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Historical Roots of Citizens United vs. FEC: How Anarchists and Academics Accidentally Created Corporate Speech Rights, The General Essay

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The Historical Roots of *Citizens United v. FEC*: How Anarchists and Academics Accidentally Created Corporate Speech Rights

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INTRODUCTION

In *Citizens United v. FEC*,[1] the Supreme Court held that Congress could not stop corporations from spending unlimited amounts of money to elect or defeat political candidates. Justice Kennedy, writing for the majority, gave a high degree of attention to the free speech interests implicated by the challenged laws, and only passing consideration to the concern that such spending might corrupt candidates, or the institutions of democracy.[2] He recognized *quid pro quo* corruption—and the appearance of *quid pro quo* corruption—as the only legitimate justifications for laws that limit campaign spending.[3]

The *Citizens United* decision was a shock to the American public, but less surprising to those who have been following the Supreme Court's jurisprudence around money, politics, speech, and corruption. At the heart of the opinion lie two sets of beliefs: one about the role and nature of the First Amendment and another about the nature of political corruption. The beliefs of the Court and the beliefs of the public on both of these issues, but particularly the latter, are sharply at odds—which explains the public's shock at the decision. This was not always the case.

Recent doctrinal history only partially explains the huge gulf between public opinion and the Court's decision. Instead, the roots of the divergence go back much further, growing out of two trends that developed between 1930 and 1970: (1) the increasing tendency of courts and academics to treat free speech as the center of the Constitution's political theory; and (2) the shift in the makeup of the Supreme Court from one populated by politicians to one populated by academics and federal judges. Together, these trends have changed the focus of the Court's discourse on corruption, such that when the Court talks about campaign restrictions, it tends to focus on First Amendment concerns at the expense of a greater focus on corruption.

The First Amendment—rarely an issue in political cases in the nineteenth century or early twentieth century—was interpreted more broadly by the Court between the 1930s and 1970s than it had ever been interpreted before. As the First Amendment's star rose, it tended to replace the anti-

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[1] 130 S. Ct. 876 (2010).

[2] *See id.* at 908–11.

[3] *Id.*

corruption interest as the touchstone for judicial decision making about election rules, gradually becoming the lens through which regulations governing political participation were understood—both for those who supported those regulations and those who opposed them.[4] At the same time, between the 1930s and 1970s, the Supreme Court went from being heavily populated by people with political experience to having few Justices who had personal experience with the pressures of politics.

These two trends came about for reasons unrelated to money and politics: Brandeis and Holmes constructed a new vision of the First Amendment in response to prosecutions of anarchists and communists; the Court shifted away from elected officials because it became too difficult to gain confirmation of appointees with a political history. Yet both trends had significant impacts on how the courts came to talk about politics. They were amplified through interaction with other cultural shifts. For example, academics more than politicians seem likely to accept the "rational man" model of political behavior. It satisfies the academic urge for formal explanations of motivation, and concepts like corruption are notoriously slippery, more easily recognizable in practice than in theory. Thus, as the academy itself became more "rigorous" and professionalized, the rational-choice scholars found a more receptive audience for their views than they would have found in the 1930s or before. Likewise, the rise of the First Amendment is part of a much larger movement towards understanding the Constitution as a bundle of highly specific rights, whose violation could be measured by highly formalized "tests" (such as the strict scrutiny, intermediate scrutiny, public forum, content-neutral, and sliding scale tests).

This Article proceeds as follows. In Section I, I chart the decline of the anti-corruption interest in Court discussions from the 1930s to the 1970s. In Section II, I briefly chart the concomitant rise of the Free-Speech First Amendment and Free-Speech Constitution, examining how the First Amendment shifted from being ignored, to a supporting actor, to a lead protagonist in political theories of the Constitution. I explain how the First Amendment eclipses concerns about political corruption as the central concern in cases involving money and politics, and eventually comes to dominate the political philosophy of the Constitution, as expressed by its Justices. In Section III, I chart the shifting makeup of the Court from one dominated by politicians and lawyers with legal experience to one in which political experience is trivial or nonexistent among its Justices. I argue that this shift explains the changing nature of language around political corruption and politics, as Justices replace traditional understandings of the power of money in politics with their own idealized vision of political campaigns. In Section IV, I show how both of these trends reveal themselves in the *Citizens United* decision.

My goal is not to provide a single theory to explain *Citizens United* and the rise of corporate political speech rights, but to identify two significant

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[4] *See, e.g.*, Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2087–88 (1991).

trends that contributed to its ideological core—and have led to the relative undervaluing of the role of the Court in protecting against political corruption. The article concludes by suggesting that academics can and should play a role in continuing to respect the First Amendment's role without fetishizing it, and that the legal academy can also encourage the political branch to hire fewer academics, and more people with political experience, for federal judgeships.

I. THE DECLINE OF THE CORRUPTION INTEREST

At the time the Constitution was drafted, fighting corruption was at the core of the drafters' vision for the constitutive principles of the country. Corruption was as fundamental an anti-principle as the concept of ordered liberty was a positive principle. As Hamilton said, the drafters created "every practicable obstacle" to corruption, in dozens of clauses.[5] The Senate was inclined to be small enough to corrupt, the President could be corrupted by foreign temptations, and the House members could be corrupted by bribes back home: the separation of powers, as instantiated in the Constitution, was primarily designed to limit these corrupting tendencies of each branch. In the first hundred years of its existence, the Supreme Court rarely examined statutes relating to the laws governing politics.

In 1810, James Madison—along with much of the country—believed it was within a state's power to rescind a contract of sale of land because the land was corruptly sold.[6] In 1803, Thomas Jefferson appointed James Madison and two other commissioners to examine the case from the perspective of the federal government. After a review of all the circumstances, he and the other commissioners concluded that the claims of the purchasers land sold because of bribery "cannot be supported."[7] Chief Justice Marshall disagreed, noting in dicta in *Fletcher v. Peck* that "corruption" was not a subject within the competence of the Court and therefore would not be a proper basis for the rescission of Georgia's land contracts.[8] Marshall went on to say that no state law could invalidate a contract, and the case came to stand for the sanctity of contracts.[9] Nevertheless, his view stood out as an exception, as there were dozens of cases where courts refused to enforce contracts because they were corruptly procured.[10]

In the nineteenth-century cases involving money and politics, speech concerns were never mentioned, but corruption concerns always were. For

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[5] *See* Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 353 (2009).

[6] Fletcher v. Peck, 10 U.S. 87, 130 (1810).

[7] JOHN T. NOONAN, JR., BRIBES 438 (1984).

[8] *See Fletcher*, 10 U.S. at 130.

[9] *Id.* at 136.

[10] *See, e.g.*, Bartle v. Nutt, 29 U.S. 184 (1830); Trist v. Child, 88 U.S. 441 (1874); *see also* Mark Pettit, Jr., *Freedom, Freedom of Contract, and the "Rise and Fall,"* 79 B.U. L. REV. 263, 273 (1999).

example, in the 1874 case *Trist v. Childs*, the Supreme Court refused to enforce a contract to lobby, because paid lobbying was so fundamentally corrupt that to use the law to enforce such a contract would be to undermine the legitimacy of the government that enforced the law.[11] Ten years later in *Ex Parte Yarbrough*, Justice Miller wrote eloquently about how any state has, as a constitutional, foundational element, the right and duty to fight against the twin threats of violence and corruption.[12] The right to combat these evils, the Court held, need not be constitutionally grounded in order to be constitutional—such rights are fundamental and presumed in the very structure of a republican state.[13] Neither of these cases was an outlier. They reflected a broad consensus that one of the fundamental goals of the American constitutional system was to protect against corruption.

