

CORRUPTION AND RATIONALES FOR REGULATING CAMPAIGN FINANCE

Concern about political corruption has been a fundamental justification for campaign finance regulation for over 100 years. But it is relevant to point out that more than a century earlier, the Founders were very much concerned about limiting corruption when they debated about the best structure for a representative democracy. One study of how frequently the word, “corruption,” was mentioned in discourse among the Founders identified more than 300 instances, of which 6 referred to bribery. Over half of the cases involved institutional-level corruption of various kinds.¹ According to Zephyr Teachout, the Founders used the term “corruption” to mean “excessive private interests influencing the exercise of public power,”² ranging from when the political system operates to benefit private interests over the public interest to when a legislator accepts a bribe.

Historical evidence of different types of corruption is documented in the work of scholars across a wide spectrum.³ Legislation to ban direct corporate contributions to candidates (Tillman Act, 1907) and a number of laws to limit individual contributions to campaigns from the 1970s to the early 2000s attest to the significant concerns of voters and legislators about the power of money to influence elections and subsequent government policies and activities.

Various approaches to defining corruption and types or categories of corruption have been offered in Court decisions and analyzed in legal scholarship. For example, Teachout identified five types of corruption: criminal bribery, inequality, drowned voices, a dispirited public, and lack of integrity.⁴ Thomas Burke characterized three types: *quid pro quo*, monetary influence, and distortion.⁵ Yasmin Dawood consolidated the various arguments about corruption and campaign finance into two categories, those related to abuse of power and those related to violations of political equality, but she recognized that both types of rationales can be applied to various corrupt activities.⁶

Corruption Defined in 1976-2010 Supreme Court Decisions

The nature of what constitutes corruption has been addressed in a number of Supreme Court decisions since *Buckley v. Valeo* (1976), which set out the *quid pro quo* standard to define corruption. The concept was broadened in Court decisions from the 1980s until 2010, as noted below, to incorporate concerns about corruption that distorted the political process through undue influence on and undue access to officeholders, resulting in failure to address issues of public concern. Attention to the broader definitions of corruption also focused on issues of trust in the system of representative democracy and political equality.

Quid Pro Quo Corruption

Quid pro quo corruption continues to be an obvious justification for restricting campaign contributions. “*Quid pro quo*” (in Latin, “this for that”) refers to an exchange between a candidate and donor in which the candidate receives a personal gain (a contribution for election or re-election to office) from the “sale” of public power (a vote or other action that benefits the donor).⁷ This is often framed as a conflict of interest because an officeholder has a duty to act in the best interests of constituents, which overrides any agreement to follow the preferences of a donor. The Supreme Court specifically mentioned *quid pro quo* corruption as well as the

appearance of quid pro quo in the *Buckley v. Valeo* (1976) decision, which supported restrictions on direct campaign contributions but not on campaign expenditures.

It is worth noting here that no one disagrees that bribery as direct payment or in the guise of a campaign contribution is corruption, and such direct exchanges should not be permitted. Bribery violates a number of criminal statutes and is typically prosecuted when discovered.

Distortion of the Political Process

A broader interpretation of corruption that has been accepted in support of the regulation of campaign contributions in past Supreme Court cases is distortion of the political process. Starting with the ideal that public policies should reflect the public interest and that officeholders should represent the interests of their constituents and the broad national interest, distortion is understood as favoring the interests of large campaign contributors and independent spenders when they conflict with the public interest or the best interests of constituents. The Court found that distortion can occur through processes of undue influence on candidates and officeholders by large donors in the 1986 *FEC v. Massachusetts Citizens for Life* and 1990 *Austin v. Michigan Chamber of Commerce* decisions.⁸

In *McConnell v. FEC* (2003), the Court expanded the concept of undue influence to include undue access to officeholders by wealthy contributors as a legitimate threat to democratic political processes. The *McConnell* case was particularly notable in its documentation of evidence that wealthy donors did receive special access to influence officeholders. Over 100,000 pages of evidence included testimony from more than 200 current and former legislators, lobbyists, and business executives about the pernicious effects of large campaign donations. For example, the decision states that “[T]he record in the present case is replete with... examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations... So pervasive is this practice that the six national party committees actually furnish their own menus of opportunities for access to would-be soft-money donors, with increased prices reflecting an increased level of access.”⁹ Further, “[I]mplicit (and, as the record shows, sometimes explicit) in the sale of access is the suggestion that money buys influence. It is no surprise then that purchasers of such access unabashedly admit that they are seeking to purchase just such influence. It is not unwarranted for Congress to conclude that the selling of access gives rise to the appearance of corruption.”¹⁰

With the Supreme Court’s decision in *Citizens United v. FEC* (2010), which allowed for-profit and non-profit corporations to spend unlimited amounts so long as they were independent from candidates, distortion took on another meaning. With new Super PACS and others spending millions in a single election, the distortion of the election process itself became a significant concern. Many worried that unlimited independent spending was taking over – drowning out the voices of citizens and taking control of an election away from the candidates themselves.

