup> – becomes salient, particularly in the context of the actual weaknesses in citizen reasoning that the interventionists identify. If the collapse of citizen autonomy is the real crisis of democracy, it seems an inadequate solution to press thumbs in particular holes in the shoddy regulatory dike that selectively creates obstacles for donors and candidates.<sup>206</sup> Given the infringement of constitutional rights entailed in the current anti-corruption scheme, it might make more sense to strike down the entirety of the regime and demand Congress address political disenfranchisement and alienation, rather than exploit corruption as a pretext for opportunistic incumbent protection. Perhaps the interventionists accept that the true character of democracy is that of a passive electorate manipulated political elites (donors, candidates, and Congress) who struggle for power,<sup>207</sup> but this is a dire possibility that the interventionist narrative does not broach.<sup>208</sup>

This analysis reveals that the theoretical deficiencies of the interventionists run deep. The interventionists identify profound challenges in mass democracy, and they should endorse a course of regulatory action that aspires to nourish citizen autonomy. Given the crude responses of Congress do not aspire to meet these challenges, the interventionists treat them with puzzling approbation.

---

<sup>205</sup> See Issacharoff, *supra* note 7, at 190 (identifying Scalia’s challenge to *McConnell* as incumbent protection, discussed *supra*, as “basically unanswered”).

<sup>206</sup> As Issacharoff and Karlan, *supra* note 3, suggest, such tactics will likely not be effective in any case, a point reinforced by the interventionists’ own belief in political elites’ savvy at evading regulation.

<sup>207</sup> Such a vision would be Schumpeterian; see *supra* note 192.

<sup>208</sup> The inconsistency in the interventionist depiction of candidates and Congress described in Section III is especially damning in this context; they trust Congress to be collectively interested and trustworthy even as individual candidates are manipulative and scheming.

*C. Organicist Immunity to Prominent Criticism*

Since *Citizens United*, many scholars have addressed the disorder in campaign finance. Critics fear candidates will now be even more directly beholden to the power of donors, bundlers, and others who obtain power not by political appeal, but by their ability to command funds. However, these critiques have little force by the organicist lights.

Michael Kang indicates that by limiting corruption *exclusively* to pre-arranged *quid pro quo*, *Citizens United* initiated a cascade that dismantled much of the campaign finance infrastructure.<sup>209</sup> He observes that the Court's reasoning entails that, for example, independent expenditures are beyond regulatory reach, an implication beyond anything suggested in *Buckley*.<sup>210</sup> Regulation of campaign spending has consequently disintegrated,<sup>211</sup> leading to 'reverse hydraulics' as money flows more directly from donors to candidates.<sup>212</sup> Kang calls the idea that independent expenditures can *never* raise the specter of corruption unrealistic, and invokes *Caperton* (discussed below) to suggest that the Court is muddled on this question.<sup>213</sup>

For the organicists, however (*Caperton* notwithstanding), this critique raises no problems. If the electorate knows who is responsible for media, a state of affairs facilitated by disclosure, no additional speech can disrupt the democratic process. While some such speech might make candidates feel gratitude or anxiety, the electorate's decision-making will accommodate such responsiveness. By organicist lights, *Citizens United* comprises not an end to campaign finance

---

<sup>209</sup> Kang, *supra* note 3, at 5.

<sup>210</sup> *Id.* at 26-27. As discussed in Section I(B)(i) *supra*, *Buckley* appears ambivalent on if *quid pro quo* corruption is an *instantiation* of corruption (i.e., one element of a subset that might justify regulation against constitutional rights), or the entire or only such entity that could justify such regulation.

<sup>211</sup> *Id.* at 31.

<sup>212</sup> *Id.* at 44. *Cf.* Issacharoff and Karlan, *supra* note 3 (describing the 'direct' hydraulic scenario, as money seeps around regulatory barriers).

<sup>213</sup> Kang, *supra* note 3, at 45-46.

law, but a step towards its logical purification (a purification that might well end with the removal of direct contribution limits).

Rick Hasen argues that *Citizens United* shuffles towards a coherent organicist position, but identifies persistent doctrinal difficulties. His observation<sup>214</sup> regarding the problematic survival of direct contribution limitations has already been discussed. Hasen identifies two other inconsistent doctrinal implications of *Citizens United*. Firstly, the reasoning of *Citizens United* would not seemingly provide a rationale for limiting foreign spending that seeks to influence elections or candidates.<sup>215</sup> However, from an organicist perspective, whether such foreign spending seeks an electoral or a legislative strategy, it cannot harm electoral outcomes. Presuming relevant disclosure, the electorate will cognize and process the source of donations and non-coordinated support. The purifying impact of democracy will be as great with regards to foreign spending (even if emanating from as seemingly noxious a source as ‘Tokyo Rose’) as to corporate spending.