Reading the corruption and political speech cases of the mid-twentieth century is like watching a shawl gradually fall off of a woman's shoulders onto the floor during a concert. The old ideas about corruption are not so much thrown out as misplaced and then forgotten—such that by the time the twenty-first century comes around, and the shawl is again needed, one doesn't even know where to begin to look.

Several statutes governing campaign finance were passed during the progressive era, and in the 1920s, they began to be challenged in the courts. The first time that the Supreme Court invalidated an anti-corruption statute was in 1921. In *Newberry v. United States*, the Court considered the aspect of the Federal Corrupt Practices Act that restricted how much money Congressional candidates could spend in order to get elected.[14] Newberry argued that that Congress had no power to pass the law because there was no textual basis in Congress' enumerated power.[15] The case was decided on the grounds that a primary is not an "election," and the federal government has no authority over non-elections.[16] The First Amendment is not mentioned, nor is "speech" *qua* speech directly addressed. Instead, the plaintiffs framed the question in terms somewhat similar to modern campaign finance law cases (but without corruption as a central role):

> [T]he question is whether Congress can go further and attempt to control the educational campaign. Upon what ground can it be said that Congress can provide how many meetings shall be held, where meetings shall be held, how many speakers shall be allowed to speak for a candidate, how many circulars may be distributed, how many committees may act in behalf of a candidate, how they

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[11] 88 U.S. at 451.
[12] 110 U.S. 651, 657–58 (1884).
[13] *Id.* at 666–67.
[14] 256 U.S. 232 (1921).
[15] Brief for Plaintiffs in Error, Newberry v. United States, 256 U.S. 232, 234 (1921).
[16] *See Newberry*, 256 U.S. at 249–50.

> shall be organized and what shall be the limit of their honest activity?[17]

Ultimately, McReynolds agreed and concluded that Congress had no inherent or textual power to regulate the amount of money spent in Congressional primary campaigns.[18]

The *Newberry* decision is arguably an important moment in the history of the concept of corruption in the Court because it is the beginning of a time in which corruption is increasingly sidelined as a core governmental threat. The opinion of the court does not outright reject a strong deference to concerns about corruption; it simply does not discuss it. This is striking because the statute was passed because of concerns about money in politics.

The concurrence, written by Pitney and substantively joined by two other judges, rejected not only McReynolds' constitutional conclusions, but also his framework. Pitney concurred with the conclusion that the judgment at issue should be reversed, but only because of faulty jury instructions.[19] For our purposes, what is most interesting is how McReynolds and Pitney respectively treat corruption. Pitney's concurrence harps on the central fragility of the state—insisting that Congress cannot be left without power to legislate in this area:

> And Congress might well conclude that, if the nominating procedure were to be left open to fraud, bribery, and corruption, or subject to the more insidious but (in the opinion of Congress) nevertheless harmful influences resulting from an unlimited expenditure of money in paid propaganda and other purchased campaign activities, representative government would be endangered.[20]

Congress *must* be able to protect, he argues, "the very foundation of the citadel" from "sinister influences."[21] I have previously argued that the debate about the role of corruption in constitutional society can be seen in two different positions taken by the early Americans: Madison, who saw one of the purposes of government as limiting corruption, and Justice Marshall, to whom ideas about corruption were necessarily vague and unworkable.[22] In Pitney, we hear echoes of Madison and the structural argument—in Mc-

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[17] Brief for Plaintiffs in Error, Newberry v. United States, 256 U.S. 232, 236 (1921).

[18] *See Newberry*, 256 U.S. at 258.

[19] *See id.* at 275–76 (Pitney, J., concurring).

[20] *Id.* at 288 (Pitney, J., concurring).

[21] *Id.* at 288–90. A few years later, the *Yarbrough* logic was revived. In *Burroughs v. United States*, with McReynolds dissenting, the Court upheld Congress' right to pass laws regarding reporting and limits on Presidential elections, quoting extensively from *Yarbrough*. Following *Yarbrough*, it held that the ability to maintain the "purity" of the federal election process was inherent in the fact of federal elections. In fact, one-fifth of the opinion is a series of direct quotations from *Yarbrough*, with the conclusion, "these excerpts are enough to control the present case. To pursue the subject further would be merely to repeat their substance in other and less impressive words." 290 U.S. 534, 547 (1934).

[22] *See* Teachout, *supra* note 5, at 346–72; *see also* Fletcher v. Peck, 10 U.S. 87, 130 (1810).

Reynolds we hear echoes of Marshall's response, the technocratic, legalistic, and narrowing response (or nonresponse) to corruption.

II. The Shift From Corruption to Speech: "Free and Honest" Speech or "Free and Honest" Elections?

In the following years, the anti-corruption interest continued to dim, while a new emphasis on free speech arose. This transition played out in the two different impulses of Justice Douglas and Justice Frankfurter. While Douglas never actually ran for office, he was politically involved enough that his name was seriously considered for Vice President in 1944—politics were in his nature, and in his blood. So was a strong civil libertarianism. He was torn between two different ideas of what is at the center of the Constitution—the First Amendment and the integrity of the electoral process.

Justice Douglas first confronted this tension in *United States v. Classic* in 1941.[23] The question in that case was whether Congress should have the power to regulate primary elections at all.[24] Up until this point, Congress had regulated the general election, but the local parties had exercised such control over the primary that it was possible to become a nominee for a party simply by purchasing votes. The Court's majority in *Classic* concluded that it is part of the inherent power of Congress to regulate these primaries, despite the fact that this puts the fingers of Congress fairly deep inside private associational political organizations.[25] Justice Douglas dissented, but he did so "with diffidence," only after spending a page discussing the following threat:

> Free and honest elections are the very foundation of our republican form of government. . . . The fact that a particular form of pollution has only an indirect effect on the final election is immaterial . . . the Constitution should be read as to give Congress an expansive implied power to place beyond the pale acts which, in their direct or indirect effect, impair the integrity of Congressional elections. For when corruption enters, the election is no longer free, the choice of the people is affected.[26]

Nearly ten years after this opinion, Frankfurter, in his concurrence in *U.S. v. Congress of Industrial Organizations*, was just as absolute about free speech as Douglas had been about corruption.[27] That case involved the construction of the section of a statute that prohibited expenditures for elections.[28] The question was whether such a statute as applied to the costs

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[23] 313 U.S. 299 (1941).
[24] *See id.* at 314–24.
[25] *See id.*
[26] *Id.* at 329–30 (Douglas, J., dissenting).
[27] 335 U.S. 106 (1948).
[28] *Id.* at 107.

associated with regular pamphlets sent to labor union members was unconstitutional. The plurality opinion, by Justice Reed, ducked the question. Reed concluded that the constitutional issue need not be resolved; the statute was not intended to apply to membership newsletters.[29] Reed mentioned that the legislation was motivated by the "necessity for destroying the influence over elections" exercised by corporations, but goes little further in discussing the corruption interest.[30]

Frankfurter's concurrence went much deeper into the problem posed by the case than did Reed's opinion. He tacked back and forth between discussions of corruption and free speech, but ultimately settled on a treatise about the virtues of free speech, arguing that the right to speak—and to hear speech—is too deeply important to be trammeled by the interest of preventing corruption. "The most complete exercise of those rights is essential to the full, fair, and untrammeled operation of the electoral process."[31]

