Defining Political Corruption: The Supreme Court's Role

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by

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Introduction

The critical analysis of political corruption is hobbled, in part, by confusion over what we mean by the term corruption. Until recently, the United States Supreme Court's decisions regarding campaign finance restrictions have provided a fairly straightforward legal definition of political corruption which focused on the trading of financial contributions for private political favors. In *Austin v. Michigan Chamber of Commerce* (1990), however, the Court redefined political corruption to include deviations from an idealized vision of political representation. This article documents this redefinition of a key legal concept and explores what has influenced this change.

Quid Pro Quo Corruption

Until *Austin*, the Court's central concern when reviewing campaign finance regulation has been how to balance the interests of free political speech against the potential for extracting political favors from elected officials through direct campaign contributions. The Court has established that political contributions used to extract private favors corrupts the democratic process. Accordingly, the court has decided that

the potential for such quid pro quo favors through direct financial contributions to political campaigns provides a compelling reason for narrowly tailored regulation of campaign finance. This article will refer to this type of political favor as *quid pro quo corruption.*

Consistent with this definition of corruption, the Court has upheld numerous restrictions on direct contributions to candidates. Also consistent with this definition of corruption, the Court has generally protected independent expenditures from regulation. Independent expenditures during a campaign may promote a candidate, but they are not prearranged or coordinated by the candidate. Prior to *Austin*, the Court had never upheld restrictions on independent campaign expenditures because, it was argued, the potential for quid pro quo corruption was too remote.

"A Different Type of Corruption in the Political Arena"

Justice Thurgood Marshall's opinion in *Austin*, however, upheld a Michigan campaign finance law that restricts independent corporate campaign expenditures. Marshall's opinion did not justify this restriction by examining its relationship to the traditional concern with quid pro quo corruption. Rather, *Austin* legitimized Michigan's restriction on independent corporate campaign expenditures by giving compelling weight to "a different type of corruption in the political arena: 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." (*Austin* 1990, 660) In other words, the Court in *Austin* does not concern

itself with how money can be spent to distort the incentives of a politician, but with how money can be spent to distort the incentives of the electorate (in this case through newspaper advertising).

Austin's concern for distortion or corrosion presumes a baseline of undistorted and structurally sound elections. What does that baseline look like? Following the logic of Marshall's opinion, a baseline election is one in which corporations do not have "unfair advantage in the political marketplace." (*Austin* 1990, 659) In a baseline election, campaign expenditures correlate with the public's support for a given candidate.[2]

By deciding that political corruption can mean too much of a particular type of campaigning, the Court posits a fundamentally different view of the electoral process than it has in the previous campaign finance cases. As we will discuss, previous dissents have given voice to this view. But *Austin* established by a firm and diverse majority that legislatures may significantly restrict spending on political speech during campaigns so that collective political speech will "reflect actual public support for the political ideas espoused." (*Austin* 1990, 660) This dramatic change deserves explanation.

Precedent

Before exploring why the Court has changed, we must first review how the Court has traditionally defined political corruption in the context of campaign finance reform.

Buckley v. Valeo

The first and most important decision in the line of cases that has examined limits on campaign financing is *Buckley v. Valeo* (1976). *Buckley* reviewed the constitutionality

of the 1974 Amendments[3] to the Federal Election Campaign Act of 1971[4] (referred to hereinafter as FECA Amendments). According to the federal court of appeals which considered the case before its appeal to the Supreme Court, the FECA Amendments provided "by far the most comprehensive reform legislation ever passed by Congress concerning the election of the President, Vice-President, and members of Congress." (*Buckley v. Valeo* 1975, 831).

FECA Amendments. The FECA Amendments broke down into four sections. (Polsby 1976; *Buckley v. Valeo* 1975). The first, and most important for this analysis, amended the federal criminal code to impose limits on contributions and expenditures. The second created a Presidential Election Campaign Fund to publicly finance presidential elections. The third mandated record keeping and public filing of certain information by individual campaigns and political committees. The fourth created the Federal Elections Commission to oversee this entire body of regulations.

The limits which the Amendments placed on campaign contributions and expenditures fell into roughly three categories. First, there were limits on how much candidates for federal office could spend when seeking nomination and election. Second, there were limits on how much an individual could contribute to a particular candidate, a limit on overall individual donations, and a ceiling on how much a candidate can contribute to his or her own campaign. Third, the amendments placed limits on independent expenditures in behalf or against a "clearly identified candidate" (what we will discuss as "independent expenditures").

Appellate Decision. The Court of Appeals for the D.C. Circuit upheld the amendments with almost no modifications. As Daniel Polsby (1976) has noted, "[t]he Court of Appeals . . . wrote as though the reforms were all but constitutionally required." The original plaintiffs appealed the decision to the Supreme Court.[5]

Arguments Before the Court. Before the Supreme Court, appellants argued that limitations on contributions and expenditures violated the First Amendment "since virtually all meaningful political communications in the modern setting involve the expenditure of money." (*Buckley* 1976, 11) The appellees, on the other hand, argued that the FECA amendments served three governmental interests. Primarily, they were designed to prevent "corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions" (*Buckley* 1976, 25). The ancillary interests were "to mute the voices of affluent persons and groups in the election and thereby to equalize the relative ability of all citizens to affect the outcome of elections," and to curb overall campaign spending "and thereby serve to open the political system more widely to candidates without access to sources of large amounts of money." (*Buckley* 1976, 25-26)

First Amendment Framework. The *Buckley* decision provided an analytical framework to consider campaign finance reform measures drawn directly from standard First Amendment jurisprudence (BeVier 1985). The Supreme Court's per curiam decision afforded a close relationship between money spent on politics and political speech.

