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I. INTRODUCTION

The critical analysis of political corruption is hobbled, in part, by confusion over what is meant by the term corruption.[1] Until recently, the United States Supreme Court's decisions regarding campaign finance restrictions provided a fairly straightforward legal definition of political corruption that focused on the trading of financial contributions for private political favors. In *Austin v. Michigan Chamber of Commerce*,[2] however, the Court redefined political corruption to include deviations from an idealized vision of political representation. This Article documents the redefinition of this key legal concept and explores what has influenced this change.

II. QUID PRO QUO CORRUPTION

Until *Austin*, the Court's central concern when reviewing campaign finance regulation was how to balance the interests of free political

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1. *See, e.g.*, Dennis F. Thompson, *Mediated Corruption: The Case of the Keating Five*, 87 AM. POL. SCI. REV. 369 (1993) (defining political corruption as the use of the legitimate practices and duties of public office for private purposes); Jonathan Bernstein, Goo Goo Terror, Institute of Governmental Studies Working Paper 95-22, Institute for Governmental Studies, University of California, Berkeley 8 (1995) (unpublished manuscript, on file with the *BYU Journal of Public Law*) ("the search for a definition is futile"); Tom Burke, The Concept of Corruption in Campaign Finance Law, Institute of Governmental Studies Working Paper 95-21, Institute for Governmental Studies, University of California, Berkeley (1995) (unpublished manuscript, on file with the *BYU Journal of Public Law*) (defining political corruption as the performance of public duties with monetary consideration in mind); Ron Schmidt, Jr., Defining Corruption: Plunkitt to *Buckley* and Beyond, Institute for Governmental Studies Working Paper 95-20, Institute for Governmental Studies, University of California, Berkeley 6 (1995) (unpublished manuscript, on file with the *BYU Journal of Public Law*) (defining political corruption as deviations from a Madisonian conception of representation).

2. 494 U.S. 652 (1990).

speech against the potential for extracting political favors from elected officials through direct campaign contributions. The Court had established that political contributions used to extract private favors corrupts the democratic process. Accordingly, the Court decided that the *potential* for such quid pro quo favors through direct financial contributions to political campaigns provided a compelling reason for narrowly tailored regulation of campaign finance. This Article refers to the potential of extracting 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. "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."[3] In other words, the Court in *Austin* was not concerned 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 presumed a baseline of undistorted and structurally sound elections. What does such a 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

3. *Id.* at 660.

political marketplace."[4] In a baseline election, campaign expenditures correlate with the public's support for a given candidate.[5]

By deciding that political corruption could mean too much of a particular type of campaigning, the Court posits a fundamentally different view of the electoral process than it had adopted in the previous campaign finance cases. As will be discussed, previous dissents have given voice to this view. But *Austin* established by a firm and politically 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."[6] This dramatic change deserves explanation.

III. 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.

A. Buckley v. Valeo

The first and most important decision in the line of cases that has examined limits on campaign financing was *Buckley v. Valeo*.[7] *Buckley* reviewed the constitutionality of the 1974 Amendments[8] to the Federal Election Campaign Act of 1971[9] (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."[10]

1. FECA Amendments

The FECA Amendments may be divided into four sections.[11] The first section, and most important for this analysis, amended the federal

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4. *Id.* at 659.

5. "Michigan's regulation aims at . . . the 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*." *Id.* at 659-60 (emphasis added).

6. *Id.* at 660.

7. 424 U.S. 1 (1976).

8. 1974 Amendments to the Federal Election Campaign Act of 1971, Pub. L. No. 93-443, 1974 U.S.C.C.A.N. (88 Stat.) 1263 (in scattered sections of 26 U.S.C.).

9. Federal Election Campaign Act of 1971. Pub. L. No. 92-225, 1972 U.S.C.C.A.N. (86 Stat.) 3 (in scattered sections of 2 U.S.C. & 18 U.S.C.).

10. Buckley v. Valeo, 519 F.2d 821, 831 (D.C. Cir. 1975).

11. Daniel Polsby, Buckley v. Valeo: *The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1; *See Buckley*, 519 F.2d at 821.