As for corruption, he equated it with undue influence. While not the first to use undue influence—it was mentioned at the time of the founders—he downgraded the moral weight of a word like corruption by making it parallel to a set of words with a far lesser pedigree and emotional resonance. Undue influence, he argued, "may represent no more than convincing weight of argument fully presented."[32] This syllogism (corruption = undue influence, undue influence = rhetorical persuasiveness, therefore corruption = rhetorical persuasiveness) did not completely satisfy him, however, because he returned to talk about exploring the dark passages in the connections between corruption and expenditures—only to dismiss them:

> There are, of course, obvious differences between such evils and those arising from the grosser forms of assistance more usually associated with secrecy, bribery and corruption, direct or subtle. *But it is not necessary to stop to point these out or discuss them*, except to say that any asserted beneficial tendency of restrictions upon expenditures for publicizing political views, whether of a group or of an individual, is certainly counterbalanced to some extent by the loss for democratic processes resulting from the restrictions upon free and full public discussion.[33]

His refusal to engage is all the more striking because he acknowledged that the legislative reason behind the bill was to root out the conditions for breeding corruption, and the political culture in which corruption could occur—not just the most obvious instances.[34]

"Free," he concluded, means free speech. "[I]n the claimed interest of free and honest elections, [this statute] curtails the very freedoms that make

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[29] *See id.* at 110.
[30] *Id.* at 113.
[31] *Id.* at 144 (Frankfurter, J., concurring).
[32] *Id.* at 145.
[33] *Id.*
[34] *Id.* at 143.

possible exercise of the franchise by an informed and thinking electorate."[35] The eloquence that earlier cases like *Yarbrough* and *Twist* bequeathed on the importance of corruption is gone in Frankfurter's concurrence, sidelined to make room for eloquence in admiration of free speech.

But Frankfurter returns, nine years later to the same difficult issues, with a greater respect for the importance of anti-corruption interests. In *U.S. v. UAW-CIO*, Frankfurter painstakingly summarized the history of public-financing debates, pumping up the dangers of corruption by referring to historians, debates on the House floor, and his own commitment to the integrity of the democratic process.[36] This summary has taken on a life of its own, as it has been referred to by Justices in two recent cases: Justice Souter in *FEC v. Wisconsin Right to Life, Inc.*,[37] and by Justice Stevens in *Citizens United*.[38] But by then, Frankfurter had abandoned corruption and concerns about corruption as a constitutional interest of high importance. He shied away—noticeably—from the word corruption, moving toward a more republican idea of society and arguing that the foundational interest that Congress was pursuing was the "active, alert responsibility of the individual citizen."[39]

In his cautious, scholarly manner, he wrote about the "popular feeling that aggregated capital unduly influenced politics, an influence not stopping short of corruption."[40] He did not expound on the difference between undue influence and corruption directly, but the sequence following the word "corruption" is telling: "The matter is not exaggerated by two leading historians," he reports, quoting them as saying that the nations' wealth "was gravitating rapidly into the hands of a small portion of the population, and the power of wealth threatened to undermine the political integrity of the Republic."[41]

If this paragraph was meant to be definitional—and it is not clear that it was—then Frankfurter adopted something at least resembling the founders' view of corruption. The view is wide (not limited to public actors, but including the role of private citizens) and deep (not limited to bribery, but including the moral crimes of failing to be an active, alert citizen). Undue influence is not merely persuasive power. Moreover, corruption is intensely important. "Speaking broadly," he wrote, "what is involved here is the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process. This case thus raises issues not less than basic to a democratic society."[42]

The case reads with a prescient anxiety. Frankfurter, understanding the dangers of money in politics, was seeking for authority—citing Elihu Root

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[35] *Id.* at 155.
[36] 352 U.S. 567 (1957).
[37] 551 U.S. 449, 535 (2007) (Souter, J., dissenting).
[38] 130 S. Ct. 876, 953 (2010) (Stevens, J., dissenting).
[39] 352 U.S. at 575.
[40] *Id.* at 570.
[41] *Id.* (citation omitted).
[42] *Id.* at 570.

speeches, hearings from Congress, Teddy Roosevelt's actions, and the writing of contemporary historians—to bolster his claim that yes, corruption concerns are important. It cannot be, the opinion pled, that this wondrous First Amendment is going to override very meaningful efforts to stave off corrupting threats to the government.

Douglas, in dissent, came after him with a heavy weapon. "When the exercise of First Amendment rights is tangled with conduct which government may regulate, we refuse to allow the First Amendment rights to be sacrificed merely because some evil may result."[43] Douglas spoke in words that Frankfurter cherishes, and it worked: Frankfurter, like Reed before him, fled. He did not submit to Douglas, but neither did he engage him. Instead of taking the next step and actually trying to balance these two major concerns, he found a way to avoid the issue altogether. All the Congressional records are for naught—the case, he concludes, is not ripe.[44] Corruption and free speech will have to battle it out another day.

Which is more fundamental, integrity or speech? Is "free and honest" free and honest as in speech, or free and honest as in free from corruption? We can hardly be surprised that some great minds anguish over this sphinx-like question, and in two major cases of the mid-twentieth century, this is exactly what Justices Reed and Justices Frankfurter did. In the two major corruption cases of the era, two different Justices avoided the central question—how to balance, or how to think about balancing, the anti-corruption interests and free speech interests. And the cases do not progress in an orderly fashion.

But what happens in this era, matching the First Amendment and corruption cases up against each other, is a subtle but important shift in the Court's basic understanding of the Constitution's political theory. Up through the 1930s, the Court—when it is forced to refer to core American political values—turns to classic republican ideals and considers its role to be a limited one, largely protecting the country from the threats of corruption. Afterwards, when it is forced to directly engage in political theory, the first place the Court looks is the First Amendment, and it sees its role as protecting the country from incursions upon the First Amendment.

Even when there was no explicit doctrinal shift, this shifting understanding of the Constitution's animating theory—and the Court's role—has significant, if barely perceptible, effects. The unnecessary but eloquent passages about the importance of protecting against corruption are gone; the unnecessary but eloquent passages about the importance of the First Amendment replace it.

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[43] *Id.* at 596 (Douglas, J., dissenting).

[44] *See id.* at 592–93. In a later case, Justice Douglas called this decision an "abdicat[ion of] the judicial function under resounding utterances concerning the importance of judicial self-denial." Pub. Affairs Assocs. v. Rickover, 369 U.S. 111, 117 (1962) (Douglas J., concurring).

As I've written elsewhere,[45] this tendency becomes even more exaggerated after *Buckley v. Valeo*, where the Court treats the anti-corruption concern as if it invented the concept and the First Amendment concern as if it were the most long-standing focus of the Court.[46] One concept directly replaces the other in the minds of the Justices as the central character in the American play about money, politics, and the Constitution. Where did this come from?

III. The Rise of the First Amendment

To understand the loss of focus on corruption, it is critical to understand the ascent of free speech doctrine. This section describes the process by which the free speech features of First Amendment came to be the predominant political value in political speech cases. This newly robust First Amendment grew out of political fights during World War I, when anarchists and activists were convicted of violating anti-sedition statutes for distributing pamphlets and criticizing the war, American foreign policy and economic policies.[47] Almost all of these convictions were upheld, and the First Amendment initially played a trivial role in discussions of the anti-sedition statutes' constitutionality. However, Justices Brandeis and Holmes dissented in several of these cases, and in these dissents created a different vision for the First Amendment.[48] As their vision was adopted in what Professor Jay calls the "creation" of the First Amendment, that amendment became the first among equals, not just as "*an*" amendment, but "*the* amendment," the one around which the American political philosophy was based.[49] This period both defined the scope, and the relative importance, of the First Amendment—and the Free Speech clause of the First Amendment—as compared to other rights.

