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The Unspoken Institutional Battle over Anticorruption: *Citizens United*, Honest Services, and the Legislative-Judicial Divide

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*Guided by a pair of decisions from 2010 (*Citizens United *and* Skilling*), this article investigates a pivotal but overlooked dispute between the Supreme Court and Congress over the acceptable contours of public corruption law. Each case narrowly relies on principles and*

precedents that appear only tangentially related to corruption. Yet in historical context, these cases emerge as only the latest judicial nullification of broad and flexible congressional anticorruption legislation. Through parallel examination of campaign finance regulation and honest services law, this article suggests a subtle but striking pattern: when Congress has advanced expansive, flexible anticorruption measures, the Supreme Court has tenaciously constrained such measures in favor of narrowly drawn bright-line rules.

This article argues that the disagreement originates in the institutions' differing postures towards anticorruption. Certain congressional action has promoted civic-minded public conduct and thus facilitated "deliberative" examination of political motives. However, the Supreme Court has generally blocked broadly constructed anticorruption measures because their enforcement threatens constitutionally protected individual rights. Thus, the Court has left standing a "competitive" anticorruption regime which presumes a market-like political setting populated by self-interested actors.

This unspoken divergence has shaped corruption law and with it the nature of American politics. The Court's intractability poses a dilemma for future anticorruption reform. Policy-makers must either defer to the Court, but relinquish the possibility of deliberative anticorruption achieved through traditional regulatory and prosecutorial means, or force a reconsideration of individual rights in the context of anticorruption enforcement.

INTRODUCTION

In the past year, the Supreme Court dramatically constrained federal regulation of political corruption through two facially unrelated decisions. In *Citizens United v. Federal Election Commission*,[1] the Court ruled that limits on corporate spending in federal elections are an unconstitutional violation of the right to free speech. The decision further eroded federal constraints on private financing of elections, an issue that has generated extensive judicial debate since modern campaign finance reform in the 1970s. In a trio of cases in June 2010 — *Skilling v. United*

1. 558 U. S. ___, 130 S. Ct. 876 (2010).

States,[2] *Weyhrauch v. United States*,[3] and *Black v. United States*[4] — the Court hobbled federal anticorruption in a different context by limiting prosecutorial discretion under the honest services provisions of 18 U.S.C. § 1346.[5] By indicating that a broad interpretation of the anticorruption measure would raise vagueness and notice concerns, the Court obstructed federal efforts to combat self-enriching conduct by public officials and more generally mandated narrow construction of official corruption law.

Though at first blush these cases and their respective precedents appear unrelated, parallel analysis of their histories reveals a striking pattern: in both contexts, Congress has passed broad and flexible measures to regulate what influences can permissibly enter the public sphere and determine when government figures are tainted by private interests. As epitomized by its most recent holdings, the Court has curtailed these measures on the grounds that they infringe individual rights (First Amendment rights with regards to campaign finance and due process trial rights with regard to honest services). Consequently, the Court has consistently frustrated certain forms of congressional anticorruption resulting in a protracted institutional conflict.

This conflict, however, has not occurred as an explicit, open, or unified debate. Neither the Court nor Congress has openly articulated a theory (or even a comprehensive definition) of corrupt conduct, and the narrow legal questions at play in the relevant cases often do not include a direct inquiry into the nature of corruption. Yet, analysis of the disputed law reveals that the two institutions have advanced differing types of anticorruption enforcement (even if they have done so indirectly and perhaps without deliberate intent). This article argues that, once reconstructed, this conflict illuminates the path of modern corruption law over the past forty years.

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2. 561 U. S. ___, 130 S. Ct. 2896 (2010).

3. 561 U.S. ___, 130 S. Ct. 2971 (2010). This essay addresses public corruption alone (excluding acts by private fiduciaries). While *Wehyrauch* alone addressed misconduct by a public official, the Supreme Court issued a full opinion only in the private-corruption case of *Skilling* and remanded *Weyhrauch* to be reconsidered in light of Skilling. *Id.* Therefore *Skilling* and its implications for public corruption are addressed in this article.

4. 561 U. S. ____, 130 S. Ct. 2963 (2010).

5. 18 U.S.C. § 1346 (2006).

Because of consistent thematic similarities in the discrete disagreements, the conflict can be framed as a clash between differing schools of anticorruption. This article organizes this divide through the distinction between competitive and deliberative democracy.[6] In focusing on the protection of individual rights from government intrusion, the Court has adopted a competitive approach to corruption. The competitive approach presumes that democratic practice is self-interested and adversarial, with constituents unblinkingly focused on their own particular political goals. Competitive democrats tend to prefer an anticorruption regime that penalizes undesirable behavior through narrowly delineated rules — not coincidentally, the type of regime less likely to metastasize and invade individual rights. Conversely, Congress has at times advanced "deliberative" anticorruption measures. Deliberative democracy emphasizes discourse and cooperation, rather than formal selection processes, as the core of healthy politics. Because trust, empathy, and respect for other parties are prerequisites for successful deliberative democracy, deliberative anticorruption inquires into the actual motives underlying public conduct. Yet, the Court has shown little toleration for deliberative anticorruption or interest in its possible justifications. Thus the Court's rulings have established a consistently and uncompromisingly competitive regime.