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 roughly into three categories. First, there were limits on how much candidates for federal office could spend when seeking nomination and election. Second, there was a limit 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 could contribute to his or her own campaign. Third, the amendments placed limits on independent expenditures in behalf of or against a "clearly identified candidate."[12]

2. Appellate decision

The Court of Appeals for the D.C. Circuit upheld the amendments with almost no modifications. As Daniel Polsby noted, "[t]he Court of Appeals . . . wrote as though the reforms were all but constitutionally required."[13] The plaintiffs, who had challenged the amendments, appealed the decision to the Supreme Court.[14]

3. Arguments before the Court

Before the Supreme Court, petitioners 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."[15] The respondents, 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."[16] 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

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12. Federal Election Campaign Act of 1971, 18 U.S.C. § 608(e)(1).

13. Polsby, *supra* note 11, at 14.

14. 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, as well as mandatory and expedited appeal to the United States Supreme Court. Buckley v. Valeo, 424 U.S. 1, 10 (1976).

15. *Id.* at 11.

16. *Id.* at 25.

outcome of elections," and to curb overall campaign spending "thereby serving to open the political system more widely to candidates without access to sources of large amounts of money."[17]

4. First Amendment framework

The *Buckley* decision provided an analytical framework to consider campaign finance reform measures drawn directly from standard First Amendment jurisprudence.[18] 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 discussed, 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.[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 strict scrutiny judicial review in order to be legitimate. Briefly stated, the government cannot restrict expression unless it can show a compelling reason to do so and that the means used to effectuate that end are narrowly tailored. Few restrictions on expression survive strict scrutiny analysis.

5. 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.[20] The Court

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17. *Id.* at 25-26.

18. Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045 (1985).

19. *Buckley*, 424 U.S. at 19.

20. 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." *Id.* at 27.

explicitly linked its concept of corruption to the idea of "secur[ing] a political quid pro quo from current and potential office holders . . . ."[21] The Court defined the "appearance of corruption," the other compelling justification for restricting contributions, with less precision. Nevertheless, read in context, it is quite clear that the phrase "appearance of corruption" referred to the public perception that there might possibly be quid pro quos extracted through campaign contributions.[22]

6. 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."[23]

7. Equalization

In addition to providing a clear First Amendment analysis concerned with 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

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21. *Id.*

22. Professor Burke's discussion of the concept of corruption in campaign finance law distinguishes between quid pro quo corruption and monetary influence corruption. *See* Burke, *supra* note 1. Burke claims that some of the cases following *Buckley* adopt a monetary influence definition of corruption that focuses on the evil of "officeholders [performing] their public duties with monetary considerations in mind." Burke, *supra* note 1, at 6. With quid pro quo there is some specific prearrangement and intent, whereas with monetary influence such intent and coordination does not exist or cannot be found. I argue, however, that the appearance of corruption standard, still rooted in a fundamental concern about quid pro quo corruption, sufficiently embraces the concerns that Burke identifies as an independent and separate approach to monetary influence corruption. In other words, when the court wrings its hands about the creation of political debts, it is explicitly justifying regulation which addresses the appearance of or potential for quid pro quo corruption, not redefining corruption itself. *See* F.E.C. v. National Right to Work Committee, 459 U.S. 197, 208 (1982); National Bank of Boston v. Bellotti, 435 U.S. 765, 788 n.26 (1978).

23. *Buckley*, 424 U.S. at 47.

> 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.[24]

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.

B. First National Bank of Boston v. Bellotti

This conceptual framework for examining the legitimacy of campaign finance restrictions remained largely intact until *Austin*. For example, in *First National Bank of Boston v. Bellotti*,[25] the Court held that restrictions on corporate expenditures used to influence the outcome of a proposed referendum violated constitutionally protected 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."[26] 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 (the creation of political debts) because there is no candidate to corrupt.[27] 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.

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24. *Id.* (citations omitted).

25. 435 U.S. 765 (1978).

26. MASS. GEN. LAWS ANN. ch. 55, § 8 (West 1977) (repealed by MASS. GEN. LAWS ANN. ch. 631, § 5 (West 1986)).

27. *Bellotti*, 435 U.S. at 788 n.26.

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 the 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 use it to distort the political process through campaigning which bears no relation to public support.[28] The majority rejected this approach as paternalistic for two reasons.[29] First, there was no judicial or legislative finding that "the relative voice of corporations ha[d] been overwhelming or even significant . . . ."[30] Second, "the fact that advocacy may persuade the electorate is hardly a reason to suppress it . . . . [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments."[31]

C. Citizens Against Rent Control v. Berkeley

In a similar case, *Citizens Against Rent Control v. Berkeley,*[32] the Court invalidated a law limiting contributions to political committees formed to support or oppose city ballot measures. In the Court's estimation, city ballot measure campaigns and committees raised no concern about quid pro quo corruption because they did not represent a politician from whom political favors could be extracted.[33] Although there was some debate about the importance of the distinction between direct contributions versus independent expenditures,[34] when considered solely from the viewpoint of how the Court legally defines corruption, the

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28. *Id.* at 810 (White, J., dissenting).

