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The Unenforceable Corrupt Contract: Corruption and Nineteenth Century Contract Law

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THE UNENFORCEABLE CORRUPT CONTRACT: CORRUPTION AND NINETEENTH CENTURY CONTRACT LAW

ZEPHYR TEACHOUT*

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I.

INTRODUCTION

In *Citizens United v. FEC*,¹ the majority in the U.S. Supreme Court purported to close the debate about corruption in campaign finance law. After decades of debate, the Court decisively rejected a broad understanding of corruption in favor of a narrow one, holding that only *quid pro quo* corruption could justify campaign finance regulation that infringed on First Amendment rights.²

The decision was a bombshell. While some commentators had predicted that the Court might continue to whittle away at Congressional power to pass laws restricting corporate electoral activity, the case was decided on the broadest possible grounds. It overturned thirty years of direct precedent and opened the

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

2. *Id.* at 910.

possibility that foreign entities might be able to spend money to influence elections.³

However, the Court in *Citizens United* left open a few opportunities for greater exploration. Justice Kennedy, who authored the majority opinion, heavily emphasized the criminal nature of the sanctions against corporate political speech.⁴ Yet, outside of criminal law, different tools could potentially be used to discourage private companies from trying to use their wealth to influence public bodies for private advantage. What if, instead, Congress limited the jurisdiction of courts over certain contracts that it deems corrupt? What if, for example, Congress did not criminalize independent corporate expenditures, but directed courts not to enforce contracts related to independent expenditures? Similarly, what if Congress did not try to limit certain kinds of lobbying through criminal law, but simply refused to enforce contracts to lobby?⁵

Public corruption is hardly a new phenomenon, and policymakers have long struggled to find an effective mechanism to deter or punish corruption. While we have recently tried to deal with public corruption through legislation aimed at reducing its incidence, nineteenth century policymakers adopted a very different tactic. In the nineteenth century, courts used contract law to discourage public corruption by refusing to enforce contracts that they deemed corrupt. Just as they would refuse to enforce contracts for prostitution, they would refuse to enforce contracts between public servants and private entities that undermined the integrity of representative government. In the most striking instance of this practice, the U.S. Supreme Court refused to enforce a contract to lobby Congress, holding that it was a clearly corrupt practice and against the public policy of the United States.⁶ Thus, contrary to Justice Kennedy's view in *Citizens United*,⁷ cases that uphold limits on campaign spending are not outliers, but rather are consistent with generations of cases that recognized the public danger of money having too much influence in politics.

Citizens United's blanket prohibition on Congressional criminalization of

3. As importantly, the decision decreased the friction that had previously prevented corporations from engaging in quasi-electoral work, and let nonprofit, 501(c)(4) organizations funded by corporate sources to shield corporate electoral activity from scrutiny relax in their pursuit of electoral impact. One of the greatest costs of the prior ban on campaign spending by corporations was the energy spent on avoiding prosecution. By giving 501(c)(4) organizations and corporations the green light to engage in all noncoordinated political activity, it reduced the cost of lawyers and the fear of being prosecuted.

4. *Citizens United*, 130 S. Ct. at 888, 889, 895, 896, 897, 908.

5. My argument was inspired in part by Deborah Hellman's ideas, which are reflected in her Article in this volume. Professor Hellman examines the freedom of legislatures to limit the sale of items that it cannot ban outright. See Deborah Hellman, *Money & Rights*, 35 N.Y.U. REV. L. & SOC. CHANGE 528 (2011). In contrast, I examine the possibility that legislatures could limit the enforcement of contracts that it may not ban outright.

6. *Trist v. Child*, 88 U.S. 441 (1874).

7. *Citizens United*, 130 S. Ct. at 899–903 (concluding that *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the Court's broad view of corruption in that case was an outlier).

corporate spending requires us to think more imaginatively. If we take Kennedy's repeated reference to criminal liability seriously, we might fruitfully explore ways to revive the use of judicial nonenforcement of contracts to discourage corruption in our electoral system. The ad hoc nineteenth century practice of refusing to enforce contracts to sell public obligations provides an intriguing possibility for exploration. These ideas involve real difficulties, and I explore the likely objections in the body of the Article. What is most appealing about nineteenth century courts' approach to corruption is that it offers the possibility to move the debate outside the framework of criminal law and instead wield the power of civil law to dissuade behavior that distorts democratic self-governance. My goal is to spark discussion and open the range of options available to Congress—and, in doing so, to continue in a larger project of exploring the relationship between courts and public corruption.

This Article introduces some of these nineteenth century practices regarding corruption and suggests that they might shed light on new ways to think about dealing with money and politics after *Citizens United*. It is not intended as a comprehensive review, but as a provocative exploration of a vastly different way of thinking about courts and corruption. This Article's primary goal is descriptive. It illustrates that, even prior to modern statutory campaign finance law, courts would use their power to refuse to enforce contracts to limit the power of money in the political sphere. In doing so, this description augments Justice Stevens' dissenting argument in *Citizens United* that courts should give great weight to corruption concerns.⁸

Part I briefly outlines *Citizens United*, with an emphasis on how the Court addresses corruption and the case's focus on criminal liability. Part II outlines the scope of the private law of corruption as it existed in the nineteenth century and features three cases exemplifying the use of private law to limit corruption. In Part III, I attempt to connect the nineteenth century model to the modern puzzle of campaign finance law, arguing that private law has the advantage of discouraging political behavior while not prohibiting it, potentially avoiding some of the First Amendment concerns raised by modern campaign finance legislation. Ultimately, I hope that the different way that nineteenth century courts dealt with political corruption is so striking that it ignites the imaginations of scholars and politicians struggling with ways to limit government capture.

II.

THE CRIMINAL FOCUS IN *CITIZENS UNITED V. FEC*

In *Citizens United v. FEC*, the Supreme Court significantly narrowed the definition of public corruption—and, with it, narrowed the ability of the government to take affirmative steps to remedy that corruption. Prior to *Citizens United*, the Court had recognized that laws limiting corporate political spending

8. *Id.* at 953 (Stevens, J., dissenting).

could be upheld if they were aimed at preventing the “distorting effects” that occur when organizations with amassed wealth exercise undue influence over the political sphere.⁹ Writing for the majority in *Citizens United*, Kennedy redefined corruption as limited only to “*quid pro quo* corruption”¹⁰ and held that the government could not punish expression protected by the First Amendment with criminal sanctions because of concerns about the distorting effects of that speech.

In *Citizens United*, the Supreme Court struck down § 441b of the Bipartisan Campaign Reform Act of 2002,¹¹ a federal law that prohibited corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate. The Court held that Congress cannot ban independent corporate efforts to influence the outcome of elections.¹² The decision rested on two connected determinations. First, the Court found that the First Amendment protects political speech regardless of the identity of the speaker.¹³ Second, the Court found that no sufficiently important countervailing governmental or constitutional goal is served by limits on corporate political advertising.¹⁴ According to the majority, independent expenditure limits do not cause corruption or the appearance of corruption.¹⁵ Since the majority recognized corruption as the only possible government interest that is sufficiently compelling to permit First Amendment restrictions, its finding that the spending limits at issue do not dissuade corruption was conclusive.¹⁶

For our purposes, two features are salient: Kennedy’s definition of corruption and his focus on the criminal law liability that burdens the First Amendment free speech rights.