When the campaign finance laws were first passed at the beginning of the last century, the First Amendment was not raised as a possible objection or concern. These laws, the Tillman Act and the Federal Corrupt Practices Act, did not face substantial opposition from free speech advocates.

A. The Creation of the "Free Speech Constitution": The Anarchists at the Root of Corporate Speech Rights

In 1917, Emma Goldman, a well-known writer and activist in the late 1800s to mid-1900s, was arrested and was sentenced to two years in prison

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[45] Teachout, *supra* note 5, at 383.

[46] 424 U.S. 1 (1976).

[47] *See, e.g.*, Arver v. United States, 245 U.S. 366 (1918).

[48] *See* Richard A. Primus, *Canon, Anti-Canon and Judicial Dissent*, 48 Duke L. J. 243, 250 (1998).

[49] *See* Stewart Jay, *The First Amendment: The Creation of the First Amendment Right to Free Expression from the Eighteenth Century to the Mid-Twentieth Century*, 34 Wm. Mitchell L. Rev. 773, 773–82 (2008).

for making speeches and distributing newspapers encouraging people not to register for the draft, in violation of the draft law. Her lawyers objected to the sentence, and—while they did not rest substantially on First Amendment grounds—mentioned the First Amendment in her defense. They argued that the draft laws violated the First Amendment because the exemption clauses of the draft act, which allowed for religious conscientious objectors, interfered with the free exercise of religion.[50] The Supreme Court took a dismissive approach to this vision of the First Amendment: "[W]e pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more."[51]

A similar dismissiveness persisted in several cases that followed involving speech and pamphleteering by anti-war activists. First, in *Abrams v. United States* in 1919, the Court upheld sentences of up to twenty years for five anarchists who had been distributing leaflets asking workers to join a general strike.[52] The majority opinion in *Abrams* barely addressed the First Amendment defense to this distribution. Likewise, in 1920, in *Schaefer v. United States*, the Court upheld five-year sentences for publishing German-language newspapers that condemned American involvement in the war.[53] And the same year the Court decided *Pierce v. United States*, which upheld convictions for distributing pamphlets discouraging enlistment in the same war.[54] Continuing in this same vein, in 1927 the Court upheld a conviction for a leader of the Communist Labor Party of California for her efforts to create a "revolutionary working class movement in America."[55]

While the majority of the Court easily upheld these convictions, first Brandeis, and then Brandeis and Holmes, dissented—finally with passionate dissents that put the right to free expression at the very center of American liberty and political theory. The dissents were highly original in their perspective. As Professor Jay wrote in his history, "Much of Brandeis' dissent, as with Holmes's in other cases, reflected a newly-found vision of free expression, not the prevailing view of eighteenth-century Americans, and certainly not of the law."[56]

In 1927 a majority of the Court started to make a shift towards this original vision. That year the Court struck down a conviction under the Kansas Syndicalism Act.[57] *Fiske v. Kansas* was the first time the Court overturned a conviction on First Amendment grounds. The case did not heavily rely on the First Amendment—instead, the free speech exploration

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[50] *See Arver*, 245 U.S. at 389–90.
[51] *Id.*
[52] 250 U.S. 616 (1919).
[53] 251 U.S. 466 (1920).
[54] 252 U.S. 239 (1920).
[55] Whitney v. California, 274 U.S. 357, 363 (1927).
[56] Jay, *supra* note 49, at 872.
[57] Fiske v. Kansas, 274 U.S. 380 (1927).

was intertwined with the claim that the relatively mild expressions of Fiske did not even fall within the act's purview.[58] However, it marked a beginning to the free speech discussions that were to come.

By the mid-1930s, the logic of the Brandeis and Holmes dissents began to appear in majority opinions, as political dissidents started winning cases on First Amendment grounds. In *Stromberg v. California*, the Court struck down an anti-syndicalist statute that criminalized the act of wearing a red flag or banner as a sign, symbol or emblem of opposition to organized government.[59] In the brief *Stromberg* opinion, Justice Hughes went beyond a technical reading of the Constitution to say that "[t]he maintenance of the opportunity for free political discussion . . . is a fundamental principle of our constitutional system."[60] Finally, by 1939, the First Amendment was not only central to any discussion about political speech, but it had catapulted, quickly, to the heart of the Constitution itself. As the Court wrote in *Schneider v. New Jersey*:

> This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution *that exercise of the rights lies at the foundation of free government by free men.* It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.[61]

The rhetorical structure of this paragraph is unremarkable to the reader in 2010, but twenty years prior to its writing—1919—it would have been alien, as alien as if a writer now referred to the gifts clause of the Constitution[62] in a similar way. For example, imagine someone writing, "The prohibition against receiving gifts from nobility is one of the fundamental political rights of a citizen. It reflects the belief of the framers of the Constitution that the assurance of this restriction lies at the foundation of free government by free men."

B. The Americanization of the First Amendment

The last stage of the new incarnation of the "Free Speech Constitution" came in *Bridges v. California* in 1941, which enshrined the First Amendment at the very heart of American liberty.[63] California claimed it had the power to hold newspapers in contempt of court to for publishing comment on pending cases.[64] Justice Black rejected California's argument, and in so

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[58] *See id.* at 386–87.
[59] 283 U.S. 359 (1931).
[60] *Id.* at 369.
[61] 308 U.S. 147, 161 (1939) (emphasis added).
[62] U.S. CONST. art. I, § 9, cl. 8.
[63] 314 U.S. 252 (1941).
[64] *See id.* at 258–59.

doing, Americanized the First Amendment, separating the First Amendment from British precedents that limited the scope of the press freedoms and suggested that contempt of court proceedings around public comment concerning ongoing cases were not subject to freedom of speech challenges.[65] Black argued that Madison elsewhere wrote that "the state of the press . . . under the common law, cannot . . . be the standard of its freedom in the United States,"[66] and that:

> No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed . . . . And since the same unequivocal language is used with respect to freedom of the press, it signifies a similar enlargement of that concept as well.[67]

The legal move is important for the particular case—but it has rhetorical consequences. *Bridges* becomes a key case in the development of the rhetoric of the First Amendment's role in the Constitutional canon. Black both explicitly Americanizes the First Amendment (drawing a clear line between American and British notions of freedom), and then works to place the First Amendment at the center of political theory: "These are not academic debating points or technical niceties. Those who have gone before us have admonished us 'that in a free representative government nothing is more fundamental than the right of the people through their appointed servants to govern themselves in accordance with their own will . . . .'"[68]

The rhetorical shift here is important, as Justice Black combines a citation to *Twining*, a case involving self-incrimination, with a citation to a double jeopardy case, and then adds that "the fullest opportunities for free discussion are 'implicit in the concept of ordered liberty.'"[69] By the end of this stitching, the First Amendment has become the heart and soul of ordered liberty and free representative government. While it takes another thirty years before the First Amendment is finally "coronat[ed]" in *Brandenberg v. Ohio*, the groundwork of the new understanding lies in the rhetoric of this period.[70]

It is hard to read these cases without being sympathetic to them, horrified that political pamphleteering was criminalized, and inclined to adopt wholeheartedly the Brandeis/Holmes/*Brandenberg* theory of the primary importance of the Free Speech protections of the First Amendment. However, it is possible to be sympathetic to the particular results, and the dissident-speech doctrine aspects of the cases, without immediately adopting all of the

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[65] *Id.*

[66] *Id.* at 264.