29. 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.

Id. at 792 n.31.

30. *Id.* at 787.

31. *Id.*

32. 454 U.S. 290 (1981).

33. *Id.* at 297-98. 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." *Id.* at 306.

34. *Id.* at 301 (Marshall, J., concurring).

Berkeley opinion affirms that "undue influence" is a potentially regulable problem for candidates, *not* voters.

Justice White predictably dissented from the *Berkeley* decision and continued to express dissatisfaction with the use of the First Amendment approach as outlined in *Buckley*. Nonetheless, White articulated compelling governmental reasons to limit spending which he felt could justify campaign finance restrictions within a First Amendment framework. White's dissent in *Berkeley* deserves attention 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."[35] White cited "[s]everal studies [that] have shown that large amounts of money skew the outcome of local ballot measure campaigns."[36] Specifically, he cited studies by Lowenstein,[37] Mastro,[38] Schockley,[39] and Lyndenberg.[40] These studies use spending data as the sole independent variable and election 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 some ballot measures succeeded despite massive corporate spending to defeat them. Nor does his dissent grapple with any of the many other possible explanations for this data, and other raw data provided by the respondents.[41] Never-

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35. *Id.* at 308 (White, J., dissenting).

36. *Id.* at 308 n.4.

37. Daniel Lowenstein, Campaign Spending and Ballot Propositions (Sept. 5, 1981) (unpublished paper delivered at the annual meeting of the American Political Science Association, New York, New York).

38. Randy M. Mastro et al., *Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to Do About It*, 32 FED. COMM. L.J. 315 (1980).

39. JOHN S. SCHOCKLEY, THE INITIATIVE PROCESS IN COLORADO POLITICS: AN ASSESSMENT (Bureau of Governmental Research and Service, University of Colorado, Boulder, 1980).

40. STEVEN LYNDENBERG, BANKROLLING BALLOTS, UPDATE 1980: THE ROLE OF BUSINESS IN FINANCING BALLOT QUESTION CAMPAIGNS (Council on Economic Priorities, 1980).

41. Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 308 (1981) (White, J., dissenting). 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 . . . ." *Id.* 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 failed to articulate any independent variables to

theless, 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.

D. 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*[42] *(NCPAC)*. This case struck down a provision forbidding political action committees from independently spending more than $1000 in support of any publicly funded presidential or vice-presidential candidate.

Justice Rehnquist, employing *Buckley's* framework, stated that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."[43] He went on to define the terms and give his 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.[44]

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."[45] Thus, *NCPAC* demonstrates the viability of the Court's quid pro quo definition of political corruption five years prior to *Austin*.

Justices White and Marshall dissented as to the substance of *NCPAC*.[46] They both challenged the distinction between direct contribu-

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explain voter turnout, other than public reaction to institutional financing of ballot measure campaigns.

42. 470 U.S. 480 (1985).

43. *Id.* at 496-97.

44. *Id.* at 497.

45. *Id.* at 498.

46. *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

tions 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*."[47] Still espousing a quid pro quo definition of corruption, Marshall's dissent indicated he was no longer persuaded that independent expenditures did not raise quid pro quo corruption concerns. Consequently, 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.

E. FEC v. Massachusetts Citizens for Life

In *Federal Election Commission v. Massachusetts Citizens for Life*[48] *(MCFL)*, the Court made a subtle but significant change. In an opinion authored 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 set of facts, rather than challenging the concept of the statute outright. Such an approach may be termed an "as applied" challenge, as opposed to a "facial" challenge. In formal terms, the precedential value of such a case usually requires a close examination of the facts. Focusing only on the facts of the case, *MCFL's* result seems consistent with the cases discussed in this Article. 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 did 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 had expressly defined the state's interest as preventing the use of "dollars for political favors," Brennan's *MCFL* opinion stated that the "rationale in recent opinions [is] the need to restrict 'the influence of political war chests funneled through

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of the decision. *See id.* at 501-02.