The centerpiece of Kennedy’s opinion, albeit an unsatisfying and vague centerpiece, was a description of the constitutionally important meaning of “corruption.”¹⁷ Kennedy framed the case as a choice between two inconsistent precedents: *First National Bank of Boston v. Bellotti*,¹⁸ which held that a state could not limit a corporation’s political speech, and *Austin v. Michigan Chamber of Commerce*,¹⁹ which held that, because of the disproportionate aggregated

9. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990) (expressing concerns about corporate political spending that is not correlated to public support for a corporation’s political position).

10. *Citizens United*, 130 S. Ct. at 909–10.

11. 2 U.S.C. § 441b (2006).

12. *See Citizens United*, 130 S. Ct. at 913.

13. *Id.* at 905.

14. *Id.* at 909–11.

15. *Id.* at 909.

16. *Id.* at 908–09.

17. *Id.* at 909–10.

18. 435 U.S. 765 (1978).

19. 494 U.S. 652 (1990)

wealth of corporations, the state could limit their political activity.²⁰ According to Kennedy, *Buckley* and most of its progeny concluded that corruption is only *quid pro quo* corruption. The unique influence over or access to politicians that contributors can gain by making independent expenditures is not corruption.²¹ Instead, Kennedy argued that politicians always favor certain policies and naturally will prefer contributors and voters who believe in similar policies.²² He explained that the desire to use money to influence policy was a “substantial and legitimate reason, if not the only reason . . . to make a contribution to . . . one candidate over another”²³ As such, *Austin*, with its broad view of corruption, was an outlier,²⁴ and he explicitly overturned it.²⁵

While undoubtedly narrow—or, as Stevens put it, “crabbed”²⁶—Kennedy’s definition of corruption was also imprecise. He did not set out the elements of *quid pro quo* corruption. Kennedy’s implicit image of *quid pro quo* corruption is that of a constituent handing a politician, instead of a candidate, cash in direct exchange for a vote; anything short of that does not appear to fall within his bounds. Yet Kennedy’s description of a corporation making a contribution to a politician’s campaign in exchange for influence over policy also arguably falls within a definition of *quid pro quo* corruption. The mere invocation of the phrase “*quid pro quo*” thus does not, as Kennedy seems to suggest, finally settle the question of what corruption means—the *quid* and *quo* are still up for grabs. Is the trade of a vote by one candidate for the vote of another candidate a *quid pro quo*? On its face, yes—but it is standard political practice, horse-trading. Is the trade of an hour of a Congressperson’s time for a phone call to several friends a *quid pro quo*? Again, both are items of value, but an agreement by a staffer “if I set up this meeting, you need to call ten people about this,” is routine. There are thousands of such examples. The scope of *quid pro quo* is defined in terms of social and legal practice, not as a matter of easily circumscribed logic.

At the same time, throughout the majority opinion, Kennedy repeatedly emphasized that the campaign finance laws at issue in the case imposed criminal liability. The use of the word “criminal” of course does not alone show that Kennedy is relying on the “criminal” aspects of the law; his emphasis is revealed more in the placement of the criminal law rhetoric. In the section explaining Kennedy’s views on the First Amendment, he describes the law as “an outright ban, backed by criminal sanctions.”²⁷ He continues:

Section 441b makes it a *felony* for all corporations—including nonprofit

20. See *Citizens United*, 130 S. Ct. at 903.

21. *Citizens United*, 130 S. Ct. at 910.

22. *Id.* (citing *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 297 (2003)).

23. *Id.* (quoting *McConnell*, 540 U.S. at 297).

24. See Richard Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 583, 596–97 (2011) (discussing Kennedy’s view of corruption in jurisprudence).

25. *Citizens United*, 130 S. Ct. at 913.

26. *Id.* at 961 (Stevens, J., dissenting).

27. *Id.* at 897.

advocacy corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. Thus, the following acts would all be *felonies* under § 441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech. These prohibitions are classic examples of censorship.²⁸

The image Kennedy attempted to create by the repeated use of the word "felony" is clearly the fear of criminal law. He repeatedly referred to the "criminal liability" and "criminal penalties" created by the law.²⁹ He stressed that the law subjected speakers to criminal sanctions and discussed the chilling effects of costly litigation.³⁰ The most emphatic discussion of criminal liability arises when Kennedy writes about the First Amendment. He explains that, "[w]hen Government seeks to use its full power, including the criminal law, to command where a person may get his or her information . . . , it uses censorship to control thought. This is unlawful."³¹ While Kennedy did not say that noncriminal sanctions might survive, the repeated emphasis on the criminal law at issue at least raises questions about how important jail time and criminal liability might be to the existing majority.

III.

THE CORRUPT QUARTERMASTER, THE LOBBYIST, AND THE POSTMASTER

In contrast to Kennedy's view of corruption as limited to a *quid pro quo* that triggers criminal sanctions, in the nineteenth century, courts dealt with corruption in a radically different way. Instead of criminal law, contract law was the grounds for much of the interaction between law and corruption. In 1909, an Oklahoma court could say that:

Cases almost without number could be cited and quoted from which hold that contracts . . . are not void because of the conclusion that corruption and wrong-doing and undue influence would be the certain result thereof, but on account of the recognition by them of corrupting tendencies of such contracts.³²

There are hundreds of examples of courts throughout the nineteenth century

28. *Id.* (emphasis added).

29. *Id.* at 895, 897.

30. *Id.* at 895–97.

31. *Id.* at 908.

32. *Hare v. Phaup* 101 P. 1050, 1052 (Okla. 1909).

assuming a broader definition of corruption that encompassed undue influence. One court described high contingent fees as “bribes,” because “[t]he use of such means and such agents will have the effect to subject state governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the elector.”³³ Courts refused to enforce contracts that would “tend to corrupt or contaminate, by improper influences, the integrity of our social or political institutions” because “[l]egislators should act from high considerations of public duty.”³⁴ Another state court noted that the “law in its wisdom we think has a tendency to close the door of temptation by refusing to recognize contracts which in any way hamper the faithful discharge of the trust which the railroad company owes to the people in the location of public conveniences.”³⁵

It is beyond the scope of this Article to canvass all nineteenth century contract law related to corruption. Instead, this Article introduces a handful of cases that are notable because of their prominence at the time and how they differ from the modern understanding of the judicial relationship to private contracts involving public matters. In each case, a court refused to enforce an otherwise legal contract because it concluded that the underlying bargain was corrupt and the social implications of enforcement would be too great. Enforcement would encourage people to try to manipulate government services for private benefit, instead of for public benefit. It would lead to a culture in which people saw government as a place to go to for special treatment and favors, thereby undermining the integrity of the democratic culture. In the first case, the U.S. Supreme Court refused to enforce a contract that included in its overall scheme an effort to corrupt a public official and defraud the government.³⁶ In the second, the Court refused to enforce a contract to lobby on behalf of an elderly gentleman.³⁷ In the third, an Indiana court refused to enforce a contract to pay for help persuading a postmaster to locate a post office in a particular building.³⁸ In the fourth—not a contract case—the U.S. Supreme Court explained its understanding of the centrality of corruption.³⁹ Each case is striking for its language, its understanding of the role of the courts, and its interpretation of corruption.