Hasen also observes that *Citizens United* is inconsistent with *Caperton*.<sup>216</sup> *Caperton* held that due process might require an elected judge to recuse himself from a case where he had received significant campaign support from one of the litigants. As Hasen observes, none of the reasoning of *Citizens United* suggests any remedy or action by the judge in *Caperton* is necessary.<sup>217</sup> Yet *Citizens United* addressed the plight of legislative representatives, not members of the judiciary. While not articulated by the Court, it is easy enough to imagine that judges,

---

<sup>214</sup> Hasen, *supra* note 1, at 615.

<sup>215</sup> *Id.* at 605-610.

<sup>216</sup> *Id.* at 611-613. Another 5-4 decision (albeit with a slightly different bench composition, as Roberts replaced Kennedy as the justice who jumped from the *Citizens United* and *McCutcheon* majorities), *Williams-Yulee v. Florida Bar*, 575 U.S. \_\_\_\_ (2014), reinforces the sense that the Court may, by the thinnest of margins, see judicial elections as distinct. That case upheld a state rule that prohibited personal solicitation of campaign donations by a candidate for judicial office, despite traditional First Amendment protection of such speech-related conduct.

<sup>217</sup> Hasen, *supra* note 1, at 613.

unlike representatives,<sup>218</sup> should be beholden to an abstract concept of justice rather than to popular will.<sup>219</sup> *Caperton* might require additional nuancing of the organicist worldview (defining special characteristics of the judiciary) but does not necessarily challenge it.

Larry Lessig's idea of 'dependence' corruption<sup>220</sup> comprehensively critiques American politics, including campaign finance. In addition to winning popular elections, candidates must also secure approval from political elites in a 'shadow' election.<sup>221</sup> The ascendance of the organicists in *Citizens United* did not generate this 'dependence' problem,<sup>222</sup> but did exacerbate it.<sup>223</sup> Lessig does not deny that the approval of the electorate is still necessary for governance in contemporary American politics. He only argues that the need for candidates to first present as acceptable to donors violates the principles of popular sovereignty.

However, the organicist faith in the purifying effect of elections brushes away these concerns; the electorate will choose whom it wants. Moreover, the organicist hostility towards broader regulation of money would likely interdict systemic efforts to address 'dependence' corruption.<sup>224</sup> These positions flow from the fundamental commitments of the organicists: it is better to trust the decision-making of the electorate than to trust the decision-making of the government to regulate its own membership selection. The organicists are committed to the position that, presuming Lessig's (eminently plausible) description of politics is correct, if the

---

<sup>218</sup> The terms alone reflect the different roles: judges are mandated to engage in a reflective process of judging, obeying some higher principle of reason, whereas representatives are mandated merely to represent those who have elected them.

<sup>219</sup> Scalia may hint at this in *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004), when he states "Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions."

<sup>220</sup> See Lessig, *supra* notes 10 and 80; Lawrence Lessig, *A Reply to Professor Hasen*, 126 HARV. L. REV. 61 (2013).

<sup>221</sup> See also Cohen, *supra* note 129 (providing a political science empirical analysis that supports Lessig's 'Lesterland' theory).

<sup>222</sup> See Lessig, *supra* note 80, at 21 (observing 'dependence corruption' would not reverse *Citizens United*).

<sup>223</sup> See *id.* at 22-23.

<sup>224</sup> The organicist posture towards some of Lessig's proposals, such as a constitutional convention, seem less clear. See *id.* at 290.



electorate *truly desires* candidates who are not beholden to monied interests, it will elect candidates who are not. Of course, this apologia for organicism ignores Lessig's substantive point: there are structural factors that preemptively shape the choice of the electorate.<sup>225</sup> More generally, Lessig's analysis reveals a sort of organicist myopia towards the structures that determine American politics. Parties, lobbyists, and machines all shape the electorate's participation in politics, even if voters' granular decisions are not overdetermined by their influence.