47. *Id.* at 520 (Marshall, J., dissenting) (emphasis added).

48. 479 U.S. 238 (1986).

the corporate form' to 'eliminate the effect of aggregated wealth on federal elections.'"[49]

Brennan never anchored this approach in the language of bribery, particular favoritism, or quid pro quo. Instead, he spoke of "the corrosive influence of concentrated corporate wealth," and "unfair advantage in the political marketplace."[50] Because these concerns were not descriptive of the bake-sale-funded right-to-life group in the particular dispute before the Court, a legal formalist would consider Brennan's reflections on distortions of politics through too much campaigning, and his musings about the bases for the restrictions on typical corporate contributions and expenditures[51] as dicta.

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 that a corporation's expenditures provide "no reflection of the power of its ideas,"[52] Brennan rhetorically drives home the point that contributions from MCFL's treasury (funded through bake sales and grass-roots contributions) are not the type of activities 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 opinion arguably altered the compelling government interest prong of the campaign finance restriction cases, and left the Court open to the analysis presented in *Austin*.

F. 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.'"[53] Second, Marshall announced that any restrictions on such speech "must be justified by a compelling state interest."[54] 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

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49. *Id.* at 257 (alterations in original) (citations omitted).
50. *Id.*
51. *Id.* at 257-59.
52. *Id.* at 258.
53. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657 (1990) (quoting Buckley v. Valeo, 424 U.S. 1, 39 (1976)).
54. *Id.* at 658.

immense aggregations of wealth."[55] Marshall's step-by-step approach used all of the elements of the *Buckley* analysis, with the exception that it changed the definition of "corruption."

In this way, Marshall merged the pre-*MCFL* concern with corruption and the appearance of corruption with Brennan's musings about unequal political power to redefine political corruption as 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."[56] Despite Marshall's protestations to the contrary, the "New Corruption"[57] looks just like the interests in equalization and openness that the Court explicitly rejected in *Buckley*.[58]

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*, focus on the particular facts of the case, specifically, the fact that the Michigan Chamber of Commerce already had a funded political action committee and did not need to spend treasury funds. Accordingly, Brennan claimed that the majority opinion was "faithful to our prior opinions in the campaign finance area, particularly *MCFL*."[59]

Stevens' one paragraph concurrence, however, specifically backed 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

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55. *Id.* at 659-60.

56. *Id.* at 660.

57. *See id.* at 684 (Scalia, J., dissenting).

58. *See supra* Part III.A.7 and Buckley v. Valeo, 424 U.S. 1, 16-18, 48-49 (1976). *See also* Burke, *supra* note 1, at 28 ("Because so much stress has been put on corruption in campaign finance law, there will always be a temptation to use it more broadly to cover goals that are only partly related—to stretch its meaning, as I believe the Court has done in *Austin*. *Austin's* proclamation that the political system is corrupted when campaign contributions don't mirror public opinion cannot be maintained. 'Corruption' will be drained of meaning if it becomes a mere synonym for 'inequality.'")

59. *Austin*, 494 U.S. at 670.

> hand, and political campaigns for election to public office on the other.[60]

In other words, Stevens suggested 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 criticized 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.[61] No other Justice endorsed Scalia's opinion.

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

IV. 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 cases in a particular way. 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 could be called the jurisprudential model, would explain the decision by reference to an underlying political theory.

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60. *Id.* at 678 (Stevens, J., concurring).

61. Ethan Bronner, *Justices Back Limits on Corporate Political Giving*, BOSTON GLOBE, March 28, 1990, at 1.

A. 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.[62] 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.[63]

Because 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.[64] 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

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62. JEFFREY SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993). 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. *Justices Release Financial Disclosure Forms,* UNITED PRESS INTERNATIONAL, May 16, 1990.

Nonetheless, judicial ethics requires recusal in the case of direct conflicts of interest. 28 U.S.C. § 455 (1994). In addition, lawyers have a responsibility to the court to bring such matters to the court's attention if they are a concern. 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*, 31 F.2d 842 (1994).

63. *Cf.* Gerald N. Rosenberg, *Symposium: The Supreme Court and the Attitudinal Model*, 4(1) LAW AND COURTS: NEWSLETTER OF THE LAW AND COURTS SECTION OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION 6-8 (1994); Rogers M. Smith, *Symposium: The Supreme Court and the Attitudinal Model*, 4 LAW AND COURTS: NEWSLETTER OF THE LAW AND COURTS SECTION OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION 8-9 (1994).

64. Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

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.[65] In other words, if policy preferences alone govern, why did the Justices wait so long to express this preference in their decisions? Have the Justices' preferences changed, or have the Justices simply felt restrained from giving full expression to their individual preferences until now?[66] It is in such instances that other models of Court behavior must be explored for answers.

B. The Legal Model

Many commentators have noted that our legal tradition includes a judiciary that responds to the constant review of its work by lawyers, law professors, and lower court judges.[67] If true, then careful reasoning and consistency would likely serve the self-interest of any Justice as well as, or better than, obtaining the immediate desired policy outcome of a particular dispute.[68] 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.[69]

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).[70] 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

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65. Lawrence Baum, *Symposium: The Supreme Court and the Attitudinal Model*, 4(1) LAW AND COURTS: NEWSLETTER OF THE LAW AND COURTS SECTION OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION 3-5 (1994). Note that the two Justices which join the Court between *NCPAC* and *Austin*, Scalia and Kennedy, both strongly adhere to the quid pro quo approach to corruption.

66. Such restraint might be a result of precedent, an influence demonstrative of the legal model.

67. *E.g.*, HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 8 (1983).

68. *Cf.* DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT AND AMERICAN POLITICS (2d ed. 1990).

69. Rosenberg, *supra* note 63, at 7-8.

70. *See* Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 679 (1990) (Stevens, J., concurring).

judicial innovations claim legalistic foundations, primarily through the common lawyer's ability to analogize to an arguably relevant line of authoritative material.[71]

1. Early campaign finance law

Focusing only on the line of cases following the FECA and its 1974 Amendments, *Austin* has dubious "legality" in 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[72] 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.[73] The Taft-Hartley Act of 1947[74] prohibited unions from making similar contributions in federal elections.

The vagueness of the statutes and their limited enforcement led to many abuses. Nonetheless, the Corrupt Practices Act was in effect until incorporated into FECA. The Supreme Court fastidiously avoided ruling on the constitutionality of these statutes.[75] 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*[76] reviews the legislative history of the Tillman Act, the Corrupt Practices 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.[77] One could plausibly argue that *Austin's* "legality" derives from hearkening back to a time when the Court

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71. LAURA KALMAN, ABE FORTAS 271-76 (1990).

72. 34 Stat. 864 (1907).

73. 43 Stat. 1074 (1925) (codified (and later repealed) at 18 U.S.C. § 610 (1970)).

74. 61 Stat. 159 (1947), *amended by* 18 U.S.C. § 610 (1970).

75. *See, e.g.*, Pipefitters Local Union No. 562 v. United States, 407 U.S. 385 (1972); United States v. UAW-CIO, 325 U.S. 567 (1957); United States v. CIO, 335 U.S. 106 (1948).

76. 352 U.S. 567 (1957).

77. "[C]ongress again acted to protect the political process from what it deemed to be the corroding effect of money employed in elections by aggregated power." *Id.* at 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 the advancement of their interests as against those of the public." *Id.* at 571.

avoided the constitutional issues behind campaign finance reform and deferred to legislatures the power to regulate the electoral process.

In *F.E.C. v. National Right to Work Committee*[78] *(NRWC)*, Justice Rehnquist, in upholding federal restrictions on a nonprofit corporation's ability to solicit funds for its political activities, explicitly refers to the incremental development in pre-FECA campaign finance laws, and he explicitly justifies the regulations in terms of deference to Congressional judgement. "[W]e accept Congress' judgment that it is the potential for such influence that demands regulation. [We will not] second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."[79] Rehnquist's deference to legislative determinations in *NRWC* regarding accumulation of capital through the corporate form corresponds with Rehnquist's deference to legislative determinations generally and may explain why he accepted Marshall's opinion in *Austin*. Nonetheless, *NRWC* explicitly justified the regulation in terms of the potential for quid pro quo corruption created by the accumulation of capital resources through the corporate form. Although *NRWC* is an important precedent for helping us understand why Rehnquist signs onto *Austin*, its reasoning is still quite different that the explicit distortion thesis presented in *Austin*.