A. *Legal But Unenforceable Contracts*

To make sense of corruption in contract law in the nineteenth century, it

33. *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. 314, 335 (1853).

34. *Bermudez Asphalt Paving Co. v. Critchfield*, 62 Ill. App. 221, 222 (1895). In that case, the Court found that a road paving contract calculated to influence legislative action to permit such paving was unenforceable as against public policy; no proof of illegality was required. *Id.*

35. *McGuffin v. Coyle & Guss*, 85 P. 954, 959 (Okla. 1906).

36. *Bartle v. Nutt*, 29 U.S. 184 (1830).

37. *Trist v. Child*, 88 U.S. 441 (1874).

38. *Elkhart Cnty. Lodge v. Crary*, 98 Ind. 238, 241–42 (Ind. 1884).

39. *Ex Parte Yarbough*, 110 U.S. 651 (1884).

might be useful to examine the current state of public policy contract law. Courts have some latitude to refuse to enforce contracts that violate societal norms. This doctrine is often divided into three parts, allowing courts to refuse to enforce contracts that are: 1) against public policy, 2) unconscionable, or 3) illegal.⁴⁰ Courts refuse to enforce contracts for illegal activity, such as a contract for gambling that is against the law in the jurisdiction, and, in certain circumstances, they refuse to enforce contracts that are unconscionable—i.e., where the terms are excessively unfair to one party.⁴¹ However, modern courts rarely invoke the public policy exception unless the conduct in question is illegal.⁴² In modern law, almost all of the cases where a contract was invalidated involved either attorney fee-splitting agreements or contracts that would violate existing statutes or regulations.⁴³ For example, a court might not enforce a contract to recover private gambling debts.⁴⁴ The prominent exception, which has not been followed widely, is *In re Baby M*, where the New Jersey Supreme Court refused to enforce a contract between would-be parents and a surrogate mother.⁴⁵

The public policy exception was not always so thin. There was at the time a more broad application of the public policy exception in the Nineteenth and early Twentieth Centuries. Courts developed a body of cases that used the public policy exception as a freestanding reason not to enforce contracts. nineteenth century courts were “frequently willing to subordinate freedom of contract, or at least some types of freedom of contract, to other social concerns.”⁴⁶ A variety of public policies, including protection of contracting parties and protection of personal morality and the family, were used as grounds to invalidate certain contracts.⁴⁷ Courts refused to enforce contracts in restraint of trade, contracts for gambling, and contracts around sexual or family relationships (prostitution and marriage).⁴⁸ While modern courts might be more likely to closely scrutinize the

40. See, e.g., *Eraser Co. v. Kaufman*, 138 N.Y.S.2d 743, 750–51 (Sup. Ct. 1955) (stating that contracts “are not presumptively invalid and will be enforced in the absence of proof that they are unconscionable, inequitable, or in contravention of public policy”); *Rivero v. Rivero*, 216 P.3d 213, 227–28 (Nev. 2009) (same).

41. *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005) (holding that a prohibition against class arbitrations in a consumer adhesion contract was unconscionable).

42. See, e.g., *Hill v. American Family Mut. Ins. Co.*, 249 P.3d 812, 816 (Idaho 2011) (“Public policy may be found and set forth in the statutes, judicial decisions or the constitution.”).

43. Cf. 1 Williston on Contracts, § 12:1 (4th ed. 2011) (listing cases in which contracts were held illegal).

44. See *id.* (citing *Boardwalk Regency Corp. v. Travelers Exp. Co.*, 745 F. Supp. 1266 (E.D. Mich. 1990)).

45. *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988).

46. Mark Pettit, Jr., *Freedom, Freedom of Contract, and the “Rise and Fall,”* 79 B.U. L. REV. 263, 325 (1999). Pettit notes that it is impossible to make absolute claims about diverse courts in a brief period of time, but argues that some generalizations may be made about the willingness of courts in the Nineteenth Century to use public policy in ways that are currently out of practice. *Id.* at 290.

47. *Id.*

48. *Id.* at 300–30.

fairness of the particular contract as between the two parties,⁴⁹ nineteenth century courts were more willing to scrutinize the contract's impact more broadly and its possible effect on the relationship between the society and citizens.⁵⁰

One type of unenforceable contract that nineteenth century courts recognized was a contract that fundamentally corrupted representative government. If one does a search for "corruption" in nineteenth century state and local cases, a substantial proportion of the results will be found in contract cases.⁵¹ In this category of cases, the courts refused to enforce contracts that subverted the public good for private gain in public affairs. As an Indiana Court explained: "A wholesome rule of law is that parties should not be permitted to make contracts which are likely to set private interests in opposition to public duty or to the public welfare."⁵² As these cases make clear, one of the jobs of the courts was to protect against private interests corrupting public offices.

B. The Corrupt Quartermaster: Law Will Not Degrade Itself

In 1830, the U.S. Supreme Court confronted *Bartle v. Nutt*, a case involving a falling out between two men after a government contract went awry.⁵³ One of the men, Marsteller, was the deputy quartermaster of the United States.⁵⁴ Part of a quartermaster's job was to manage supplies for the military; it was a position of public trust, because he was responsible for attempting to get the best price for the supplies. He and two others, Bartle and Coleman, entered into an agreement regarding a contract with the government to rebuild Fort Washington.⁵⁵ The scope of the agreement constituted the dispute of the case. However, this much is clear: Marsteller was to provide funds and materials, Bartle was to oversee the contract, and all three would share in the profits of the contract.⁵⁶

While rebuilding Fort Washington, the threesome sent false reports of the cost of the building to the government, which were noticed by officers of the Treasury.⁵⁷ Because these false accounts were caught, the contract cost more to execute than planned, and it was done at a loss. Bartle sued Coleman for the costs he incurred, arguing that they had a contract to share profits and losses, thus the losses must be shared.⁵⁸ Bartle argued that the court should engage in

49. *Id.* at 295–97.

50. See generally *id.* (describing Nineteenth Century courts' approach to contract law).

51. Some of this is necessarily impressionistic. However, a Westlaw search for "corruption" with "contract" from 1800 to 1900 recovers 1500 documents. A similar search without the word "contract" uncovers 8357 cases; the same search with "contract" added reveals 3626 documents.

52. Elkhart Cnty. Lodge v. Cray, 98 Ind. 238, 241–42 (Ind. 1884).

53. *Bartle v. Nutt*, 29 U.S. 184 (1830).

54. *Id.* at 188.

55. *Id.* at 184–85.

56. *Id.* at 185.

57. *Id.* at 184.