[67] *Id.* at 265. *See also* Robert E. Herman, *Recent Limitations on Free Speech and Free Press*, 48 YALE L.J. 54 (1938).

[68] *Bridges*, 314 U.S. at 281.

[69] *Id.* at 281–82.

[70] 395 U.S. 444 (1969); J.M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 393 (1990).

new rhetoric. The First Amendment was never intended to be the keystone of the federal political theory of the country, but the dissents by Holmes and Brandeis and the Americanization of the First Amendment in this period made it so. These dissents created the foundation of the modern era, where questions of politics and self-government are all referred *first* to the First Amendment, and larger questions of what constitutes a republican form of government, the explicit political philosophy clause in the Constitution, come second.

It is these cases that allowed Jack Balkin to write in 1990 that "freedom of speech is the paradigmatic liberty through which one participates in democracy in the pluralist conception. *Its constitutional instantiation, the First Amendment, becomes identified with democratic pluralism itself.*"[71] Balkin was profoundly right, but not in the deterministic way that he suggested. The First Amendment need not have become the "paradigmatic liberty" through which one participates in a plural democracy—it is the peculiar, and historically shaped intellectual context of our modern Constitutionalism that has chosen the First Amendment as the paradigmatic liberty.

Supreme Court opinions contribute to an ecology of ideas and then are partially shaped by the ecology they have created. The elevation of the Free Speech constitution in the courts has led to its elevation outside of the courts. In recent surveys done by the First Amendment Center, Americans routinely identify "free speech" as the purpose of the First Amendment in numbers ranging from four to six times more than they identify the runner-up rights.[72] This in turn, in complex ways, feeds into academic work, which feeds back into the courts and into the public. Scholars often talk about "the First Amendment" when they mean "speech rights."

While the Court has never technically held that the First Amendment is the first among equals, its valorization has led academics to fight on the battlefield of the Free Speech clause when they would justify restrictions on campaign funding. Professor Owen Fiss wrote about this (and then accelerated what he was describing) when he wrote, in 1991, that

> There was a sense in the body politic that the First Amendment is not simply a technical legal rule, to be amended whenever it produces inconvenient results, but rather an organizing principle of society, central to our self-understanding as a nation and foundational to a vast network of highly cherished social practices and institutions.[73]

Fiss also stated in 1987 that "[t]he first amendment also enjoys what substantive due process was never able to obtain, namely, a consensus—support from the entire political spectrum . . . . [A] special place or exception was

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[71] *Id.* at 392 (emphasis added).

[72] FIRST AMENDMENT CTR., STATE OF THE FIRST AMENDMENT—2010 CORE QUESTIONS SURVEY (2010), *available at* http://www.firstamendmentcenter.org/pdf/SOFA.Sept.2010data.pdf.

[73] Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2087 (1991).

always reserved for speech" and called out "[t]his peculiar status of free speech in our constitutional scheme."[74]

Having recognized free speech's unique role, Fiss then accepts the terms of engagement, and proceeds to explain why it is necessary to understand speech as meaning the protection and encouragement of robust deliberative debate. Fiss suggests that the First Amendment should be understood less as a protection of the industrial production of speech, and more as a protection for robust deliberative debate.[75] The essay is provoking and powerful—for our purposes what is so interesting is that the platform on which the debate occurs is the First Amendment.

When New York University and the Brennan Center held a colloquium on the *Citizens United* decision, they titled it "Money, Politics, & the Constitution: Building a New Jurisprudence." However, almost all of the discussion centered around the radical nature of the Court's interpretation of the First Amendment, and possible alternate visions of the First Amendment.[76]

This academic shift, which then colors legal articles and law schools, changes the Justices' emotional relationship to the concept, making smaller violations of the Free Speech Clause of the First Amendment greater and more traumatic than smaller violations of the Fourth Amendment, or Second Amendment, or the Foreign Gifts Clause of the Constitution. There is a growing taboo around speech—and wherever there is a taboo, something interesting is happening. Much like one can talk freely about partition in Ethiopia/Eritrea but not in Israel/Palestine, one can talk freely about the limits of other constitutionally protected rights, but must be more cautious around First Amendment ones.

In addition to Owen Fiss, Alexander Meiklejohn and others have done beautiful writing and work explaining how the First Amendment should be understood not in purely libertarian terms, but as a protection of popular sovereignty, with the goal of broadening public power in order to allow citizens to understand the arguments and make educated civic choices.[77] I am largely persuaded by much of their work, but an accidental side effect is that this work enlarges yet more the relative role of the First Amendment in the role of the Court's Constitutional political theory. It reframes debates about democracy *inside* debates about the meaning of the First Amendment. In effect, we have a tendency to narrow the field in which debates about money and politics can be made to the narrower arena of the First Amendment, as if all questions of political theory can be resolved there.

Consider how the First Amendment appears in *Citizens United v. Federal Election Commission*. Kennedy begins by dressing up the First Amend-

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[74] Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 782–83 (1987).

[75] *Id.* at 785.

[76] *Money, Politics & the Constitution: Building a New Jurisprudence*, BRENNAN CTR. FOR JUSTICE, http://www.brennancenter.org/content/pages/money_politics_the_constitution_symposium.

[77] *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (Kennicat Press, 1972) (1948).

ment as a wise elder. He quotes Scalia to argue that upholding the FEC's authority to regulate campaign finance is a "significant departure."[78] Why this quote and not another? Whether consciously or not, Kennedy's construct of the First Amendment as "ancient" endows it with special qualities, like the qualities of a king in a court. This appellation is especially striking because *Austin* was anything but a departure—rightly or wrongly, the First Amendment principles invoked by Scalia are modern, not ancient.

Moreover, Justice Kennedy quotes Justice Roberts' *Wisconsin Right to Life* opinion for the proposition that First Amendment standards, however, "*must give the benefit of any doubt* to protecting rather than stifling speech."[79] The absolute language of "any doubt" confers an absolute, veto-providing authority to First Amendment concerns.

The *Citizens United* opinion reads like a disquisition on First Amendment rights, and there is little alternate political theory to balance it. While the opinion talks a good deal about political speech, it barely mentions politics and only once talks about the integrity of the political process. Despite the fact that the case in front of the Court concerned a bill passed by a majority of Congress after huge national public debate about the nature of money and politics and their relationship in our country, the opinion treats the question as if it involves only the First Amendment, not politics more broadly.

In sum, there has been a fascinating progression in the understanding of the relationship between the First Amendment and campaign finance. The Amendment is completely absent when the first anti-bribery campaign finance laws are passed. Then it gradually introduces itself, and then—after *Buckley v. Valeo*—comes to dominate the entire discussion of campaign finance laws. The shift is subtle, and it does not automatically flow from the shape of the Constitution itself. If the First Amendment had simply been recognized for its power in preventing anti-sedition lawsuits and not coronated as the heart of American political theory, a different history could have easily played out—one where anti-corruption concerns were balanced against First Amendment concerns. But because the First Amendment emerged as a defining, fundamental, liberty- and democracy-creating engine, it replaced, instead of joined, the anti-corruption principles of the Courts.

IV. Makeup of the Court: From Politicians to Appellate Judges and Academics

A second explanation of the change in the role—and prominence—of corruption in political theory cases is the changing makeup of the court. Corruption is a notoriously contested concept. In previous work I outlined

[78] *Citizens United*, 130 S. Ct. at 886 (quoting Fed. Election Comm'n v. Wis. Right to Life, 551 U.S. 449, 490 (2007) (Scalia, J., concurring in part and concurring in the judgment)).