A restriction on the amount of money a person or group can spend on

> political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discusses, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money . . . The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. (*Buckley* 1976, 19)

By closely associating money and speech the Court invoked the traditional doctrines of the First Amendment. According to those doctrines, legislated restrictions on political speech must survive a level of judicial review known as strict scrutiny in order to be legitimate. Briefly stated, the government cannot restrict expression unless it can show that it has a compelling reason to do so and that the government's means to effectuate that end are narrowly tailored. Few restrictions on expression survive strict scrutiny analysis.

Corruption and the Appearance of Corruption. Invocation of strict scrutiny analysis in *Buckley*, however, did not spell the end of the FECA Amendments. Given "the deeply disturbing examples surfacing after the 1972 elections" the Court held that the need to remedy *corruption* and *the appearance of corruption* provided compelling justification for restricting direct contributions.[6] The Court explicitly linked its concept of corruption to the idea of "secur[ing] a political *quid pro quo* from current and potential office holders." (27) The Court defined the "appearance of corruption," the other compelling justification for restricting contributions, with less precision. Nonetheless,

read in context, it is quite clear that the phrase "appearance of corruption" referred to the public perception that there possibly might be quid pro quos extracted through campaign contributions.

Independent Expenditures. The Court's discussion of "independent expenditures" also helped to settle the legal meaning of corruption and the appearance of corruption. The Court simply was not persuaded that the government's interest in preventing corruption and the appearance of corruption justified the FECA Amendments' ceilings on independent expenditures. "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." (*Buckley* 1976, 47)

Equalization. In addition to providing a clear First Amendment analysis focused on concern for quid pro quo corruption, the Court explicitly denied the equalization justifications offered by the appellees.

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend

on a person's financial ability to engage in public discussion. (*Buckley* 1976, 47) Equalization and openness, according to the Court, are not sufficiently compelling reasons to limit First Amendment rights of speech and association.

To summarize, in *Buckley* the Court established a conceptual framework for examining legislative attempts to limit campaign spending. The Court explicitly linked the money spent on campaigning with speech and association. Accordingly, restrictions on campaign financing were subjected to strict scrutiny. The Court held that the First Amendment only justified those narrowly tailored restrictions concerned with potential quid pro quo corruption.

First National Bank of Boston v. Bellotti

This conceptual framework for examining the legitimacy of campaign finance restrictions remained largely in tact until *Austin.* For example, in *First National Bank of Boston v. Bellotti* (1977), the court held that restrictions on corporate expenditures in a referendum unconstitutionally violated free speech.

A Massachusetts statute made it a felony for a corporation to expend corporate funds "for the purpose of . . . influencing or affecting the vote of any question submitted to voters, other than one materially affecting the property, business or assets of the corporation." Additionally, the law specified that questions of taxation were not in the material interest of a business.

Applying *Buckley's* First Amendment framework, First National Bank of Boston challenged the statute when it wanted to publicly share its views on a proposed income

tax amendment to the state constitution.

Justice Powell's opinion for the Court rejected the state's justifications for the restrictions. Powell stated that in a referendum campaign there is no concern about corruption, i.e., "the creation of political debts," in a referendum because there is no candidate to corrupt (*Bellotti* 1977, 788 n. 26).

Echoing *Buckley's* rejection of an equalization rationale, Powell's *Bellotti* opinion rejected an "enhancement theory" advanced by the state and Justice White's dissent. Since this enhancement theory is very similar to the theory which ultimately prevailed in *Austin*, it should be noted that Justice White's dissent in *Bellotti* marked the first articulation of enhancement theory in this line of cases.

Justice White argued that the corporate form of business organization, granted by the state, provides corporations with the ability to amass great amounts of capital and then distort the political process through campaigning which bears no relation to public support of its ideas. The *Bellotti* Court rejected this approach as paternalistic for two reasons.[7] First, there was no judicial or legislative finding that "the relative voice of corporations has been overwhelming or even significant[.]" Second, "the fact that advocacy may persuade the electorate is hardly a reason to suppress it. . . . the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." (787)

Citizens Against Rent Control v. Berkeley

In a similar case, *Citizens Against Rent Control v. Berkeley* (1981; referred to

hereinafter as *Berkeley*), the Court invalidated a law limiting contributions to political committees formed to support or oppose city ballot measures. City ballot measure campaigns and committees raised no concern, in the Court's estimation, for quid pro quo corruption because they did not represent a politician from whom political favors could be extracted (*Berkeley* 1981, 297-98)[8]. Although there was some debate about the importance of the distinction between direct contributions versus independent expenditures (*Berkeley* 1981, 301, Justice Marshall's concurrence), when one considers the *Berkeley* opinion solely from the viewpoint of how the Court legally defines corruption, it affirms that "undue influence" is a potentially regulable problem for candidates, *not* voters.

Justice White predictably dissented from the *Berkeley* decision. White continued to express dissatisfaction with the use of the First Amendment approach outlined in *Buckley.* Nonetheless, White could still articulate many compelling government reasons to limit spending which he felt could justify campaign finance restrictions within the First Amendment framework.