Political Equality

Political equality is a fundamental value in American democracy and has been used as the basic foundation for concerns about undue influence and undue access. Richard Hasen has argued that citizens have the equal right to expect that their legislative representatives will be responsive to

their needs and interests and not just those of large donors. Therefore, campaign contributions may be regulated if they are found to diminish these rights.¹¹ Arguments based exclusively upon political equality have not been supported by the Supreme Court in campaign finance cases, although they have been used as a secondary consideration, as in the *McConnell* case noted above.¹² In fact, even though contribution limits were upheld on other grounds, the Court explicitly rejected fairness as the compelling justification for contribution limits in the regularly cited quote in the *Buckley v. Valeo* decision: “[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”¹³ However, political equality continues to be offered by legal scholars and by others who claim that unlimited money in campaigns is just “not fair” to citizens who do not have the financial resources to make large contributions or expenditures.¹⁴

Narrowing Corruption Back to *Quid pro Quo*

The current Supreme Court in its 5-4 decision in *Citizens United v. FEC* (2010) retreated to the *quid pro quo* definition of corruption as the only justification for restricting campaign contributions by corporations, unions, and other interest groups. The majority in the *Citizens United* decision rejected distortion as a compelling state interest to justify limits on the First Amendment by dismissing it as a problem that needed to be solved. What is “undue” influence and access cannot be determined by clear-cut guidelines because elections and political participation are inherently about influence and access, according to the Court’s majority.

The Court reaffirmed its position in the *McCutcheon v. FEC* (2014) decision, which stated that aggregate limits on an individual person’s campaign contributions also violated the First Amendment guarantee of free speech. The majority 5-4 opinion cited the *Citizens United* decision’s position that “[I]ngratiation and access...are not corruption...’ They embody a central feature of democracy – that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns. Any regulation must instead target what we have called ‘*quid pro quo*’ corruption or its appearance.”¹⁵ The majority opinion further stated that “[S]pending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder’s official duties, does not give rise to such *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner ‘influence over or access to’ elected officials or political parties.”¹⁶

On the other hand, in the 2014 *Williams-Yulee v. Florida Bar* decision, a different 5-4 majority¹⁷ indicated that judicial elections may have restrictions on campaign contributions because judges are held to a higher standard of independent judgment in deciding cases than elected officials who are expected to be responsive to their supporters, including donors.

Arguments to Support Limits on Campaign Finance Since 2010

In response to *Citizens United* and subsequent decisions that narrowed the definition of corruption to *quid pro quo* bribery, three legal scholars (Lawrence Lessig, Robert C. Post, and Nicholas Stephanopoulos) have recently offered somewhat similar arguments for the compelling government interest in limiting money in campaigns. Their arguments are based upon criticisms

of the current system of campaign financing and its negative consequences on officeholders, voters, and the general public. These scholars argue that the pernicious effects of unlimited campaign contributions and spending are powerful enough to overcome First Amendment free speech concerns.

Dependence Corruption

Lessig has popularized a new term, “dependence corruption,” to describe the corrupting influence of the current system of reciprocity between donors and officeholders through lobbyists as intermediaries.¹⁸ These are not corrupt individuals who are crassly engaging in bribery, but rather participants in a system of “dependence” wherein the officeholders need the funds to continue in office and the donors’ desire public policies favorable to their interests, whether ideological or economic. According to Lessig, lobbyists serve as the middlemen who distribute donor funds and communicate the preferences of donors to candidates. In an increasing number of cases, officeholders are motivated to become lobbyists once their public service is over. The compelling state interest in regulating campaign contributions is to limit, if not eliminate, the system of dependence between officeholders, lobbyists, and large donors.

Electoral Integrity

Robert Post’s argument identifies “electoral integrity” as the core value to be preserved by fostering public trust in democracy and confidence in elected officials.¹⁹ These fundamental characteristics of representative democracy are weakened by unlimited money in elections. Post goes back to the *Buckley v. Valeo* (1976) decision as wrongly decided. His reasoning can be related to arguments about the appearance of *quid pro quo* corruption that would create distrust in the integrity of public officials and large donors, whether wealthy individuals, corporations, or interest groups. If voters believe that large campaign contributions shift an officeholder’s votes away from supporting their interests, voters are less likely to vote and otherwise participate in the political process. To Post, preserving electoral integrity is a precursor principle that must exist in order for the First Amendment to flourish and thus provides the compelling state interest in regulating campaign finance.