[79] *Id.* at 891 (citing Fed. Election Comm'n v. Wis. Right to Life, 551 U.S. 449, 469 (2007) (Scalia, J., concurring in part and concurring in the judgment)) (emphasis added).

five ways the courts in the last thirty years have talked about it—as a kind of inequality, as a distortion, as a loss of integrity, as undue influence, and as a failure to follow federal bribery law.[80] Professor Larry Lessig talks about corruption in a democracy as being caused by inappropriate dependencies, an argument I find persuasive.[81] The political scientist Joseph Nye defined it as the abuse of public power for private gain.[82] For some, corruption is essentially a violation of a rule or norm regarding economic access to the public goods.[83] For others, it is necessarily a moral violation.[84] The concept is both essentially contested and still very powerful, like liberty or equality.

However, it appears to have a more special meaning for people who have been involved in politics than for those who imagine politicians as all inherently self-seeking. This seems slightly counterintuitive to those who have never campaigned; one would think that politicians, more familiar with the dark arts, would be more cynical than a naïve public. But instead, those involved in politics tend to have a far more complex and subtle understanding of the way in which money shapes incentives. Those with academic backgrounds, on the other hand, have a particular relationship to speech and are more likely to emphasize the verbal content of political power battles.

Obviously, involvement in politics and noninvolvement in politics are not binary. Anyone who is a Supreme Court Justice must have had at least a slight brush with, or interest in, electoral life or public policy. Counting Justices' public roles does not reveal a perfectly neat pattern. Those who have never held public office could easily have been deeply engaged in working on a political campaign, or an issue campaign, while those who have held such positions could have done so with little or no politicking on their part. Clearly, direct political experience is not necessary for brilliant insight into political life—think of Hobbes—but in American history, the two roles tend to coincide. Moreover, many of the greatest political philosophers in world history *were* deeply politically engaged. John Stuart Mill was a member of Parliament. Edmund Burke was a statesman and dedicated anti-colonialist in India. Machievelli was a diplomat and civil servant. All of these important philosophers wrote about theories of politics having experienced politics.

However, the visceral experience of politics—like the visceral experiences of art, theater, and love, perhaps—is fundamentally different than the imagined, or theorized, life of politics. Those involved who have confronted and experienced irrational intransigent power, or power that is intransigent

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[80] Teachout, *supra* note 5, at 341.

[81] *See, e.g.*, Lawrence Lessig, *Democracy After Citizens United*, BOS. REV., Sept./Oct. 2010, at 11, *available at* http://bostonreview.net/BR35.5/lessig.php.

[82] J.S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 419 (1967).

[83] *See, e.g.*, SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES AND REFORM 26 (1999).

[84] *See, e.g.*, Laura S. Underkuffer, *Defining Corruption: Implications for Action*, in CORRUPTION, GLOBAL SECURITY, AND WORLD ORDER 27, 27 (Robert I. Rotberg ed., 2009).

because of vested interests, know a force that is not easily described. This life is experienced on an emotional level akin to love because the choice to seek—and hold—political office in the United States is itself a product of a non-economic, non-rational actor, seeking something more elemental than rationality can account for. Thus, as economic modeling makes a weak gesture towards accuracy, political theory that is overly modeled and overly rational makes a weak gesture towards the life of politics.

A. The Politician Justices

I mentioned earlier a few cases from the nineteenth century in which the Court talked extensively about its role as a protector of the state against corruption. Consider the different biographies of the Justices who wrote the earlier opinions, placing corruption fears at the heart of the Court's role, and the later Justices, who paid more attention to the First Amendment concerns.

Justice Swayne, who wrote *Trist v. Child*, had been active in the legislature and the Republican Party. He moved from Virginia to Ohio because of his strong abolitionist beliefs and was the elected attorney for Coshocton, Ohio. Andrew Jackson appointed him U.S. Attorney for Ohio in 1830—he moved to Columbus for the job and ended up running for office there, first on the Columbus City Council, and later on in the state legislature. He was an active early Republican organizer and political leader and part of the party's formation in the 1850s. When he wrote for the Court in 1874—in an opinion that refused to enforce a contract to lobby as against the public policy of the United States—it was not as a naïve academic or utopian, but as someone who had lived inside the logic of politics for over fifty years, as a candidate, organizer, appointee, councilman, and state representative. He wrote that lobbying is "contrary to the plainest principles of public policy. No one has a right in such circumstances to put himself in a position of temptation to do what is regarded as so pernicious in its character."[85] He went on to argue that "[i]f any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption and the employment as infamous."[86]

Justice Samuel Miller, who wrote *Yarbrough*, had also been extremely active in politics before becoming a judge. Horace Stern's profile of Justice Miller begins with a quote from Emerson's Self-Reliance, describing him as someone who "in turn tries all the professions, who teams it, farms it, peddles, keeps a school, preaches, edits a newspaper, goes to Congress, buys a township, and so forth, in successive years, and always, like a cat, falls on

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[85] Trist v. Child, 88 U.S. 441, 451 (1875).
[86] *Id.*

his feet."[87] Miller spent ten years as a doctor before becoming a practicing lawyer and was active in politics—in particular, abolitionist politics—in Kentucky. He ran as a delegate for a statewide abolitionist convention, and then withdrew his candidacy so as not to split the vote. He moved from Kentucky to Keokuk, Iowa, in order to free his slaves and raise his children outside of slavery. He became a leader in Republican Party politics in Iowa, and was nominated for (but not ultimately elected to) the state senate. And when he was being considered for the Supreme Court, a massive petition effort of Iowa politicians supported him. Later, he was involved in the electoral commission involving the disputed Presidential election in 1876.[88]

His passion for politics is revealed in *Ex parte Yarbrough*—the entire opinion reads as a passionate defense of self-government. Throughout the opinion he references what he sees as the two primary tools for undoing democracy, violence and corruption, which he sometimes refers to as force and fraud:

> That a government whose essential character is republican, whose executive head and legislative body are both elective, whose numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration. If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends, from violence and corruption.[89]

In fact, when *Yarbrough* was decided, over half of the Justices had successfully run for office (Field, Harlan, Matthews, Wade, and Woods).[90] Justice Field was in the California State Assembly and ran and lost a campaign for state senate.[91] Justice John Marshall Harlan was actively involved in at least six political parties—the Whigs, the Know Nothings, the Kentucky Opposition Party, the Constitutional Union Party, the Conservative Union Party, and the Republican Party.[92] He personally ran for and won the office of attorney general, and he campaigned actively for other candidates.[93] Justice

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[87] Horace Stern, *Samuel Freeman Miller*, *in* 6 GREAT AMERICAN LAWYERS 539, 541 (William Draper Lewis, ed., 1909).

[88] *Id.* at 576.

[89] 110 U.S. 651, 657–58 (1884).

[90] HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS 96 (2008) (Field); *id.* at 106–07 (Harlan); *id.* at 108–09 (Matthews); FED. JUDICIAL CTR., *Waite, Morrison Remick*, *in* BIOGRAPHICAL DIRECTORY OF FED. JUDGES, http://www.fjc.gov/servlet/nGetInfo?jid=2474 (Waite) (on file with the Harvard Law School Library); FED. JUDICIAL CTR., *Woods, William Burnham*, *in* BIOGRAPHICAL DIRECTORY OF FED. JUDGES, http://www.fjc.gov/servlet/nGetInfo?jid=2650 (Woods) (on file with the Harvard Law School Library).