58. *Id.*

the typical inquiries one might find in a case involving a partnership gone bad—i.e., examining the scope of the arrangement, considering the writings back and forth between the parties, and reviewing the accounting.⁵⁹ The administrator of Coleman's estate, William D. Nutt, countersued for costs he incurred.⁶⁰

The Supreme Court found that “[t]o describe such a case is to decide it,” as “[p]ublic morals, public justice, and the well established principles of all judicial tribunals, alike forbid the interposition of courts of justice to lend their aid to purposes like this.”⁶¹ The *Bartle* Court understood political corruption in a different sense than that imagined by Justice Kennedy, although Justice Kennedy would probably also find the contract at issue in *Bartle* to be corrupt. A public officer used his position of public trust for private gain. The corrupt officer described here was the quartermaster, who initiated the effort to use his position to get a government contract. However, no particular crime was charged, and, in fact, it does not appear that there was a criminal law against defrauding the government at the time. Although the case does not detail all the elements, it seems likely that there were legal and illegal elements to the initial contract. Yet the illegality of the contract's subject matter was not central to the decision.⁶² By contrast, modern invocations of the public policy exception to invalidate contracts invariably cite to criminalizing legislation as the reason for nonenforcement.

It is worth noting the specific moral outrage present in the opinion, particularly as it includes a component important to contract law at the time. The violation at issue was not a technical one, but a civic one, which greatly angered the Court. The Court described the action in moral terms, with a strong condemnation that goes beyond the description of the action:

Public morals, public justice, and the well established principles of all judicial tribunals, alike forbid the interposition of courts of justice to lend their aid to purposes like this. To enforce a contract which began with the corruption of a public officer, and progressed in the practice of known and wilful deception in its execution, can never be consummated or sanctioned by any court.⁶³

The Court treated this case as an easy one. It did not analyze criminal legal statutes, but took for granted that it had the authority to determine that the behavior was inappropriate.

The *Bartle* Court concluded that it would not “degrade itself” by aiding these corrupt characters, but would leave them as they found them.⁶⁴ This language is important, because it puts contract law—private law—in a different

59. *Id.* at 189.

60. *Id.* at 184.

61. *Id.* at 188.

62. *Id.*

63. *Id.*

64. *Id.* at 189.

relationship to public morals and democratic design than is typically assumed in modern law. Law is an agent that can or cannot be used, and the Court imagines that it is possible for courts to refuse to serve particular ends, but to leave them to private enforcement.

Bartle is important for two major reasons. First, it supports the premise that public morals can and should be considered in cases involving contracts between private parties. While modern law tends to treat public and private law as discrete categories, the Court here clearly saw its role in determining a private contract to be public-focused. Second, it supports the notion that the judiciary plays an active, subsidizing role when it chooses to enforce a contract, as public resources are used to enable private wealth creation via courts. As such, the judiciary should not lend its aid to schemes that involve defrauding the government.⁶⁵ Morals and justice “forbid the interposition of courts of justice to lend their aid to purposes like this.”⁶⁶ The Court concluded that, in cases such as *Bartle*, it ought to leave the parties as it found them;⁶⁷ if inequities exist, then it is not the Court’s task to determine who among the culpable parties is more or less culpable.

No precise line divides public and private law.⁶⁸ However, the terms are used and understood to circumscribe different realms generally and, in the modern era, the spheres are treated as more distinct. Sometimes they are divided by who has standing, by who is affected, or by the subject matter of the dispute.⁶⁹ In the classic contemporary formulation, private law governs the relationship between individuals and entities, while public law governs the relationship between individuals and the state.⁷⁰ Private law is a set of rules that governs behavior between relatively autonomous actors, who are assumed to be educated, willing to negotiate, and free to negotiate. While private law is enforced by public agents—such as police, officers, and courts—there is a general understanding that its scope is limited to the private realm. Private law is the law of contracts and torts; public law is criminal law and constitutional law. Corporate law is private law; election law is public law.

The public/private distinction is an ancient divide, going back to Roman

65. *See id.*

66. *Id.*

67. *Id.*

68. *See generally* Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982) (discussing the difficulty of distinguishing between public and private law).

69. *See* Randy E. Barnett, *Foreword: Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J.L. & PUB. POL’Y 267, 267–68 (1986) (arguing that private law and public law can be distinguished on the basis of four factors: “(1) the kinds of substantive standards used to assess the types of conduct that may properly be subject to legal regulation; (2) the different status of persons or entities that may properly complain about violations of legal regulation; (3) the different status of persons or entities that are subject to legal regulation; (4) the different kinds of institutions that may be charged with adjudicating and enforcing legal regulations”).

70. *See id.* at 270.

law.⁷¹ However, the scope and clarity of the division has not been consistent.⁷² Contract law is now understood as falling neatly within the realm of private law.⁷³ While it has public dimensions, particular contracts are not examined to determine whether they threaten the relationship between individuals and the government. Yet, as *Bartle* demonstrates, in the past, the private law of contracts could also be understood as being public-facing and regulating the relationship between individuals and the state.⁷⁴ Law in its very nature was public, and so every agent of the court, constrained by precedent, was to consider the public effects of enforcement. The choice to enforce a contract was itself a public action.

This nineteenth century conception of contract enforcement as a public action is technically true in the most basic sense: the cost of enforcing a contract is paid for by publicly-collected tax dollars, which fund the construction of court houses and the salaries of police officers, court clerks, and judges. But it is also true in a more abstract sense—the law, including the law of contracts, is a public creation open to public debate.⁷⁵ Law is not a priori and does not exist in the abstract; law exists because it continues to be chosen by the public as the best method for securing our collective public good. The use of public institutions to enforce private contracts is a public subsidy for those contracts.⁷⁶

The courts' role in enforcing contracts can be understood in different ways. The modern tendency is to imagine the courts as infrastructure that provide a necessary service. However, one can imagine—as the *Bartle* court did—that it is a subsidy to certain private actions. The *Bartle* Court imagined itself as actively supporting or discouraging activities. It believed that “[t]o enforce a contract which began with the corruption of a public officer, and progressed in the practice of known and wilful deception in its execution, can never be consummated or sanctioned by any court.”⁷⁷ A modern court might come to a

71. BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 2 (1962).

72. See generally Kennedy, *supra* note 68 (discussing the difficulty of distinguishing between public and private law).

73. Barnett, *supra* note 69, at 270–71 (“Private law subjects would include contract, torts, property, corporations, agency and partnership, trusts and estates, and remedies—subjects defining the enforceable duties that all individuals owe to one another.”).

74. There are many reasons for this change, including the rise of the regulatory state, which limited certain capacities to contract through legislation, and so shifted the institutional role of protecting public policy from the judiciary to the legislature. See generally GRANT GILMORE, THE DEATH OF CONTRACT (1974).

75. See, e.g., Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

76. Alan Chen, *Meet the New Boss*, 73 DENV. U. L. REV. 1253, 1267 (1996) (“The private law realm exists only as a product of a public regime. The conception of contract and property law as ‘private’ has long been criticized. One fundamental argument that obliterates the distinction arises from the fact that private law enforcement must come through the force of the state. The boundaries of ‘private’ law are governed largely by common law rules, which are themselves developed through paradigmatic state agents, the courts.”)