White's dissent in *Berkeley* deserves some scrutiny because it expressed the concern that money can "skew" the political process. "[T]here is increasing evidence that large contributors are at least able to block the adoption of measures through the initiative process" (*Berkeley* 1981, 308). White cited "[s]everal studies [that] have shown that large amounts of money skew the outcome of local ballot measure campaigns." (*Berkeley* 1981, 308 n. 4) The studies he cites are by Lowenstein (1981), Mastro, et al. (1980),

Schockley (1980), and Lyndenberg (1981). These studies use spending data as the sole independent variable and results as the dependent variable to imply that campaign spending determines the outcome of ballot propositions (*post hoc ergo propter hoc*). White's dissent, however, failed to critically analyze the data. For example, White did not even try to account for why it was that some ballot measures succeeded despite massive corporate spending to defeat them. Nor does his dissent grapple with any of the many other possible explanations of this data, and other raw data provided by the respondents.[9] Despite its shortcomings, White's dissent in *Berkeley* began to frame the issue of campaign finance reform in terms of skewed and distorted elections rather than quid pro quo corruption and First Amendment freedoms.

FEC v. National Conservative Political Action Committee

Perhaps the clearest definition of the pre-*Austin* quid pro quo corruption was found in *Federal Election Commission v. National Conservative Political Action Committee* (1985; referred to hereinafter as *NCPAC*), which struck down a provision forbidding political action committees (PACs) from independently spending more than $1000 in support of any publicly funded presidential or vice-presidential candidate.

Justice Rehnquist, employing *Buckley's* framework, said "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances" (*NCPAC* 1985, 496-97). He went on to define his terms and give the rationale for the decision.

Corruption is a subversion of the political process. Elected officials are

> influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors. But here the conduct proscribed is not contributions to the candidate, but independent expenditures in support of the candidate. (*NCPAC* 1985, 497)

Rehnquist bolstered this terse and explicit quid pro quo definition of corruption in his analysis of independent expenditures. "[T]he absence of prearrangement and coordination undermines the value of the expenditure to the candidate and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." (*NCPAC* 1985, 497) *NCPAC* demonstrates the viability of the Court's quid pro quo definition of political corruption.

Justice White and Marshall dissented to the substance of *NCPAC*.[10] They both challenged the distinction between direct contributions and independent campaign expenditures. Although White challenged the entire line of post-*Buckley* cases, Marshall's dissent was more focused. "To the extent that individuals are able to make independent expenditures as part of a *quid pro quo*, they succeed in undermining completely the first rationale for the distinction [between direct contributions and independent expenditures] made in *Buckley*." (*NCPAC*, 1985, 520) Still espousing a quid pro quo definition of corruption, Marshall's dissent indicates he was no longer persuaded that independent expenditures did not raise quid pro quo corruption concerns.

Nonetheless, in this 1985 case, eight of nine justices continued to adhere to a legal definition of political corruption concerned with the financial quid pro quo. Only Justice White expressed concerns that quid pro quo corruption alone failed to account for other compelling concerns raised by the use of money in politics.

FEC v. Massachusetts Citizens for Life

In *Federal Election Commission v. Massachusetts Citizens for Life* (1986; hereinafter *MCFL*), the Court made a subtle but significant change. In an opinion by Justice Brennan, the Court held that FECA prohibitions against the use of corporate treasury funds for independent expenditures did not apply to a particular non-profit ideological corporation. This case reviewed the application of the statute to a particular case, rather than challenging the concept of the statute outright. Lawyers would refer to this case as an "as applied" challenge, as opposed to a "facial" challenge. In formal terms, the precedential value of such a case usual requires a close examination of the facts. Focusing only on the facts of the case, *MCFL's* result seems consistent with the cases we have discussed. The justices could arguably find that, when balancing the threat of quid pro quo corruption with the right to political expression, the independent expenditures by a small ideological group do not raise the specter of exchange of funds for political favors. Curiously, Brennan's *MCFL* opinion (joined by Marshall, Powell, Scalia and O'Connor) never addressed the issue of compelling state interest in terms of quid pro quo corruption. Instead, Brennan pulled together past dicta to begin crafting a new compelling state interest. Although just one year earlier the *NCPAC* court expressly

defined the state's interest as preventing the use of "dollars for political favors," Brennan's *MCFL* opinion states that the "rationale in recent opinions [is] the need to restrict 'the influence of political war chests funneled through the corporate form' to 'eliminate the effect of aggregated wealth on federal elections'" (257, quoting *NCPAC*, 1985, 501 and *Pipefitters Local Union No. 562 v. United States*, 1972, 416). Brennan never anchored this approach in the language of bribery or particular favoritism or quid pro quo. Instead, Brennan spoke of "the corrosive influence of concentrated corporate wealth," and "unfair advantage in the political marketplace" (*MCFL* 1986, 257). Because none of this was particularly descriptive of the particular bake-sale-funded right-to-life group in dispute before the Court, a legal formalist would consider Brennan's imprecise adumbrations on distortions of politics through too much campaigning, and his musings about the bases for the typical restrictions on corporate contributions and expenditures (see *MCFL* 1986, 257-59) as dicta. By noting that "[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas . . ." and its expenditures provide "no reflection of the power of its ideas" (*MCFL* 1986, 258), Brennan drives home rhetorically the point that contributions from MCFL's treasury (funded through bake sales and grass-roots contributions) are not the sort of thing that the Federal Elections Commission should curtail. Although Brennan ostensibly used a First Amendment framework to strike down a campaign finance restriction, as applied, his dicta arguably altered the compelling government interest prong of the campaign finance restriction cases, and left the Court open to the sort of analysis presented in *Austin*.