The organicist immunity does not objectively dismiss the incisive critiques of Kang, Hasen, or Lessig. It only indicates that the organicists *by their own light* reject such critiques, and that such critiques only have force based on assumptions in opposition to the currently ascendant jurisprudence.

#### V. A Path Forward: Honesty in Democratic Theory and Adapting *Buckley* to Mass Politics

This chapter has exposed the presumptions that underlie the Court's campaign finance doctrine. The doctrine's troubled condition can be traced to three characteristics in particular: failure of the liberals and conservatives, even as they sharply debate campaign finance, to observe that the real subject of the partisan debate are the terms of just democracy; the substantive deficiencies within the democratic theories of each faction; and the distortive effect of contorting their actual views into the confused framework of *Buckley*.

One of these problems has a straightforward solution, albeit one that only lies within the power of the Court itself: it must confront the questions of democratic theory directly. Admittedly, the question of what comprises good democratic theory itself may not be justiciable (and indeed, may be the sort of political question both legally beyond the Court's ken<sup>226</sup> and better left to the

---

<sup>225</sup> Lessig's critique might be seen directed against excessive Schumpeterian elite competition. *See supra* note 192.

<sup>226</sup> *See, e.g., Vieth*, 541 U.S. at 277 (describing the characteristics of nonjusticiable "political questions").

polity<sup>227</sup>). But as this chapter has revealed, when the Court adjudicates questions of campaign finance doctrine, it inevitably resorts to democratic theory. When it does so, it must do so with greater forthrightness and clarity. But this lies within the Court's power alone.

This section touches upon the other two questions facing the Court: what substantive values should the Court adopt when it must resort to democratic theory? And how should it deal with the now-pervasive but troubled legacy of *Buckley*? This section offers one path forward, though it is necessary to note that the underlying characteristics attributed to democratic actors and systems will be determinative of any solution. If one, for example, asserts that the electorate is immune to distortive influences, one will strongly adhere to organicist principles regardless.<sup>228</sup>

However, current mass democratic structures and practices alienate most voters from the apparatus of rule and differentiate ideal democracy from its practical unfolding, suggesting that the organicist assumptions are suspect. These realities compel consideration of the questions this chapter has identified as underlying campaign finance: what are the cognitive and social characteristics of persons as political actors within the framework of contemporary democracy? This section offers a preliminary alternative account that has some kinship with the interventionist account, but with greater coherence and force. It further describes how the precedential framework of *Buckley* might be adapted to serve such an improved account. While

---

<sup>227</sup> See, e.g., Elhauge, *supra* note 61.

<sup>228</sup> Some social scientists have already classified differing approaches that bear on such an inquiry. See, e.g., see Martin Gilens and Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSP. ON POLITICS* 564, 565-68 (2014) (identifying four different major lines of understanding electoral power in the US, of which two suggest elites exert disproportionate power (either directly or through guiding pluralist wedges) and thus support the interventionist interpretation of campaign finance, and two suggest that politics is broadly egalitarian in either an interest group pluralist or genuinely populist manner, and thus support the organicist approach).

this is only one path forward,<sup>229</sup> it confers the benefit of improving upon the existing democratic theories upon which the Court relies.

A preliminary consideration suggests four aspects of contemporary<sup>230</sup> mass democracy have direct relevance to the characteristics disputed by the organicist/interventionist divide. One is a structural attribute: the scale of mass democracy means most people participate relatively little in their own self-rule, instead delegating this responsibility. This delegation produces a second feature of modern democracy, the emergence of elites who wield disproportionate political power through a complex and often opaque infrastructure. These two structural changes alter the fabric of political practice. The mass of voters cannot allocate sufficient attention to politics. Subsequently the elites who are responsible for daily political practice gain disproportionate ability to shape the broader discourse and culture of politics as well as set policy and execute the tasks of governance.

The first set of structural problems instantiates a divergence between the modern realities of democracy and its historical inspiration. ‘Traditional’ democracy involve little differentiation between the rulers and the ruled; the town hall meeting provides a familiar example.<sup>231</sup> Conversely, the professional political apparatus<sup>232</sup> of modern democracy is thoroughly distinct

---

<sup>229</sup> For an alternate account, see, e.g., Hellman, *supra* note 14 at 1408 (“process-protecting” should be the basis of the campaign finance approach).