77. *Bartle v. Nutt*, 29 U.S. 184, 188 (1830).

similar conclusion as the *Bartle* court did, but the method it would have used to get there is different.

Bartle v. Nutt illustrates an understanding of the judiciary as a *subsidy* to business and to private arrangements. It is not so much that the Court withdrew its support from corrupt behavior, as that it did not want to offer its support in the first place. Moreover, it shows that public morals should be considered when the Court is asked to rule on a contract between private parties.

C. *Lobbying Is Against the Public Policy of the United States*

Bartle v. Nutt is a curiosity, but it can be reconciled with modern law in other ways. Contemporary courts might refuse to enforce the same contract because they would find that federal statutes forbid such contracting, or because of the underlying illegal nature of the enterprise. By contrast, *Trist v. Child*, an 1874 case in which the Supreme Court refused to enforce a basic contract to lobby, is unimaginable today, as it directly conflicts with modern First Amendment doctrine and the modern law of contracts.⁷⁸ Its approach towards the relationship between speech, power, money, and the judiciary is miles apart from the approach of the contemporary Court.

The case arose out of N.P. Trist's claim that the United States owed him money for helping to negotiate the Treaty of Guadalupe Hidalgo.⁷⁹ However, by the time Trist sought payment, he was too old and sick to travel to Washington to try to convince Congress to pass a bill authorizing payment to him.⁸⁰ Instead, he hired Linus Child, a Boston lawyer, to represent him.⁸¹ Trist agreed to pay Child a contingency fee—twenty-five percent of whatever he secured—and nothing else.⁸² When Congress eventually passed a bill calling for Trist to be paid, Child sought twenty-five percent of the sum, as they had previously agreed.⁸³ Trist refused to pay, prompting Child to file suit against him.⁸⁴

Child argued that his arrangement with Trist was like any attorney-client relationship.⁸⁵ Unlike prior cases in which secret collusion was used to secure government funding, "[e]very act of theirs was open, fair, and honorable."⁸⁶ Child's core argument was based on Trist's right to personally petition Congress: if Trist had this right, he should have a right to hire an agent to petition on his

78. Compare *Trist v. Child*, 88 U.S. 441 (1874), with Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby*, 16 HARV. J.L. & PUB. POL'Y 149 (1993) (arguing that there is a presumptively strong First Amendment right to lobby).

79. *Trist*, 88 U.S. at 441.

80. *Id.* at 445.

81. *Id.* at 441–42.

82. *Id.* at 442.

83. *Id.*

84. *Id.*

85. See *id.* at 444 ("Here both father and son were openly and avowedly attorneys for their client, Trist.").

86. *Id.* at 444.

behalf.⁸⁷ As such, the agreement between Childs and Trist was simply a matter of a normal contingency fee rather than a payment for corrupt lobbying. Child's lawyer explicitly distanced his client from self-interested influence peddling,⁸⁸ arguing, "We are not here asking the court to open the door to corrupt influences upon Congress, or give aid to that which popularly known as 'lobbying,' and is properly denounced as dishonorable."⁸⁹ Instead of arguing that lobbying was protected, he argued that he wasn't lobbying.

The Court rejected these arguments, holding that while an individual can petition Congress on her own behalf to pass a bill granting payment of a private claim, they cannot pay a third party to do so.⁹⁰ The Court placed its logic within the long history of common law cases that hold that contracts against public policy are void.⁹¹ The contract between Trist and Child was "if not corrupt, . . . illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy."⁹² The Court did not rest its conclusion upon the fact of the contingent fees but based its arguments instead upon the illegitimacy of paid political petitioning.⁹³ The Court grounded its opinion in two features of corruption that do not appear in *Citizens United*: 1) that anyone could be corrupted,⁹⁴ and 2) citing Montesquieu, that moral failure—not bribery, which was not at issue in the case—threatened society.⁹⁵ The Court never explicitly states what it means by corruption or the threat of corruption. However, it suggests that a Congressperson selling influence would be corrupt and, moreover, that a widespread practice of paying for influence would undermine the integrity of the entire political system.⁹⁶

Citizens' virtue is the "foundation of a republic," the Court explained.⁹⁷ Citizens have an important public office to fill, as "[t]hey are at once sovereigns and subjects."⁹⁸ While public servants are obliged to be "animated in the discharge of their duties solely by considerations of right, justice, and the public good," citizens have a "correlative duty" to "exhibit truth, frankness, and

87. *Id.* at 444–45.

88. *See id.*

89. *Id.* at 445.

90. *See id.* at 451 (stating that the law forbids "the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim").

91. *Id.* at 449 (citing state cases).

92. *Id.* at 451.

93. *Id.*

94. *See id.* at 451 ("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. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.").

95. *Id.* at 450 ("The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history." (citing MONTESQUIEU, *THE SPIRIT OF THE LAWS* (1748))).

96. *Id.*

97. *Id.* at 450.

98. *Id.*

integrity” in their conversations “with those in authority.”⁹⁹ According to the Court, “[a]ny departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong.”¹⁰⁰ The language here reflects a view of corruption that is worlds apart from Justice Kennedy’s *quid pro quo* approach. Because citizens’ virtue is so vital, the Court suggested that people do not have a right to put themselves in a position where they would be tempted to offer a bribe. Lobbying, according to the Court, is the first step towards bribery and, the Court holds, the “law forbids the inchoate step.”¹⁰¹ Moreover, the Court suggests that, while an individual instance of lobbying may seem benign, if an individual is allowed to lobby, then everyone would be allowed to lobby. And if everyone is allowed to lobby, then corporations would be allowed to lobby. The Court almost takes for granted that corporate lobbying would be impermissible:

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.¹⁰²

The Court was not precise about the particular harm imagined. Is it that money would have too great an impact? Is it inequality? Is it civic culture? Its conviction of the harm and danger is so ingrained that it need not be explicitly described. However, in context, it appears that the Court may have been concerned about a combination of all three, with a focus on the civic culture of a society. The Court seems to have been concerned that widespread lobbying will erode confidence in the legitimacy of representative government.¹⁰³ You can see this in the Court’s reference to Montesquieu, the focus on citizenship, and the moral language. The Court emphasized public morality, arguing that “[i]f the instances [of lobbying] were numerous, open, and tolerated, they would be regarded as measuring the decay of the public morals and the degeneracy of the times.”¹⁰⁴ The private act is measured not by its impact on the parties in the case, or on future parties in similar cases, but by its impact on society and democratic culture.

99. *Id.*

100. *Id.*

101. *Id.* at 451. The language of “temptation” is particularly interesting here because it echoes the founding era interest in temptation: the crafters of the Constitution wanted not only to protect against bribery but also the temptation to bribe. See Zephyr Teachout, *The Anticorruption Principle*, 94 CORNELL L. REV. 341, 347 (2009).

102. *Trist*, 88 U.S. at 451.

103. This sentiment is an early precursor to the idea in *Buckley* that not only corruption, but the appearance of corruption, causes significant democratic erosion. See *Buckley v. Valeo*, 424 U.S. 1 (1976) (finding that avoiding the appearance of corruption is a sufficiently compelling interest to justify government restriction of speech).