[91] ABRAHAM, *supra* note 90, at 96.

[92] LOREN P. BETH, JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE 30 (1992).

[93] *Id.* at 70.

Woods was mayor of Newark, Ohio and a representative in the state assembly.[94] Justice Matthews was elected to the Ohio State Senate and the United States Senate.[95]

In the middle years discussed above, when the Court wavered on the relative importance of the First Amendment and corruption concerns, the decisions of the Court made by Justices who previously engaged in politics—such as Pitney and Sutherland—tended to give more weight to concerns about corruption than those who did not. Justice Pitney was a representative in New Jersey and in Congress and had hoped to become Governor.[96]

By the 1930s and 1940s, the Court had substantially changed. Douglas, Frankfurter, and McReynolds never won elective office. McReynolds had run for office but failed. By the time *CIO* was decided, all three opinions were written by people who had not been part of electoral politics (Reed, Frankfurter, and Rutledge).[97]

Finally, in 1976, when *Buckley v. Valeo* was decided, none of the Justices had substantial political experience: Potter Stewart was in a private law firm before becoming a federal appellate judge.[98] Brennan was in private practice, the military, and the New Jersey Supreme Court.[99] Thurgood Marshall was a litigator before being appointed to the Second Circuit and the Supreme Court.[100] Warren Burger was active behind the scenes in Minnesota politics, but was primarily a litigator before his appointment to the Court of Appeals.[101] Harry Blackmun was an academic and law partner before the Court of Appeals.[102] Rehnquist was also involved behind the scenes in politics, but never as a candidate.[103] Stevens was a creative force within his practice and community, but never ran for office. White was a Kennedy supporter, but never ran for office. Justice Powell is the one excep-

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[94] FED. JUDICIAL CTR., *Woods, William Burnham, in* BIOGRAPHICAL DIRECTORY OF FED. JUDGES, http://www.fjc.gov/servlet/nGetInfo?jid=2650 (on file with the Harvard Law School Library).

[95] FED. JUDICIAL CTR., *Waite, Morrison Remick, in* BIOGRAPHICAL DIRECTORY OF FED. JUDGES, http://www.fjc.gov/servlet/nGetInfo?jid=2474 (on file with the Harvard Law School Library).

[96] *Mahlon Pitney,* OYEZ PROJECT, http://www.oyez.org/justices/mahlon_pitney/ (on file with the Harvard Law School Library); ABRAHAM, supra note 90, at 147–48 (Sutherland).

[97] ABRAHAM, *supra* note 90, at 171–73, 186.

[98] FED. JUDICIAL CTR., *Stewart, Potter, in* BIOGRAPHICAL DIRECTORY OF FED. JUDGES, http://www.fjc.gov/servlet/nGetInfo?jid=2294 (on file with the Harvard Law School Library).

[99] FED. JUDICIAL CTR., *Brennan, William Joseph Jr., in* BIOGRAPHICAL DIRECTORY OF FED. JUDGES, http://www.fjc.gov/servlet/nGetInfo?jid=249 (on file with the Harvard Law School Library).

[100] ABRAHAM, *supra* note 90, at 229.

[101] *Id.* at 43.

[102] FED. JUDICIAL CTR., *Blackmun, Harry Andrew, in* BIOGRAPHICAL DIRECTORY OF FED. JUDGES, http://www.fjc.gov/servlet/nGetInfo?jid=187 (on file with the Harvard Law School Library).

[103] ABRAHAM, *supra* note 90, at 252.

tion—he was chairman of the Richmond School Board, which likely was an elected position.[104]

Justices who worked behind the scenes in politics are likely to have a perspective similar to someone who has actually run for office or been elected—depending, of course, on the way in which they worked behind the scenes, how involved they were in strategy, fundraising, or politicking, and some of this cannot be described in a crude biography. I do not think these Justices completely lacked political savvy or experience, but the contrast between this Court and its predecessor even forty years prior is striking.

B. The Academic and Appellate Justices Court

The current Court that decided *Citizens United* has an even more limited pedigree. No members of that Court have been elected to office.[105] Justice Roberts never practiced law outside of Washington, D.C., and his primary experience was as a federal appellate judge.[106] Justice Scalia started in private practice and then was an academic, in addition to practicing law in D.C. for the government.[107] Justice Kennedy was in private practice and an academic before his appointment.[108] Clarence Thomas worked in D.C. as a legislative assistant for two years—some contact with politics, presumably, though not elective—and practiced in D.C. as the Chairperson of the Equal Employment Opportunity Commission.[109] Justice Ginsburg was an academic and appellate judge.[110] Breyer was an academic and appellate court judge who served as the Chief Counsel to the Senate Judiciary Committee.[111] Justice Alito worked in various roles in federal prosecution before becoming an appellate judge.[112] Justice Souter served as New Hampshire's Attorney

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[104] FED. JUDICIAL CTR., *Powell, Lewis Franklin, Jr.*, *in* BIOGRAPHICAL DIRECTORY OF FED. JUDGES, http://www.fjc.gov/servlet/nGetInfo?jid=1927 (on file with the Harvard Law School Library).

[105] *See* SUSAN NAVARRO SMELCER, CONG. RESEARCH SERV., R 40802, SUPREME COURT JUSTICES: DEMOGRAPHIC CHARACTERISTICS, PROFESSIONAL EXPERIENCE, AND LEGAL EDUCATION, 1789–2010, at 23 (2010).

[106] FED. JUDICIAL CTR., *Roberts, John Glover Jr.*, *in* BIOGRAPHICAL DIRECTORY OF FED. JUDGES, http://www.fjc.gov/servlet/nGetInfo?jid=3001 (on file with the Harvard Law School Library).

[107] FED. JUDICIAL CTR., *Scalia, Antonin*, *in* BIOGRAPHICAL DIRECTORY OF FED. JUDGES, http://www.fjc.gov/servlet/nGetInfo?jid=2108 (on file with the Harvard Law School Library).

[108] FED. JUDICIAL CTR., *Kennedy, Anthony McLeod*, *in* BIOGRAPHICAL DIRECTORY OF FED. JUDGES, http://www.fjc.gov/servlet/nGetInfo?jid=1256 (on file with the Harvard Law School Library).

[109] FED. JUDICIAL CTR., *Thomas, Clarence*, *in* BIOGRAPHICAL DIRECTORY OF FED. JUDGES, http://www.fjc.gov/servlet/nGetInfo?jid=2362 (on file with the Harvard Law School Library).

[110] FED. JUDICIAL CTR., *Ginsburg, Ruth Bader*, *in* BIOGRAPHICAL DIRECTORY OF FED. JUDGES, http://www.fjc.gov/servlet/nGetInfo?jid=865 (on file with the Harvard Law School Library).

[111] FED. JUDICIAL CTR., *Breyer, Stephen Gerald*, *in* BIOGRAPHICAL DIRECTORY OF FED. JUDGES, http://www.fjc.gov/servlet/nGetInfo?jid=255 (on file with the Harvard Law School Library).

[112] FED. JUDICIAL CTR., *Alito, Samuel A. Jr.*, *in* BIOGRAPHICAL DIRECTORY OF FED. JUDGES, http://www.fjc.gov/servlet/nGetInfo?jid=26 (on file with the Harvard Law School Library).

General (an appointed position) before becoming a justice on the New Hampshire Supreme Court.[113] Justice Stevens was in private practice prior to his appointment.[114] While all had various jobs that involved appointment and public service, none had run for office or committed a substantial part of their life to political work—moreover, even those who had, did so in the relatively constrained environment of Washington D.C., instead of on the hustings.