<sup>230</sup> The commitment of originalists such as Scalia complicates the validity of such an analysis. If one accepts the originalist premise, the Courts should not imagine things to be other than as established at the founding, and leave updating the Constitution to the polity; but if the polity is problematically constrained by the characteristics of modern politics, how can it ever successfully perform such an updating? One solution to this is offered by representation reinforcement approach, but raises the questions of judicial rule; *see supra* note 199.

<sup>231</sup> For a description of how contemporary democracy and its ancient inspiration differ in critical regards of scale, structure, and equality of access, see JOHN DUNN, *WESTERN POLITICAL THEORY IN THE FACE OF THE FUTURE* (1993), at 12-27; MOSES FINLEY, *DEMOCRACY ANCIENT AND MODERN* (1985), at 102 (“It would not have been easy for ancient Athenian to draw the sharp line between ‘we,’ the ordinary people, and ‘they,’ the governmental elite, which has been so frequently noted in the responses of the present-day apathetic.”); for a description of the virtues, difficulties, and compromises of the New England town hall meeting in comparison to modern democracy, see Dahl, *supra* note 129, at 110-11.

<sup>232</sup> For a discussion of the structural genesis of this alienation, see generally Cohen, *supra* note 129; JACOB ROWBOTTOM, *DEMOCRACY DISTORTED* (2010), at 171.

from the mass of voters, with an attenuated relationship between voters and those whom they elect.<sup>233</sup> The resulting democracy has a vastly different character than the idealized model, assuming attributes of a corporatist if populist structure rather than equal rule by and of the same set of persons.

The second pair of problems flows from these structural characteristics. The masses are alienated from daily practical governance, and in any case lack the time and resources to remain fully informed of its details, let alone fully participate in its execution.<sup>234</sup> Thus the delegation to elites means that these elites shape political life, and, most importantly for elections, have the opportunity to determine the very terms and range of political choice, and to set the tone of political discourse.<sup>235</sup> These problems are the cognitive and social expressions of a structural reality. Democratic discourse and behavior by political actors, unsurprisingly, exists in a reciprocal relationship with the distribution of actual power and responsibility.

This relationship between power and ability to shape discourse is intertwined with the deep patterns observed by this chapter, and exposes the theoretical deficiencies of both wings. The heroic organicist treatment of the citizen refuses to acknowledge the structural realities of mass democracy, and its attendant difference in political realization of power.<sup>236</sup> Indeed, insofar as the organicists recognize political context can shape electoral behavior, they only

---

<sup>233</sup> The scholarship on this is immense. For examples from the legal scholarship, see, e.g., Issacharoff and Pildes, *supra* note 80 (describing the need to address elite domination to prevent incumbent lockup); Issacharoff and Karlan, *supra* note 3, at 1733-34 (describing the impact of mass structures on voting practice); BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* (1997) at 149 (representative democracy mingles “inegalitarian and aristocratic aspects” with “egalitarian and democratic aspects”).

<sup>234</sup> For examples from social science, see Cohen, *supra* note 129; Dahl, *supra* note 129, at 83 (discussing the attributes and challenges of large-scale democracy). For an attempt to solve this problem, see generally Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence through Heuristic Cues and “Disclosure Plus”*, 50 *UCLA L. REV.* 1141 (2003) (describing how voter ignorance in mass democracy can be addressed through increased information deployment).

<sup>235</sup> See generally Schumpeter, *supra* note 172; Gilens and Page, *supra* note 228.

<sup>236</sup> In their acknowledgement of interest group pluralism, the organicists acknowledge different citizens may hold different amounts of power; but mass democracy means that different citizens hold differing amounts of power *at the level of structure* embedded prior to the existence of wedge blocks, a proposition the organicist refuse to admit.

acknowledge the power of the state to harm individual choice by speech restriction. The interventionists vaguely acknowledge the structural challenges of contemporary politics, but do not describe the nature of contemporary democracy with any specificity. Interventionists therefore cannot with any cogence characterize (or with any efficacy address) the diminished status of most voters or disproportionate power of elites.