Austin in Context

Brennan's musings about corporate power in *MCFL* appear as fully formed constitutional doctrine in *Austin.* First, Justice Marshall identified independent corporate expenditures as "political expression 'at the core of our electoral process and the First Amendment freedoms.'" (*Austin* 1990, 657 quoting *Buckley* 1976, 39) Second, Marshall announced that any restrictions on such speech "must be justified by a compelling state interest" (*Austin* 1990, 658). Third, Marshall identified the compelling government interest as "preventing corruption." Finally, Marshall asserted that "[r]egardless of whether this danger of 'financial *quid pro quo*' corruption may be sufficient to justify a restriction on independent expenditures, Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth" (*Austin* 1990, 659-660). This step-by-step approach uses all of the elements of the *Buckley* analysis, with the exception that it changes the definition of "corruption."

In this way, Marshall joined the pre-*MCFL* concern with corruption and the appearance of corruption with Brennan's musings about unequal political power, to provide a new definition of political corruption, namely too much corporate speech. Too much corporate speech is "corrosive and distorting," and has "little or no correlation to the public's support for the corporation's political ideas." Despite Marshall's protestations to the contrary, the "New Corruption" (Scalia's phrase; see *Austin* 1990, 684) looks just like the interests in equalization and openness that the Court explicitly rejected in *Buckley*

(*Buckley*, 1976, 16-18, 48-49).

Chief Justice Rehnquist and Justices White and Blackmun joined the opinion without comment. Justices Brennan and Stevens each penned concurring opinions. Brennan's concurrence specifically addresses what he characterizes as overstatements raised by the dissenting opinions. Brennan's volleys with the dissenters, much like his majority opinion in *MCFL*, focused on the particular facts of the case (in this case the fact that the Michigan Chamber of Commerce already had a funded PAC, and did not need to spend treasury funds). Accordingly, Brennan claims that the majority opinion is "faithful to our prior opinions in the campaign finance area, particularly *MCFL*." (*Austin*, 1990, 670)

Stevens one paragraph concurrence, however, specifically backs away from Marshall's redefinition of political corruption.

> In my opinion the distinction between individual expenditures and individual contributions that the Court identified in *Buckley v. Valeo*, 424 U.S. 1, 45-47 (1976), should have little, if any weight in reviewing corporate participation in candidate elections. In that context, I believe the danger of either the fact, or the appearance, of *quid pro quo* relationships provides an adequate justification for state regulation of both expenditures and contributions. Moreover, as we recognized in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), there is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other. (*Austin*, 1990,

679)

In other words, Stevens clearly considered that the state's interest in curbing the appearance of any exchange of dollars for political favors from politicians (quid pro quo corruption) was sufficient to reach the same outcome in this case without altering the legal definition of political corruption.

The dissenting opinions strongly criticize Justice Marshall's redefinition. Justice Scalia, who had joined Brennan's *MCFL* opinion, launched an angry and sarcastic critique of Marshall's use of precedent, logic, language, and political theory. Scalia equated the Michigan statute to Orwellian censorship. Scalia read his dissent from the bench, a method used by the justices to signal the intensity of their objections (Bronner 1990). Scalia's opinion was not endorsed by any other justice.

Kennedy's dissent, joined by O'Connor and Scalia, was a less biting, but still strongly criticized the Court's apparent abandonment of the distinction between direct contributions and independent expenditures.

Explaining *Austin*

Why did the Court alter its quid pro quo approach to political corruption so quickly and so completely? For most of a decade, Justice White was the only justice who expressed strong objections to the quid pro quo approach. Then, there was some discussion about the validity of distinguishing direct contributions from independent expenditures. But with *Austin* a majority of the Court abruptly revealed, as a matter of law, that not only are politicians corruptible, but that the electorate itself is corruptible

through the "distortion" and "corrosion" of corporate expenditures on advertising.

Close observers of the Court have given us several models to help explain why the Court decides the way it does. The dominant attitudinal model would suggest that the individual justices are purely interested in policy outcomes, and that for any array of personal attitudes or interests, six out of nine justices wanted *Austin's* result. The various formulations of the so-called legal model would suggest that the Constitution, statutes, and case law, or at least a consistent interpretive approach to such authoritative materials, compelled *Austin's* result. Finally, what I will call the jurisprudential model, would explain the decision by reference to an underlying democratic theory.

The Attitudinal Model

The purest formulation of the attitudinal model contends that the personal policy preferences of the justices provide a complete and adequate explanation of Supreme Court decisions (Segal & Spaeth 1993).[11] It is difficult to say, however, that *Austin* represents only one policy preference. At one level there is the policy represented by the Michigan statute, and at a higher level, the policy toward campaign finance generally. Finally, at an even more abstract level, the case might represent a *judicial policy* of presuming the constitutionality of legislation, which begins to collapse the attitudinal model into the so-called legal model (compare Rosenberg 1994; Smith 1994).