2. *The reapportionment cases*

The reapportionment cases of the 1960s attempted 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*.[80] 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 political 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 persons who give in larger sums or to more candidates than their fellow citizens are in effect voting more than once.[81]

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78. 459 U.S. 197, 208-11 (1982).
79. *Id.* at 210.
80. 377 U.S. 533 (1964).
81. ALEXANDER HEARD, THE COSTS OF DEMOCRACY 48 (1960).

According to this view, excessive spending on campaigning violates the "egalitarian spirit of political democracy."[82]

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.[83] 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 read into the First Amendment under a republican vision of the Constitution. This a perfectly plausible defense of enhancement theory.[84]

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 by the Court.

C. The Jurisprudential Model

Perhaps we can best explain *Austin's* redefinition of political corruption by returning to some basic legal and political theory. Legal

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82. *Id.*

83. Marlene A. Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815 at 821, 825-36, 853-54 (1974).

84. WILLIAM ESKRIDGE & PHILIP FRICKEY, CASES AND MATERIALS ON LEGISLATION 237 (1988).

theorist Ronald Dworkin suggests that while judges require a minimally adequate fit with prior authoritative texts, their choice between contending minimally adequate "fits" derives from what the judges consider to be the most persuasive political theory that they can find or construct.[85] This is referred to as the jurisprudential model. How Marshall adequately fit the dicta of *MCFL* with the form of *Buckley* has already been demonstrated. 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 contribute to Marshall's redefinition of corruption, has been grounded in neo-republicanism[86] and neo-Lockeanism,[87] supposedly contradictory traditions.[88]

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 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.[89]

The work of Murray Edelman argues that the general public is prone to irrational perceptions of political reality, easily confusing symbol with substance.[90] Elites, who understand this confusion can manipulate public opinion by creating political forms which give unrealistic

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85. RONALD DWORKIN, LAW'S EMPIRE 65-68, 87-88 (1986).

86. ESKRIDGE & FRICKEY, *supra* note 84.

87. James A Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189 (1990).

88. I have noted Eskridge and Frickey's neo-republicanism elsewhere. *See supra* note 84 and accompanying text. 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 argued that a viable political community will likely rest upon the convergence of norms. JOHN RAWLS, POLITICAL LIBERALISM (1993).

89. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

90. MURRAY J. EDELMAN, THE SYMBOLIC USES OF POLITICS (1964).

impressions about policy. Because elites (such as corporations) do not themselves confuse symbol with substance the way that the general public does, small groups of elites, following rational political strategies, will frequently defeat the interests of very large parts of the public.[91]

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):

> [T]he [C]onstitution must take steps to enhance the value of the equal rights of participation for all members of society . . . . [T]hose similarly endowed and motivated should have roughly the same chance of attaining positions of political authority irrespective of their economic and social class. . . . 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 advantages to control the course of public debate.[92]

Although Marshall provided no citation to Rawls in his *Austin* decision, this Rawlsian approach to representation helps explain what the Court attempted to achieve in *Austin*. Inasmuch as the corporate form of business enterprise allows for greater private means, corporations should be restricted from using that advantage to control the course of public debate. Any other result would undermine Rawls's principle of equal rights to participation. This principle of equal rights to participation 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. Therefore, the jurisprudential model does not explain how the change represented in *Austin* took place despite its ability to demonstrate the fit between Rawlsian liberalism and the reasoning and result of *Austin*.

Court decisions often correspond to relatively recent developments in political theory. Professor Martin Shapiro, for example, demonstrated

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91. 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, who argue that stable democracy requires that the intensity of conviction, feeling and interest need to be worked out by institutions that allow bargaining. *See* EDWARD PENDLETON HERRING, THE POLITICS OF DEMOCRACY: AMERICAN PARTIES IN ACTION (1940). 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.

92. JOHN RAWLS, A THEORY OF JUSTICE 224-25 (1971).

how the administrative law of the present mirrors the political theory of the previous decade.[93] 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.[94]

Scholars of the judiciary need to explore the possible institutional mechanisms responsible for doctrinal change. Too many of our accounts simply find lagging correlations between developments in theory, or public opinion, without trying to specify how such influences might be absorbed into the judiciary. Are judges reading theory? Are they actively following public opinion? Or are the ideas and attitudes that the judges sooner or later adopt "just out there" in the press, the media, popular culture, etc.? Unfortunately, we do not have very reliable data on what judges read or watch, nor do we have strong sociometric data on judges to indicate their ties to other elites in society. What follows is a suggestion for at least one way to think about an institutional mechanism that can account for the doctrinal change evident in *Austin*.