Organicists might be able to redeem their position by either (rather unrealistically) arguing that these features of mass democracy do not impair popular autonomy, or (perhaps more realistically) conceding they impact democratic self-governance, but arguing the threat that the government could stifle democratic discourse outweighs any benefits to acknowledging such features of modern politics. However, treated seriously, these observations offer fodder to a post-interventionist approach that firmly recognizes the characteristics of modern democracy and which fixes the underspecification of *Austin* and *McConnell* by precisely explaining how the threats of ‘distortion,’ ‘influence,’ and ‘access’ relate to contemporary political realities. In effect, it is possible for social science to add specification and structure to the interventionist position. The real crisis of campaign finance is structural inability of most voters to demand accountability from their representatives. Those citizens who *can*, through a higher level of access obtained by their patronage, demand specific accountability hold unique and disproportionate power. This problematic domination by elite access in turn creates a feedback loop: the very terms of the process are set by the representatives, who are in turn excessively beholden to these elites with unique access. This systemic crisis is the underlying malady of contemporary corruption, which manifests through particular acts of problematic ‘influence’ or ‘access’. The scale and structure of contemporary democracy is, in effect, intimately related to (and must inform) the broadened interventionist interpretation of corruption.

A circumspect approach could reconcile the realities of mass democracy with *Buckley*'s speech-and-corruption balancing test. As this chapter has suggested, the speech and anti-corruption interests dovetail, as both protect citizen autonomy and the ability to ensure the proper causal relationship between popular will and government action. However, the impact of mass democracy reveals the benefits of contemplating them separately. The First Amendment interest, with its focus on personal faculties, is well-suited to addressing the psychic distortions by which mass democracy can impair citizen engagement with politics. The anti-corruption interest, meanwhile, can directly address the disproportionate power of political elites by inquiring if their practices change political discourse in a manner harmful to the electorate. Thus, in principle if not yet in practice, the *Buckley* balancing can handle the problems of mass democracy effectively.

However, if the general contours of the *Buckley* test can be retained, its doctrinal implementation must be retooled.<sup>237</sup> The First Amendment prong cannot be addressed merely by asking, simplistically, if there is a first-order impact on the 'amount' of speech or association. Rather the inquiry must be more nuanced, and determine how much the chilling effects of the measure worsen the political position (in terms of level of knowledge, ability to associate, sense of political engagement, and so forth) of the mass of voters. Likewise, the anti-corruption question cannot simply ask if an act akin to bribery might occur. Rather it must determine if the measure reduces the illicitly disproportionate control of elites (that is to say, professional politicians, the party apparatus, and wealthy donors) over political discourse and democratic life.

238

---

<sup>237</sup> Indeed, it would be important to avoid the conceptually seductive but ultimately unhelpful mingling suggested by *McCutcheon*, 134 S.Ct. at 1468 (Breyer, dissenting).

<sup>238</sup> This broadened view of the purpose of corruption law is related to a reinterpretation of corruption advanced by Teachout, *supra* note 55, and Lessig, *supra* note 80. It also bears some resemblance to that advanced by Breyer,

If implemented with a robust commitment to the realities of democracy and the need to reconceptualize constitutional rights and corruption, this approach could revitalize the Court's assessment of particular regulatory measures. For example, the current approval of contribution caps would require complete reevaluation. Assessing if a donation exerts excessive control over an official could not merely be determined by reviewing the amount of the expenditure or of the cap, but would require a broader contextual inquiry of if the donation contributes to disregard of the public interest. Yet the practical effect of such a change in the blackletter method would be moderated by the nature of litigation: the Court can only rule on legislation brought before it. The nature of litigation would therefore soften the practical impact of any change in the Court's methodology.

### Conclusion

The sorry condition of the campaign finance jurisprudence runs deep. This chapter has explained a driver behind this state of affairs, and elucidated its foundations. The two factions currently battling in the Supreme Court do not seem to recognize (or if they do recognize, do not acknowledge) that they advance theories of democracy and of personhood. This shared myopia means that the partisan rift cannot be bridged, or even meaningfully contemplated.

Regardless of if future revisions of campaign finance law adopt the categories offered by this chapter – or, indeed, if jurists determine the challenge of mass democracy to be the right issue to address in fixing campaign finance and election law – this chapter has delineated the general approach reform must take. The Court's view of political life, and how it interacts with private wealth, must be brought some sort of coherence. The characteristic flaws of the Court's consideration – the organicist lack of realism and the interventionist lack of specification – both

---

*supra* note 38, though greater specificity would aid in the implementation of any such “participatory democratic” principles.

imply a failure to engage with the complexities of contemporary politics. Likewise, the categories that run throughout the cases suggest convenient points of theoretical entry that would permit continuity in the Court's analysis. But even if a radically different approach is adopted, it *must* remain focused on the Court's view of politics. Otherwise the Court's treatment of democracy and corruption will remain obscured, and taint campaign finance reform.