Since the Michigan statute applied to corporate treasuries and not labor unions, and since the newspaper advertisement at issue in the conflict argued for restricting workmen's compensation, one could read *Austin* as deciding policy about the balance of

power between corporate and labor interests in the political process. But the Justices understand that their published decisions do not simply resolve an individual dispute, but create constitutional doctrine nationally (Easterbrook 1984, 4). Although the court found that the disparate treatment of corporations and unions did not create an equal protection problem, it is not clear that independent expenditures by unions are safe from state regulation in the wake of *Austin.*

Considering only the text, the majority decision represents a preference for greater state regulation of the electoral process because of a distrust of corporate participation in the process. Although one might assume that this represents the justices' policy preferences, the *Austin* case highlights a shortcoming of the attitudinal model: it cannot predict change. *Austin* is interesting precisely because it marks a change in doctrine which is not easily explained by the nose counting relied upon by purveyors of the attitudinal model (Baum 1994, 4). In other words, if policy preferences alone govern, why did they wait so long to express this preference in their decisions? Have their preferences changed or have they simply felt restrained (by precedent?) from giving full expression to their individual preferences until now? It is in such instances that other models of court behavior must be explored for answers.

The Legal Model

Many commentators have noted, as a descriptive point, that our legal tradition includes a judiciary that responds to the constant review of its work by lawyers, law professors, and lower court judges (e.g. Berman 1983, 8). If true, then careful reasoning

and consistency would likely serve the self-interest of any justice as well, or better, than obtaining the immediate desired policy outcome of a particular dispute (compare O'Brien 1990, 325). This seems to be the intuition which informs the most sophisticated versions of the legal model of judicial behavior, which posits that the previous, relevant, authoritative texts, and a consistent interpretive application of such texts to the dispute before the court, compel a judge's decision (Rosenberg 1994).

The legal model, however, does not explain *Austin*. *Austin* breaks from the post-*Buckley* case law. *Austin* could have reached exactly the same result with the traditional account of *quid pro quo* corruption (as demonstrated in Stevens' concurrence). Instead, the majority willingly accepted Marshall's expansive definition of corruption. Like the attitudinal model, the legal model's attempts to find patterns in judicial decisions would almost assume away radical change. Nonetheless, many judicial innovations claim legalistic foundations, primarily through the common lawyer's rare ability to analogize to an arguably relevant line of authoritative material (Kalman 1990, 271-76).

Early Campaign Finance Law. Focusing only on the line of case following the FECA and its 1974 Amendments, *Austin* has dubious "legality," in the sense that it deviates from those cases. However, prior to FECA, some case law developed around a number of federal campaign finance statutes that limited corporations and unions from financing campaigns. For example, the Tillman Act of 1907[12] prohibited corporations and national banks from making "money contribution[s]" in connection with federal elections. This restriction was extended to all contributions by the Corrupt Practices Act

of 1925.[13] The Taft Hartley Act of 1947[14] prohibited unions from making similar contributions in federal elections.

The vagueness of the statutes and limited enforcement led to many abuses. Nonetheless, the Corrupt Practices Act was in effect until incorporated into FECA. The Supreme Court fastidiously avoided deciding on the constitutionality of these statutes.[15] Nonetheless, these cases indicate a judicial willingness to substantively limit the participation of large organized groups in campaigns, particularly where the cases refer to the legislative history of the statutes. For example, Justice Frankfurter's opinion in *United States v. UAW-CIO* (1957) reviews the legislative history of the Tillman Act, the Corrupt Practice Act, and the Taft-Hartley Act. The opinion, which remands the issue without constitutional guidance, draws heavily on statements from legislative hearings to express concern, even fear, about the effects of aggregated wealth on American democracy.[16] One could plausibly argue that *Austin*'s "legality" derives from hearkening back to a time when the Court avoided the constitutional issues behind campaign finance reform and deferred to legislatures the power to regulate the electoral process.

The Reapportionment Cases. The reapportionment cases of the 1960s attempt to equalize power in electoral politics. Decided under the Constitution's equal protection clause, the reapportionment cases held that the power of voting should be equalized , hence the "one person, one vote" approach of *Reynolds v. Sims* (1964). The idea that the principles underlying the reapportionment cases should be brought to bear on campaign finance has received scholarly support for quite some time. Alexander Heard, for

example, as early as 1960 (before the reapportionment cases) made the following statement.

> A deeply cherished slogan of American democracy is "one man one vote." . . . Concern over the private financing of campaigns stems in significant measure from the belief that a gift is an especially important kind of vote. It is grounded in the thought that people who give in larger sums or to more candidates than their fellow citizens are in effect voting more than once (Heard, 1960, 48).

According to this view, excessive spending on campaigning violates the "egalitarian spirit of political democracy." (Heard, 1960, 48)

Many legal scholars have promoted this approach. Law professor Marlene A. Nicholson, for example, argued in the *Stanford Law Review* in 1974 (during the post-Watergate debates about campaign finance regulation), that the use of money in politics violates the Equal Protection principle of one person one vote, and therefore, the Court should strike down any statutory scheme which permitted large campaign contributions (1974, 821, 825-36, 853-54). Law professors William Eskridge and Philip Frickey have based what they call their "enhancement theory" of the First Amendment on a "republican" vision of government, which takes into account not only the liberty of speech, but the qualities of virtue and deliberation in the political process. They support the idea of limiting campaign finance by altering First Amendment jurisprudence to include more substantive values of democracy.