The bulk of a Justice's work is done in chambers, not on the bench or in conference. Chambers are occupied by judicial law clerks and secretaries. I recommend that Court scholars look more closely at the role played by judicial law clerks in order to explicitly explain doctrinal change.

It has long been known that most of the Justices rely on their law clerks to make the first draft of opinions.[95] 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.[96] 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

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93. MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION (1988).

94. *Cf.* William Mishler & Reginald S. Sheehan, *The Supreme Court as a Counter-Majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 87-101 (1993); Helmut Norpoth & Jeffrey Segal, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711, 711-16 (1994).

95. Richard A. Posner, *Legal Scholarship Today*, 45 STAN. L. REV. 1647 (1993); O'BRIEN, *supra* note 68. It was also common knowledge among Court observers that Justice Marshall, the authoring Justice of *Austin*, delegated far more authority to clerks in this regard than any of the other Justices. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 198, 258 (1979).

96. P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 282 (1987).

theoretical insights to bear on legal doctrine.[97] As Professors P.S. Atiyah and Robert Summers note:

> The law clerks are . . . a most important bridge between the judges and the academic legal community in America, helping to make the judges better informed about the latest academic ideas and theories, and tending to make the judges themselves more interested in addressing the academic community. The highly substantive orientation of American law schools . . . thus enters the judge's chambers in flesh and blood.[98]

Despite the admirable study of John Oakley and Robert Thompson,[99] more study and thought needs to be given to how the small group dynamics of a chamber staff with three or four ambitious clerks to each judge contributes to the substantive development of the law.

Let us briefly consider the socialization of the law clerks staffing the chambers of the Supreme Court during the 1989-90 term, the term in which *Austin* was decided. We can check this empirically, but 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. What had top law students from the mid-1980s learned about political theory and campaign finance regulation?

In addition to the likelihood that many 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's influence on legal thought in the mid-1980s.[100] 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.[101]

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 deservedly famous law review article in the

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97. Posner, *supra* note 95.

98. ATIYAH & SUMMERS, *supra* note 96, at 282.

99. JOHN B. OAKLEY & ROBERT S. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS (1980).

100. 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's A THEORY OF JUSTICE.

101. John Rawls, *The Basic Liberties and Their Priority*, *in* LIBERTY, EQUALITY, AND LAW: SELECTED TANNER LECTURES ON MORAL PHILOSOPHY (Sterling M. McMurrin ed., 1987).

Columbia Law Review, "*Lochner's* Legacy."[102] Therein, Sunstein noted that the central problem with the Court's decision in the turn of the century case, *Lochner v. New York*,[103] had to do with the Court's conception of neutrality and its choice of an appropriate baseline.[104] 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 as 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.[105]

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 . . . . The effort would be the legal analogue to the various efforts in modern political theory to go beyond or replace classically liberal social contract theories.[106]

Sunstein cited John Rawls's *Theory of Justice*. In Sunstein's opinion, 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 that, given the way that law review articles circulate, and given the way that judicial law clerks are chosen, the judicial law

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102. Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873 (1987).
103. 198 U.S. 45 (1905).
104. Sunstein, *supra* note 102, at 883.
105. *Id.* at 884.
106. *Id.* at 907.

clerks at the Supreme Court in 1989-90 were well acquainted with Sunstein's handy map to their problem. Even if the 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.[107] I speculate that in our era, relatively recent theoretical approaches to law are sometimes 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.

V. CONCLUSION

Legal and political theorists should debate at a normative level whether the Court has found a better theory for its 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.[108] Guided by elaborate rules of evidence, fact-finding courts seem institutionally fitted to ferreting-out bribes and pay-offs. Correspondingly, a quid pro quo definition of corruption provides courts with a relatively straightforward legal standard for considering the merits 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 constitutes 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.[109] This shift may have opened the courts generally to innovations in other areas of First Amendment jurisprudence which may prove difficult to manage.

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

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107. MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 131-32 (1981).

108. Paul S. Edwards & Nelson W. Polsby, *The Judicial Regulation of Political Processes: In Praise of Multiple Criteria*, 9 YALE L. & POL'Y REV. 190 (1991).

109. Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41 (1992).

attitudinal model and the legal model do not adequately explain the decision. The jurisprudential model fits nicely 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 a mechanism to explain how the judiciary absorbs such changes. I have suggested that, institutionally, one 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.