104. *Trist*, 88 U.S. at 451.

Finally, the Court argued that there is no clear way to distinguish between private pleas to Congress and demands for more broad-sweeping legislation. It assumed without argument that lobbying for general legislation must be condemned and focused instead on the problems presented by lobbying for small, private bills. Because small private bills are not known by the public, and the discussions around the bills are often "whispered," advocacy for private bills creates huge opportunities for advocates to induce legislators to support these bills for the wrong reasons, and, again, for bribery.¹⁰⁵ Instead of engaging in objective fact-finding, "[t]hose whose duty it is to investigate" hear unsupported facts by self-interested parties;¹⁰⁶ without a check on the facts communicated by the self-interested parties, legislators may simply rubberstamp the bill.

The Court dwelled not on preventing wrongdoing, but on limiting temptation. In this view, one of the jobs of the courts is to keep a solid foundation in the halls of Congress. In effect, the Court saw its job as protecting political culture:

To legalize the traffic of such service, would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point. It would invite their presence and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step.¹⁰⁷

If lobbying were legal, the Court suggested, everyone would be tempted to engage in it. A permissive attitude towards legal lobbying could lead to more opportunities for bribes. While not all lobbying might be wrong, the culture of lobbying would weaken civic culture. The Court did not suggest that lobbying does not occur or that bribery does not already occur. Instead, it assumed that both are commonplace, which creates all the more reason to not legally sanction it.¹⁰⁸

Trist was neither bizarre nor unique for its time.¹⁰⁹ Its lack of remarkableness is itself worthy of contemporary study because it exhibits a

105. *Id.* at 451.

106. *Id.*

107. *Id.* at 451–52.

108. *See id.* at 452 ("The widespread suspicion which prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence.").

109. Its unremarkableness is shown by the fact that little was made of the case at the time, and that it both cited, and was cited by, dozens of other cases. *See, e.g.,* *McGehee v. Lindsay*, 6 Ala. 16 (1844) (refusing to enforce a public contract in which a state-employed supervisor had an interest). The court talked about how no man can serve two masters with conflicting interests. Doing so creates "a temptation perhaps . . . too strong for resistance by men of flexible morals, or hacknied in the common devices of worldly business, . . . which would betray them into gross misconduct, and even crime." *Id.* at 20. The court focused on creating structures where temptations do not enter in for men with "flexible morals" or who are steeped in the usual run of business behavior. In fact, the Alabama Court quite explicitly did *not* suggest that immoral activity came into play here, or that there was bribery or an incorrect price. Instead it found that there was a policy of not enforcing these contracts as a "preventive check against such temptations and seductions." *Id.*

different attitude towards the courts' obligation to uphold civic culture than current courts display. Today, courts and many academics not only tolerate but celebrate paid lobbying. They see it as a fundamental First Amendment right, and a necessary part of the legislative process.¹¹⁰ But *Trist* shows that this was not always the general view. According to the *Trist* Court, lobbying is presumptively corruptive. The Court understands corruption to include a broad range of activities, and it recognizes that its obligation to prevent it is equally broad.

While the Court in *Trist* and *Citizens United* rely on different logic, and come to different conclusions, the question underlying each case is similar. Laws that once restricted lobbying are similar to laws that once restricted independent corporate expenditure. Both were designed to limit how much money can be spent to distort democratic desires. They both implicated speech rights. Both were designed to limit inappropriate dependencies in government. Both paid lobbying and campaign donations allow companies or individuals with amassed wealth to have disproportionate political power in a society.

Between *Trist* and *Citizens United*, there is no question that the Supreme Court narrowed its view of corruption substantially; it also narrowed its understanding of its own duty to protect democratic integrity. In *Trist*, an essential job of any court is to limit corruption and the appearance of corruption; in *Citizens United*, this job is seen as more secondary and technical. Moreover, *Trist* demonstrates that contract law, rather than criminal law, can be used to deter corruption.

D. The Post Office and the Public Good

Like *Trist*, *Elkhart County Lodge v. Crary*,¹¹¹ is also fairly typical of the cases of the time. In the late 1800s, the federal postmasters had to use part of their salary to pay for the building where they would accept and distribute mail for the town.¹¹² Because post offices were the center of public traffic at the time,

110. See, e.g., Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL'Y REV. 105, 107 (2008) ("Both lobbying and campaign finance are vital to representative democracy. Lobbying helps elected officials obtain the information they need to develop legislative or regulatory initiatives; to assess how proposals for government action will affect specific interests, industries, constituencies, or society at large; to determine how different groups view particular policy alternatives; and to decide how they will vote on the measures that come before them."); Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 CORNELL J.L. & PUB. POL'Y 1, 9 (2006) ("Though widely vilified, lobbyists representing individuals or groups can make a valuable contribution to informed and effective government. Lobbyists can direct ideas and opinions to appropriate decision makers and clearly express the views of citizens who have too little time or skill to do so personally. Lobbyists also illuminate the practical consequences of proposed government conduct by ensuring that the insights and professional expertise of a particular business or industry become part of the deliberative process.").

111. *Elkhart Cnty. Lodge v. Crary*, 98 Ind. 238 (1884).

112. *Id.* at 239.

the location of a post office would have a huge impact on the success of nearby establishments.¹¹³ In Elkhardt County, Indiana, the room used as a post office was getting a little run down, so the government started looking for a new place to put a post office.¹¹⁴ Two different groups of businessmen wanted the post office near their businesses.¹¹⁵ A brick building, under construction, seemed ideal for the post office, and certainly ideal for one of the competing business groups.¹¹⁶ The owners of the brick building approached nearby property owners and proposed that they would offer a room in the building for nominal rent to the government in return for a yearly payment from the local businessmen.¹¹⁷ Additionally, the owner of the brick building, who was a personal friend of the postmaster, would suggest to the postmaster that the building was a good location.¹¹⁸ The proposed contract was for ten years.¹¹⁹ In essence, one private party paid another private party to use his powers of personal persuasion to convince a federal official to select a particular location for a building.

After a dispute, the building owners did not want to keep paying the annual installments. They argued that the "consideration" given in exchange for the promised money was illegal, and that the contract was void for being against public policy.

The Supreme Court of Indiana agreed, holding that "contracts which tend to improperly influence those engaged in the public service, or which tend to subordinate the public welfare to individual gain, are not enforceable in any court of justice."¹²⁰ The court's reasoning depends upon the idea that there is something tangible called "the public welfare." If there is no "public welfare," but only competing private interests, then subordination becomes an unintelligible idea. Because there is a public welfare, it is the responsibility of law to protect it and to shape the public good, not to harm it.

In the court's view, "personal influence . . . is not a vendible article in our system of laws and morals, and the courts of the United States will not lend their aid to the vendor to collect the price of the article."¹²¹ In so finding, the court appears to veer into property law, where the bounds of alienability are created. In close cases, questions of what is and is not alienable always come down to a public policy discussion—policy creates the nature of property. The policy, in this case, is the policy expressed above—that sale of personal influence would harm the public good. Yet there is an implicit strain in this discussion that the

113. *See id.* ("The value of adjacent property was enhanced by the location of the post-office and its rental value increased.").