> The value of political equality, which is at the root of the one person, one vote decisions . . . and which finds textual support in the Equal Protection Clause of the Fourteenth Amendment to the Constitution, is a worthy public value that might be rad into the First Amendment under a republican vision of the Constitution. This a perfectly plausible defense of enhancement theory. (1988, 237)

In short, law scholars have provided a way to think about the First Amendment which would allow egalitarian notions of "enhancement" from the reapportionment cases to invade what has traditionally been a bastion of libertarianism. Perhaps the Court in *Austin* has followed their lead. But *Austin* itself does not lead the reader to any line of cases other than *Buckley* and its progeny. Neither the Corrupt Practices materials nor the Reapportionment Cases appear in any recognizable form in the *Austin* decision. References to either line of inquiry might have satisfied the increasingly loose requirements of the legal model, but they simply do not appear in the reasons provided for the court.

The Jurisprudential Model

Perhaps we can best explain *Austin*'s redefinition of political corruption by returning to some basic legal and political theory. Legal theorist Ronald Dworkin suggests that while justices require a minimally adequate fit with prior authoritative texts, that their choice between contending minimally adequate "fits" derives from what the justices consider to be the most persuasive political theory that they can find or construct (Dworkin 1986, 65-

68, 87-88). I will refer to this approach as the jurisprudential model. We have demonstrated how Marshall adequately fit the dicta of *MCFL* with the form of *Buckley*. But where do we locate *Austin*'s animating theory? The Court made reference to the minimally adequate legal text of *MCFL*, but not to any theoretical treatise. Moreover, First Amendment enhancement theory, which seems to inform Marshall's redefinition of corruption, has been grounded in neo-republicanism (Eskridge & Frickey, 1988) and neo-Lockeanism (Gardner 1990) supposedly contradictory traditions.[17]

Nonetheless, there are clues. The distrust which *Austin* displays towards corporate groups in the political process has a long tradition in American populism. This distrust has also been systematically articulated in relatively recent political theory about plural elites. One line of this scholarship agonizes over how, in supposedly majoritarian democracy, the few can defeat the many. The most formalistic of these approaches comes from Mancur Olson (1965) who says that small economic interests are more effective politically because they are not subject to the high organizational costs and free rider problems which trouble widely dispersed interests. Therefore the few are better organized and able to defeat the many.

The work of Murray Edelman (1964) argues that diffuse publics are prone to irrational perceptions of political reality, easily confusing symbol with substance. Elites, who understand this confusion can manipulate public opinion by creating political forms which give unrealistic impressions about policy. Because elites (such as corporations) do not themselves confuse symbol with substance the way that large publics do, small

groups of elites, following rational political strategies, will frequently defeat the interests of very large publics.[18]

The philosophical work of John Rawls best expresses the normative implications of these ostensibly descriptive theories. Faced with the danger that the few will defeat the many, Rawls argues that justice requires us to enhance or maximize the chances for the least advantaged person in society (a "maximin" strategy).

> The constitution must take steps to enhance the value of the equal rights of participation for all members of society . . . those similarly endowed and motivated should have roughly the same chance of attaining positions of political authority irrespective of their economic and social classes. . . . The liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantage to control the courts of public debate. (Rawls 1971, 224-25)

Although Marshall provides no citation to Rawls in his *Austin* decision, this Rawlsian approach to representation is a helpful way of explaining what the Court attempted to achieve in *Austin*. It certainly provides a theoretical rationalization for the case, but like the Reapportionment Cases, there is no positive proof in the text of the case of its influence on Marshall's opinion. Despite our ability to demonstrate the fit between Rawlsian liberalism and *Austin*, the jurisprudential model does not explain how the change represented in *Austin* took place.

Nonetheless, court decisions often correspond to relatively recent developments in political theory. Professor Martin Shapiro (1988) has demonstrated how the administrative law of the present mirrors the political theory of the previous decade. What Shapiro's account lacks, like other accounts of changes in the Court's approach to doctrine, is an explicit institutional account of how these changes in thinking are absorbed by the judiciary (compare Mishler & Sheehan 1993; Norpoth & Segal 1994).

I suggest that court scholars need to look more closely at the role played by judicial law clerks in order to explicitly explain changes such changes in court doctrine. It has long been known that most of the justices rely on their law clerks to make the first draft of opinions (Posner 1993; O'Brien 1990, 249). It was also common knowledge among court observers that Justice Marshall delegated far more authority to clerks in this regard than any of the other justices (Woodward & Armstrong 1979, 198, 258). These law clerks come from the best law schools, where, in addition to getting top grades, they most likely served as editors on their respective student-edited law reviews. In that role they would have read literally hundreds of articles from law faculty, who themselves are increasingly in the business of trying to bring theoretical insights to bear on legal doctrine (Posner 1993). Because Supreme Court law clerks are usually chosen from clerks to other judges, the law clerks at the Court when *Austin* was decided would have been at law school between 1985 and 1988.