This is an extraordinary transformation, from a Court filled with politicians to a Court with no politicians. Those involved in politics may have been much more likely to warm to arguments about the severity of the threat of money, having a more subtle understanding of its impact. Those outside of politics might be more likely to look at this in market or academic terms, being interested in equality—or undue influence—but not in the more insidious infections of power. The politicians might have known too well how money, and power, can actually corrupt the spirit, not just flood the market. The virile language of *Trist* and *Yarbrough*—and also that of Hamilton, Montesquieu, Mason, Gerry, and Madison—may simply have failed to connect with the modern jurist, more likely to be trained in litigation than in counting votes in a district.

Justice Swayne in *Trist* writes, "If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption and the employment as infamous."[115] Justice Kennedy in *Citizens United* writes, "The anticorruption interest is not sufficient to displace the speech here in question. Indeed, 26 States do not restrict independent expenditures by for-profit corporations. The Government does not claim that these expenditures have corrupted the political process in those States."[116]

The scholarly or appellate mind is more likely to warm to the theories put forth by the law and economics school of thought. Some of this is accidental, but some, deliberate. The Law and Economics movement, which began in the late 1950s and gained force throughout the 1960s and 1970s, included a deliberate effort to change the language of the law. Law and Economics scholars tend to believe a very particular story about human nature: on the one hand they acknowledge that the belief is a useful fiction; on the other hand they use that useful fiction to paint a full portrait of human life.

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[113] FED. JUDICIAL CTR., *Souter, David Hackett, in* BIOGRAPHICAL DIRECTORY OF FED. JUDGES, http://www.fjc.gov/servlet/nGetInfo?jid=2244 (on file with the Harvard Law School Library).

[114] FED. JUDICIAL CTR., *Stevens, John Paul, in* BIOGRAPHICAL DIRECTORY OF FED. JUDGES, http://www.fjc.gov/servlet/nGetInfo?jid=2290 (on file with the Harvard Law School Library).

[115] Trist v. Child, 88 U.S. 441, 451 (1875).

[116] 130 S. Ct. 876, 908–09 (2010).

For purposes of understanding the shift in the role of speech and corruption, the key feature of the Law and Economics movement is the part played by the rational man. The rational man assumption is the assumption that an individual weighs the costs and benefits of his actions and will always take the action with the greatest net benefit to himself. The areas in which this assumption had the most obvious and striking impact are torts and contracts, where Law and Economic scholars attempt to import this assumption into the decisions themselves. Law and Economics scholars try to turn benefits and costs into dollar values and then measure them against each other.

In the Law and Economics movement, there are those who bring a strong form of rational man theory to law (assume that criminals are rational), and those who bring a weaker form. Professor Guido Calabresi, for instance, recognizes that people may lack information, have psychological biases, and be irrational in weighing short-term costs against long-term costs.[117] But even Calabresi, with his conditions on rationality, works with the assumption that the person—however rationally—will be oriented towards maximizing his or her own benefit.

Corruption, in the way it was understood in the case law through at least the 1930s, assumed the possibility of a benevolent irrationality, the possibility that in public service, individuals will pursue public ends even when it might benefit them to pursue their own private ends. Moreover, the language of the Law and Economics movement gives a positive, enlightenment-related term to self-serving behavior: rationality. The Justices who joined Justice Miller in refusing to enforce a contract to lobby would be far more likely to use a negative epithet than an honorific like "rational" for a company that was paying lobbyists.

One of the social functions of a word like "corrupt" is to support a system of government where the actors do not imagine themselves as self-interested. Some self-interest may be present, and few throughout history would deny the benefits of pride, power, ambition, attention, love, and adulation that can come with public office—but those who believe in corruption also believe that despite these other concerns, it is valuable to aspire to a society where those in government are concerned on a daily basis with the well-being of the public.

For the most part, the Law and Economics movement was not focused on the public servant: the goal was to change the rhetoric and the rigor within legal cases involving traditionally private law. But the effect of the successful debate was to squeeze out, almost as a side effect, a way of talking about government that allowed for corruption to be a central idea.

The strong version of this is found in the views of Justice Scalia and Justice Thomas, neither of whom believes corruption to be a valid concept at

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[117] Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 515 n. 43 (1961)

all.[118] But the weak form of this infuses the dissents as well as the majority opinions, as the Justices fail to describe the actual experience of politics. Even Justice Stevens, in his outraged dissent, does not create a recognizable image of the way in which money moves in political campaigns and how it affects the psyches of those involved.

When a donor to Chuck Schumer demanded his contribution back because he thought Schumer was getting too hard on financial institutions and should be a better friend to Wall Street[119]—in absolute violation of campaign laws—those who have experience in politics found the story unremarkable and routine. The illegal (and unprosecuted) donor "bribe" for a position is widely known and experienced, but the theory of campaign donations tends to dismiss it as too hard to prove. The commitment to *a priori* understandings of corruption, instead of real-world understandings of corruption, has parallels in other areas of experience—where the increased commitment to modeling instead of observing has led to very dangerous results. Modeling left no room for the financial crash of 2008. Financial models—like the models of corruption and speech understood by the Court—are dangerous, because while they purport to be self-contained, they never are.

As with the previous section, there is an irony here in the change of law. One might think that those with real experience in the very cynical, dirty world of politics would reject ideas of "corruption" and efforts to diminish corruption as wide-eyed and naïve. One might think that after decades of working with donors, lobbyists, and an ignorant public, those who had been candidates would demolish a constitutional notion of an anti-corruption principle. And one might suspect that naïve academics would postulate the possibility of a public-facing public servant, only to be ridiculed by practicing congress members and mayors. But the reverse is true. Practicing politicians, as cynical as they may become, understand the difference between the corrupt and non-corrupt person or system in visceral ways; they do not find the line too hard to thread. Academics, on the other hand, and ideological litigators, are more troubled—they, not the experienced politicos, created the model of the rational man/rational politician, the one to whom corruption is an incoherent and outdated idea.

CONCLUSION

Modern actions have their roots in much older shifts. While the public was shocked by *Citizens United*, academics were taken aback—themselves shocked—by the degree of public reaction. I think this is because even those academics who disagreed, even sharply disagreed, with the opinion, had come to accept a few basic habits of the Court—the habit of treating the

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[118] Teachout, *supra* note 5, at 343, 388.

[119] Michael Powell, *Facing Reelection, Senator Charles Schumer Draws Breath*, N.Y. TIMES, Feb. 5, 2010, at A18, *available at* http://www.nytimes.com/2010/02/05/nyregion/05schumer.html?scp=1&sq=chuck+schumer+wall+street&st=nyt.

First Amendment as the primary source of political theory and the habit of describing politics as visitors from an alien world, not as inhabitants.

The centrality of the First Amendment is a modern innovation in American constitutional law—of its 230-year history, the First Amendment has played the current leading role only for the last sixty. Prior to the 1940s, the First Amendment was one of many—now it is often treated as first among equals of the constitutional amendments. Whereas fears about corruption have always (pre-*Buckley*) been centrally important, the relationship between corruption and speech, which seems obvious to a modern jurist, simply is not present in the early years.

There are many other reasons for the shift, but the change in the political experience of the Justices appears to have filtered into the opinions, and to be partially responsible for the abstract way in which the Supreme Court now talks about corruption. While nineteenth century Justices were typically politicians, now few are. This undoubtedly has shaped how corruption is viewed, and seems to have shaped how seriously the threat is taken.