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 239–40.

119. *Id.*

120. *Id.* at 241.

121. *Id.* at 244.

recognition of personal influence as a transferrable, sellable thing would itself diminish the person who holds that influence. In effect, the court concluded that “personal influence” is a good that any individual can use on their own but that cannot be sold. This is a fascinating analogy, of course, because it makes “personal influence” in the conduct of public affairs something very much like the vote, sexual affection, or bodily organs—a good that is fundamentally inalienable in the eyes of the law. Some of these prohibitions exist in statutory law, but some are found in the common law that has developed in response to particular public policy arguments, such as where courts consistently refuse to enforce contracts for prostitution,¹²² or contracts that encourage divorce.¹²³

The *Elkhart County Lodge* court’s analogy thus indicates a different understanding of the role of courts in defining the bounds of what we can and cannot do with property, and in contract. The case reveals that courts at the time were willing to use contract law to make decisions about the shape of political life. In effect, the court was doing what many statutes now do—trying to limit public corruption—but doing it through contract law.

E. A Constitutional Law of Corruption?

At the same time that state and federal courts quietly enshrined the private law of corruption, the U.S. Supreme Court also recognized something related, but slightly different, in *Ex Parte Yarbough*.¹²⁴ Although *Yarbough* is best known as a landmark civil rights case, the case also discusses corruption in a way that I think is likely representative of how courts thought about corruption at the time. It reveals that nineteenth century courts thought about corruption as a deep and fundamental (and arguably constitutional) threat.

In *Yarbough*, several members of the Ku Klux Klan threatened and beat a black man in order to intimidate him out of voting.¹²⁵ After they were convicted for conspiracy to violate federal laws, they brought a writ of habeas corpus against the warden in the prison they were held, claiming that the laws they were punished under were invalid and unconstitutional.¹²⁶ The defendants argued that the federal government had no authority to prosecute them, as there was no constitutional text giving the federal government the power to regulate this kind of crime.¹²⁷

The Court’s response was impassioned. According to the Court, the temptation to subvert elections through “violence and . . . corruption” is a

122. Cf. Lawrence A. Cunningham, *A New Legal Theory to Test Executive Pay: Contractual Unconscionability*, 96 IOWA L. REV. 1177, 1224 (2011) (implying that a contract for prostitution is “an extreme case of a contract that no state would recognize as enforceable—an illegal bargain”).

123. Williston on Contracts, § 16:19 (4th ed. 2011).

124. *Ex Parte Yarbough*, 110 U.S. 651 (1884).

125. *Id.* at 657.

126. *Id.* at 653–54.

127. *Id.* at 658.

constant source of danger; “[s]uch has been the history of all republics.”¹²⁸ The Court refused to entertain the argument that combating corruption would exceed the state’s constitutional grant of power, rejecting this possibility as “so startling as to arrest attention and demand the gravest consideration.”¹²⁹ The very fact of government, it concluded, implies the capacity to enact and prosecute laws protecting the integrity of that government.¹³⁰ Without such ability, the government is at great risk:

If the government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other.¹³¹

The Court further argued that republican, elected governments have a uniquely strong implied right to combat corruption: “If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption.”¹³² Congress thus had the power to limit corruption based solely on its power to protect itself: because the government is fundamentally fragile, great vigilance is needed.

Staying within the four walls of the opinion, the Court appears to take a broad view of corruption and to consider the intimidation of voters a form of corruption. This view is interesting because it suggests that the Court considered the dissuasion of a citizen from performing his civic duties akin to the dissuasion of, say, a judge from performing his civic duties. Much as one might say that a person who threatens a judge corrupts the system, a person who threatens a citizen performing his citizenship activities threatens the system.

While *Yarbough* is not a contract case, it expresses the same view seen throughout the other cases—that corruption is a broad problem, and that courts have a special responsibility to respond to it and protect against it.

128. *Id.* at 666–67.

129. *Id.* at 657.

130. *See id.* at 657–58 (“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.”).

131. *Id.* at 667.

132. *Id.* at 658.

F. Conclusion

In each of the four cases discussed above, the reason for refusing to enforce the contract was not an underlying statute that made the behavior illegal, but concern that the contract (or behavior, in the case of *Yarbough*) was corrupt. In each case, the ruling court adopted a broad view of corruption that encompassed notions of civic duty as well as simply *quid pro quo* corruption. A review of dozens of contract law cases from the period suggests that these cases are representative of the treatment of these issues during the period. While a much deeper and more thorough (and longer term) study would be required to stitch all of the nineteenth century contract cases together, this initial study at least suggests a different approach. They are evidence that courts frequently refused to enforce contracts that undermined the integrity of the political process.

IV.

WHY NINETEENTH CENTURY CONTRACT LAW MATTERS IN LIGHT OF *CITIZENS UNITED*

These historical authorities are important in their own right because they provide a richer understanding of the history of both contract law and corruption law. However, they have special resonance in light of Kennedy's opinion in *Citizens United*. First, they undermine the notion that courts have always had a narrow view of corruption. Second, they suggest that contract law might provide an intriguing avenue for experimentation.

A. Corruption Redefined

A key feature of Kennedy's decision was his argument that *Austin's* broad definition of corruption was an outlier. He referred to the cases as pre-*Austin* and post-*Austin* and emphasized the singularity of the *Austin* opinion.¹³³ And he described *Austin* as uniquely giving weight to the governmental interest in prohibiting aggregated wealth from unduly influencing politics.¹³⁴

I have argued elsewhere that corruption is a fundamental constitutional concern that is given far too little deference by the modern Supreme Court.¹³⁵ Corruption was the Founders' paramount concern when drafting the Constitution. By the terms of the debate in Philadelphia and the terms the Founders used to describe the Constitution's purpose, limiting corruption was the most important goal of the convention.¹³⁶ The Constitution was drafted with the purpose of limiting corruption in the new republic; it was the paramount

133. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 903 (2010).

134. *See id.* (noting that the government had raised these arguments in cases prior to *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), and that the Court did not adopt that reasoning).

135. *See generally* Teachout, *supra* note 101.

136. *Id.* at 346–73.

concern that drove hundreds of drafting decisions in the summer the Constitution was written. It was, according to various accounts by Founders as diverse as Madison, Hamilton, Washington, and Franklin, the primary motivation behind the Constitution's final form.¹³⁷ Moreover, their understanding of corruption was not cash-for-votes, but conduct which used public channels for private gain and created a situation where public officials were fundamentally dependent upon private cash flows. I argued that the judicial branch ought to recognize an "anti-corruption" principle, akin to federalism or the separation of powers, that would guide constitutional decision-making.¹³⁸

My previous Article ended when the Constitutional Convention ended. However, as I demonstrated in the previous Part, if one extends the historical inquiry into the nineteenth century, at least some courts understood corruption far more broadly than Justice Kennedy. Corruption, under this line of cases, referred to personal failures that posed structural threats to democracy, often caused by inappropriate dependencies.