Although it is likely that most Supreme Court law clerks came to the study of law from the social sciences or humanities, and should have known the writing of John Rawls

as undergraduates, it would have been nearly unthinkable for the well trained law student to miss Rawls' influence on legal thought in the mid-1980s.[19] Indeed, Rawls explicitly took to task the Supreme Court for its approach to campaign finance, as represented by the *Buckley* decision, in his widely read Tanner lecture, which was published in 1987 (Rawls 1987).

Also in 1987, Cass Sunstein influenced legal scholarship by explicitly pointing the way to introduce a Rawlsian baseline into the law of campaign finance in his justly famous law review article in the *Columbia Law Review*, "Lochner's Legacy" (Sunstein 1987). Therein Sunstein noted that the central problem with the Court's decision in the turn of the century case *Lochner v. New York* (1905) had to do with the Court's conception of neutrality and its choice of an appropriate baseline. (Sunstein 1987, 883). Sunstein proceeded to note many areas of constitutional law still haunted by a *Lochner*-type analysis, noting preeminently *Buckley*'s first amendment analysis of campaign finance restrictions.

> *Buckley* is a direct heir to *Lochner*. In both cases, the existing distribution of wealth is seen as natural, and failure to act is treated no decision at all. Neutrality is inaction, reflected in a refusal to intervene in markets or to alter the existing distribution of wealth. *Buckley*, like *Lochner*, grew out of an understanding that for constitutional purposes, the existing distribution of wealth must be taken as simply "there," and that efforts to change that distribution are impermissible. (Sunstein 1987, 884)

Sunstein then mapped out the alternatives to this type of analysis. The Court could adopt the approach advocated in Justice Holmes' famous *Lochner* dissent, i.e., abandon the search for a baseline by which to judge government action and presume constitutionality in all but the most extreme cases. Sunstein, however, advocated a different and admittedly problematic approach to this problem.

> That approach would attempt to generate a baseline independent of either the common law or the status quo through some theory of justice, to be derived from the language and animating purposes of the text and based to a greater or lesser degree on existing interpretations. Such an effort would be the legal analogue to the various efforts in modern political theory to go beyond or replace classically liberal social contract theories. (Sunstein 1987, 907)

Sunstein cited to John Rawls' *Theory of Justice.* In Sunstein's opinion, then, the Supreme Court's review of campaign finance restrictions was based on a wrongheaded approach to baselines which treated the status quo as neutral and prepolitical. Rather than defer to the status quo, the Court should base its review on an articulated theory of justice, such as that advocated by Rawls.

I would submit, given the way that law review articles circulate, and given the way that judicial law clerks are chosen, that Marshall's clerks were well acquainted with Sunstein's handy map to their problem. Even if Marshall's clerks somehow missed Sunstein's article while in law school, they were no doubt aware of it by the time they began drafting their opinion in *Austin.* The way in which legal thought develops and

changes has often been traced to the legal academy (Shapiro 1981, 131-32). In our era, relatively recent theoretical approaches to law are translated into legal doctrine through surprisingly powerful law clerks who have been socialized to the practice of law through elite academic law schools and work on law reviews.

Conclusion

Legal and political theorists will debate at a normative level whether the Court has found a better theory for their review of campaign finance restrictions. Whatever they conclude, it seems fairly obvious that *Austin* raises some immediate institutional concerns for the Court. First, lawyers and the courts that hear their arguments, are acculturated to offering, considering, applying, and forging bright line rules rather than making complicated tradeoffs (Edwards & Polsby 1991). Guided by elaborate rules of evidence, fact-finding courts seem institutionally fitted to ferreting-out bribes and pay-off. Correspondingly, a quid pro quo definition of corruption provides a constitutional court with a relatively straightforward legal standard for considering the merit of a particular campaign finance restriction. *Austin*'s redefinition of corruption provides no helpful bright line. By presuming as its baseline an ideal political process in which voters are unaligned and uninformed, the Court has now appropriated to itself the difficult and controversial job of elaborating what this rarefied form of ideal politics is, and what constitute deviations from it. Second, by grounding review of campaign finance restrictions in a Rawlsian ideal of politics the Court has moved this portion of first amendment jurisprudence away from the first amendment's traditionally libertarian moorings (Epstein 1992). This shift may have opened the courts generally to unwelcome

innovations in other areas of first amendment jurisprudence.

In summary, this article has attempted to document and explain the Court's new definition of political corruption in *Austin* by considering some of the standard models used to explain Court behavior. The attitudinal model and the legal model do not adequately explain the decision. The jurisprudential model provides a nice fit with an underlying political theory which distrusts how groups operate in the political process and provides a maximin-type strategy to correct this defect. The jurisprudential model, however, does not give us a mechanism to explain how the judiciary absorbs such changes. I have suggested that institutionally we can trace the underlying change in legal theory apparent in *Austin*'s constitutional doctrine to the role played by law clerks who have been socialized to the practice of law through elite academic law schools and their work on law reviews.

NOTES

1. Assistant Professor of Political Science, Brigham Young University. I wish to thank Nelson Polsby, Mitchell Edwards, and Jon Bernstein for their helpful comments on earlier drafts of this paper.

2. "[T]he corrosive and distorting effects of immense aggregations of wealth . . . *that have little or no correlation to the public's support for the corporation's political ideas.*" *Austin* 1990, 660.

3. 1974 Amendments to the Federal Election Campaign Act of 1971, Pub. L. No. 93-443, 88 Stat. 1263.