Misalignment and Responsiveness to Large Donors

The third and final argument recently presented by Stephanopoulos makes the case against unlimited contributions because they create significant differences between elected officials and the constituencies they are elected to represent.²⁰ He asserts that government policies ought to reflect voters’ preferences, but this relationship will not prevail if concentrated contributions skew candidates and elected representatives toward the interests of large donors and away from the interests of the voters in their districts. He distinguishes misalignment from other arguments for limiting contributions by individuals who are ideologically motivated toward extreme positions, but believes that contributions by political parties and by Political Action Committees are more likely to reflect centrist political philosophies and thus relate more closely to the median voter. Therefore, these contributing entities should have less regulation.²¹ This rationale has some similarities to Lessig’s and Post’s approaches but offers an additional analysis of differences among various types of donors in their propensity for misalignment.

-
- ¹ Lawrence Lessig, “Out-Posting Post,” p. 101. In Robert C. Post, 2014. *Citizens Divided: Campaign Finance Reform and the Constitution*. Cambridge: Harvard University Press.
- ² Zephyr Teachout, 2014. *Corruption in America: From Benjamin Franklin’s Snuff Box to Citizens United*. Cambridge: Harvard University Press, p. 38.
- ³ See, for example, Teachout, op. cit.; Robert E. Mutch, 2014. *Buying the Vote: A History of Campaign Finance Reform*. Oxford and New York: Oxford University Press.
- ⁴ Zephyr Teachout, 2009. “The Anti-Corruption Principle.” *Cornell Law Review* 94, 341.
- ⁵ Thomas F. Burke, 1997. “The Concept of Corruption in Campaign Finance Law.” *Constitutional Commentary* 14, 127.
- ⁶ Yasmin Dawood, 2014. “Classifying Corruption.” *Duke Journal of Constitutional Law and Public Policy* 9, 103.
- ⁷ *Id.*
- ⁸ The *Austin vs. Michigan Chamber of Commerce* decision, 494 U.S. 377 (1990), supported state prohibition of corporate funds being used as independent expenditures to support or oppose candidates for state office. It includes the frequently quoted statement that the state does have a compelling interest in controlling “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.” (p. 659-660)
- ⁹ *McConnell v. FEC*, 540 U.S. 93 (2003), pg. 41-42.
- ¹⁰ *Id.*, (44-45).
- ¹¹ Richard L. Hasen, 2003. *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore*. New York: New York University Press.
- ¹² See also Ch. 3, “Campaign Finance,” pp. 71-76, in John Paul Stevens, 2014. *Six Amendments: How and Why We Should Change the Constitution*. New York. Little, Brown and Company.
- ¹³ *Buckley v. Valeo*, 424 U.S.I, 48-49 (1976).
- ¹⁴ For example, Cass R. Sunstein, 1994. “Political Equality and Unintended Consequences.” *Columbia Law Journal* 94, 1390; Mark C. Alexander, 2005. “Money in Political Campaigns and Modern Vote Dilution.” *Law & Inequality* 23, 239.
- ¹⁵ *McCutcheon v. FEC*, 572 U.S. ___ (2), (2014).
- ¹⁶ *Id.*, (19).
- ¹⁷ The majority in the *Citizens United* and *McCutcheon* cases was comprised of Chief Justice Roberts and judges Alito, Kennedy, Scalia, and Thomas. The majority in the *Williams-Yulee v. Florida Bar* case included Chief Justice Roberts and judges Breyer, Ginsberg, Kagan, and Sotomayor.
- ¹⁸ Lawrence Lessig, 2011. *Republic Lost: How Money Corrupts Congress and a Plan to Stop It*. New York: Hachette Publishing.
- ¹⁹ Robert C. Post, 2014. *Citizens Divided: Campaign Finance Reform and the Constitution*. Cambridge: Harvard University Press.
- ²⁰ Trevor Potter provided a similar argument in a recent speech at the Safra Center for Ethics at Harvard University, entitled “The Changing Conception of Corruption.” See text at <http://www.campaignlegalcenter.org/news/blog/court-s-changing-conception-corruption>, accessed 5/11/2015.
- ²¹ Nicholas O. Stephanopoulos, 2015. “Aligning Campaign Finance Law.” *Virginia Law Review* forthcoming.