Justice Kennedy concluded that improper influence is not corruption, and that the appearance of influence would not lead to perceptions of corruption.¹³⁹ Yet this view is in direct conflict with decades of nineteenth century and early twentieth century precedent, as well as *Austin*. For example, in refusing to enforce a contract in 1920, the Nevada Supreme Court explicitly held that a contract need not be illegal, and the actors involved need not have a corrupt motive, if the overall effect of similar contracts would be to allow people to "assum[e] a position where selfish motives may impel them to sacrifice the public good to private benefit."¹⁴⁰

Similarly, while Kennedy concluded that only direct *quid pro quo* is corrupt, nineteenth century courts routinely concluded that *quid pro quo* was not required in each instance, although they recognized the "corrupting tendencies of such contracts."¹⁴¹ They recognized that the definition was not pat or simple, but that the lack of simplicity did not relieve courts of the responsibility of trying to define it. Courts thus had little difficulty in talking about corruption in a way that included almost any effort to use money to put private interests before public interests in what they perceived to be fundamentally public-facing decisions.¹⁴²

137. *Id.* See also Notes of James Madison (Aug. 14, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 282, 288 (Max Farrand ed., rev. ed. 1966) (1937) ("What led to the appointment of this Convention? The corruption & mutability of the Legislative Councils of the States.") (recording arguments of Mercer).

138. *Id.* at 342.

139. *Citizens United*, 130 S. Ct. at 910.

140. *King v. Randall*, 190 P. 979, 981 (Nev. 1920). In that case, the court found that a building contract based on the consideration of the location of a courthouse for a private benefit was unenforceable as it interfered with the public interest in the location of the courthouse.

141. *Hare v. Phaup* 101 P. 1050, 1052 (Okla. 1909); *Davis v. Janeway*, 155 P. 241, 243 (Okla. 1916).

142. For example, in an extensive discussion from a Delaware court (in the context of a criminal charge that an election officer refused to allow someone to vote for corrupt reasons), that

If one peels back history and looks at cases from the nineteenth century, *Austin* feels more mainstream, and the *quid pro quo* references in *Buckley* and *Citizens United* look more like an outlier. At the very least, courts seem to have long struggled with the difficulty of defining corruption in tractable terms, but they do not appear to have reached a long-standing consensus that corruption is limited to *quid pro quo* exchanges.¹⁴³

B. A Modern Law of Contract Enforcement?

A second reason the nineteenth century laws might matter is that they provide a precedent for the use—or withholding—of the state’s power to enforce contracts to dissuade corporate powers from exploiting weaknesses in the electoral machinery for private ends. After all, courts’ doctrine of refusing to enforce contracts on broad political corruption grounds never died, exactly; it was just slowly whittled away as American courts become much more skeptical of the public policy exception.¹⁴⁴ Thus, as of 2010, the public policy doctrine still exists. The current Restatement of Contracts, for instance, states that “[a] promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”¹⁴⁵

More importantly, the Supreme Court, while very stern towards criminal sanctions,¹⁴⁶ has been less stern regarding the legislative branch’s use of noncriminal powers to dissuade certain kinds of political speech. It has held that Congress may withhold otherwise available subsidies to avoid facilitating lobbying, such as by refusing to give charitable organizations that engage in lobbying tax-exempt status.¹⁴⁷ In conditioning tax-exempt status on a

court quoted from an earlier Delaware case:

It is difficult to define corruption, but we may say that it is the willfully and corruptly doing an act or omitting a duty which a person, acting in a public capacity, knows it to be his duty to do or omit, in disregard of his official duty, and the obligations of his oath.

State v. Colton, 33 A. 259, 260 (Del. 1891) (quoting State v. Porter, 4 Del. 556, 557 (1845)).

143. Of course, Kennedy’s characterization of *Austin* as an unruly outlier that needs to be tamed is weak even if one looks only at the modern jurisprudence. See Hasen, *supra* note 24, at 601.

144. Pettit, *supra* note 46, at 325. Cf. Crocker v. United States, 240 U.S. 74, 78–79 (1916) (finding that there was “an obvious departure from recognized legal and moral standards” where a company employed an agent with “compensation contingent upon success, to secure the contract for furnishing . . . satchels” to the federal government. Because of their baneful tendency . . . [such] agreements . . . are deemed inconsistent with sound morals and public policy, and therefore invalid”).

145. RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

146. See discussion *supra* Part II.

147. Fed. Comm. Comm’n v. League of Women Voters of Cal., 468 U.S. 364 (Congress can “reasonably refuse to subsidize the lobbying activities of tax-exempt charitable organizations by prohibiting such organizations from using tax-deductible contributions to support their lobbying

commitment not to lobby, "Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for . . . lobbying."¹⁴⁸ By an extension of that same logic, a statutory rule that restricted courts ability to enforce contracts to lobby might be slightly more likely to survive a First Amendment challenge. A commitment to enforce contracts is not free—it is meaningful, costly, material support for those who use it. So Congress would not be criminalizing electioneering—it would simply be refusing to subsidize it, a distinction with potential constitutional significance. This could play out in many different ways, but one could imagine, for example, the state of Vermont passing a law that said that Vermont courts could not enforce contracts by corporations that contracted with a film production company to make electioneering television ads designed to defeat a particular candidate for office (or tracking the part of BCRA that was struck down in *Citizens United*). This would make corporations less likely to engage in this kind of electioneering because if something went wrong, they couldn't go to the courts to sue for breach.

By turning to contract law, instead of criminal law, the state might soften these direct attacks on prior efforts to limit corruption using criminal sanctions. More importantly, it would send a strong signal that the courts are fundamentally public spaces, publicly funded, and they should not be used to enforce contracts that do, in fact, undermine the fundamentally public nature of our democracy.

V.

CONCLUSION

The majority opinion in *Citizens United* purported to close the debate about corruption in campaign finance law. However, it left open a few opportunities for greater exploration. The ad hoc nineteenth century practice of refusing to enforce contracts to sell public obligations provides an intriguing possibility for exploration. In the nineteenth century, courts used contract law to discourage public corruption, and they would sometimes refuse to enforce contracts that they deemed corrupt. Just as they would refuse to enforce contracts for prostitution, they would refuse to enforce contracts between public servants and private entities that undermined the integrity of representative government. In the most striking instance of this practice, the U.S. Supreme Court refused to enforce a contract to lobby Congress, holding that it was a corrupt practice and against the public policy of the United States.

These cases challenge Kennedy's view that *Austin* was an outlier. They show that there is a long history of cases that recognize that undue influence could constitute corruption and create the appearance of corruption. They also

efforts." (citing *Regan v. Taxation of Representation of Wash.*, 461 U.S. 540(1983)).

148. *Regan*, 461 U.S. at 546.

open the imagination to new ways of preventing corruption. In the modern framework, contract law is rarely considered as a possible tool to discourage political corruption and political dependence on concentrated financial power. The nineteenth century contract law of corruption suggests that we might fruitfully explore the structure of contract enforcement, and reminds us that courts can never be neutral in their relationship to corruption. The stability and certainty declared by Justice Kennedy is fundamentally elusive; we must always engage in a more searching, difficult, textured understanding of the way the legal system discourages and encourages relationships between institutions, people, money, and power.