4. Federal Election Campaign Act of 1971. Pub. L. No. 92-225, 86 Stat. 3 (1972).

5. Within the FECA Amendments Congress explicitly specified several unique procedures for judicial review of the constitutionality of many of the Act's provisions, including certification to the D.C. Court of Appeals, and mandatory and expedited appeal to the United States Supreme Court (*Buckley* 1976, 10).

6. The Court rejected the appellants contention that existing bribery laws were the least restrictive way of dealing with the problem of corruption. It should also be noted that the Court readily accepted the notion that regulations were justified by the desire to check "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions" (*Buckley* 1976, 27).

7. Justice Powell's disdain for paternalism is evident in the following comment:

> The State's paternalism evidenced by this statute is illustrated by the fact that Massachusetts does not prohibit lobbying by corporations, which are free to exert as much influence on the people's representatives as their resources and inclinations permit. Presumably the legislature thought its members competent to resist the pressures and blandishments of lobbying, but had markedly less confidence in the electorate (*Bellotti* 1977, 792 n. 31).

8. Justice White's dissent reconfirms that this is the analysis used by the Court. "[T]he ordinance is not directed at *quid pro quos* between large contributors and candidates for office, 'the single narrow exception' for regulation that [the Court] viewed *Buckley* as endorsing" (*Berkeley* 1981, 306).

9. For example, although obviously related, issue visibility may prove more important than outspending per se. Also, defeat of an initiative may not necessarily be acceptance

of the position of an initiative's detractors, but merely a preference for the status quo in the face of conflicting information. White's opinion uncritically accepted the city's interpretation of the data provided. For example, White argued that public recognition "that enormous contributions from a few institutional sources can overshadow the efforts of individuals may have discouraged participation in ballot measure campaigns[.]" But to support this argument he notes that voter turnout in Berkeley municipal elections decreased from 65.9% in April 1973 to 45.6% in April 1981. White simply failed to think about any other independent variables than public reaction to institutional financing of ballot measure campaigns to explain voter turnout.

10. *NCPAC* also considered the issue of standing, which it denied to the Democratic Party. Justices Stevens, White, Marshall, and Brennan, all dissented from the standing portion of the decision (*NCPAC*, 1985, 501-02).

11. The most cynical formulation of the attitudinal model might suggest that personal interest alone determined *Austin*'s outcome. By such accounting, Marshall and his concurring brethren had some personal interest in upholding the restriction, whereas Scalia, Kennedy and O'Connor had some personal interest in protecting Michigan corporate management interests. Direct personal interest in a case is difficult to discern from the mandated judicial disclosure documents which only provide the type and range of the justices' investments, not their individual investment interests (UPI 1990). Nonetheless, judicial ethics requires recusal in the case of direct conflicts of interest (28 U.S.C. § 455), and lawyers have a responsibility to the court to bring such matters to the court's attention if they are a concern (*In re Bernard*, 1994). Although we need not be naive about judicial ethics, one would have to maintain a very jaundiced view of the bench to believe that judges lightly brush aside such conflicts. I recommend consideration of Judge Alex Kozinski's review of the problems surrounding recusal in *In re Bernard* (1994).

12. 34 Stat. 864 (1907).

13. 43 Stat. 1074 (1925), codified (and later repealed) at 18 U.S.C. § 610.

14. 61 Stat. 159 (1947).

15. For example, consider *United States v. CIO*, 1948; *United State v. UAW-CIO*, 1957; and *Pipefitters Local Union No. 562 v. United States*, 1972.

16. "Congress again acted to protect the political process from what it deemed to be the corroding effect of money employed in elections by aggregated power" (*United States v. AFL-CIO*, 1957, 582). "The idea is to prevent . . . the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth

from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and advancement of their interests as against those of the public" (*United States v. AFL-CIO*, 1957, 571).

17. I have noted Eskridge and Frickey's neo-republicanism elsewhere. Professor James Gardner has argued that enhancement of accuracy and legitimacy in elections is mandated by the Lockean framework of the constitution, which posits as its central tenet that popular sovereignty is based on an agency theory of representation. Therefore, distortions of the principal (voter)-agent (representative) relationship are unconstitutional. Gardner argues that promoting the "accuracy" of elections by altering the First Amendment jurisprudence which gives us cases like *Buckley* will help us fulfill the Lockean vision of the Constitution. Although republicanism and Lockean liberalism are often portrayed as divergent political theories, distinct theoretical approaches do not preclude the possibility of arriving upon a convergent norm. John Rawls has recently argued that a viable political community will likely rest upon the convergence of norms (Rawls 1993).

18. It should be mentioned at this point that Olson and Edelman stand in opposition to the well-established work of the pluralists, such as E.P. Herring (1940), who argue that stable democracy requires that the intensity of conviction, feeling and interest need to be worked out by institutions that allow bargaining. Therefore, organized groups are not to be distrusted, but are relevant and important political units. They rise and decline, coalesce and fragment, depending on the issue and the intensity of feeling. Groups achieve functional representation based on the intersections of interest and consequent lobbying, publicity, etc. Representation is best handled through groups, not one man one vote or "enhanced" or "diluted" electoral forms.

19. An electronic search of the Westlaw database for legal texts and periodicals up to and including 1990 (the year *Austin* was decided) retrieves 795 documents which cite directly to Rawls' *A Theory of Justice*.

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