This article first develops a theoretical apparatus to analyze this conflict; then compiles the evidence; and concludes with a theoretical analysis and policy implications. Section I provides a brief synthetic

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6. *Cf.* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 130-212 (2003) (describing two models of democracy). "Concept 1" bears some similarities to deliberative democracy; "Concept 2" bears similarities to competitive democracy. *See id.* at 130. Posner is ultimately critical of Concept 1, on the grounds that it is "aspirational," whereas Concept 2 is laudably "realistic." *Id.* at 158. Posner's descriptions do not map onto the categories in this paper precisely, and in particular Concept 1 at times moves into caricature. *See, e.g., id.* at 131 (describing as a basic premise of Concept 1 democracy that individuals should deliberate on what is "best for society as a whole rather than on narrow self-interest"). Deliberative process may pursue consensus, but more broadly, individuals must be willing to engage in productive discourse about their interests, and recognize the legitimacy of others' claims. For an alternative foundational conception of these two models, compare Jürgen Habermas, *Three Normative Models of Democracy*, 1 CONSTELLATIONS 1 (1994) (describing "republican" and "liberal" models which correspond to Posner's "Concept 1" and "Concept 2" respectively).

description of the two conceptions of democracy. Section II proceeds to describe differing views of the corruption each produces.[7] Section III uses these ideas to analyze the judicial and legislative debate on campaign finance. Section IV does the same for honest services and official corruption more broadly. Section V provides a comprehensive analysis of the conflict, in particular why the Court's decisions have so consistently had a competitive alignment. Section VI addresses the broader effects of the conflict on politics and offers policy recommendations.

PART ONE: THEORETICAL FOUNDATIONS

I. TWO CONCEPTIONS OF DEMOCRACY

This section summarizes a lively debate in democratic theory, between those who believe properly functioning democracy is characterized by *competition* between citizens, leaders, and interests groups and those who believe healthy self-governance consists of shared *deliberation* among members of a polity.[8]

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7. Analyzing corruption through a binary competitive and civic-deliberative axis is neither exclusive nor definitive. Rather, this article uses it as an instrumental framework, stylized to aid perception of the conflict between courts and Congress. For other frameworks for understanding corruption, *see, e.g.*, MICHAEL JOHNSTON, SYNDROMES OF CORRUPTION: WEALTH, POWER, AND DEMOCRACY (2005) (providing four approaches based on a comparative analysis of different levels of political and economic development by country, designed to complicate and add nuance to the traditional quid pro quo bribery model); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 387-97 (2009) (describing different approaches courts have used); Mark Philp, *Defining Political Corruption*, 45 POL. STUD. 436, 440 (1997) (describing the three common definitions of corruption as "public office-centred" (focused on behavior by leaders), "public interested-centred" (focused on harm to public welfare), and "market centered" (abuse of public positions as opportunities to maximize profit)).

8. *Cf.* Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31-32 (1985) (observing the tension between "republican" founders, who thought politics should be centered around "[d]ialogue and discussion," and pluralists, who saw politics as characterized by "conflict and compromise" between interest groups fighting for scarce resources and who saw the notion of the common good as "incoherent, potentially totalitarian, or both") (internal citations omitted)).

A. Competitive Democracy

Competitive theorists define democracy as a structured conflict between political actors. In a representative democracy, citizens express their political preferences by electing leaders.[9] Democracies must possess sufficiently effective and impartial procedures by which the electorate can make such selections.[10] Beyond any background structural

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Sunstein's distinction has some ahistorical kinship to the competitive/deliberative distinction, though pluralism need not correspond to idealized competitive theory. Sunstein discusses a type of corruption, but it is fundamentally different from the conception addressed in this essay: He defines corruption as the broader systemic infiltration of special interests into government, not as particular acts of malfeasance. *Id.* at 32, 39. This idea of corruption is related to that of institutional corruption. *See infra* note 29.

9. Joseph Schumpeter provides the authoritative modern definition of competitive democracy: "the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote." JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 269 (Unwin Paperbacks, 1987). He analogizes individual voting to consumption, *id.* at 283, thus indicating his sympathy toward the competitive idea of democracy as preference-satisfaction. Schumpeter's view of politics may be overly pessimistic and focused on elite control — he suggests that most individuals lack rationality or coherence in their political views, *id.* at 260-62, and that "the electoral mass is incapable of action other than a stampede," *id.* at 283. Nevertheless he offers "the most influential power-centered theory of government developed in the twentieth century . . . ." IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY 51 (2003). More recent competitive-democratic theorists are less dismissive of non-elite political participation. *See, e.g.,* ROBERT DAHL, PREFACE TO DEMOCRATIC THEORY 67-71 (2006) (defining democracy as a competitive preference-realizing infrastructure); Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, *in* DEMOCRACY'S VALUE 23, 31 (Ian Shapiro & Casiano Hacker-Cordon eds., Cambridge Univ. Press 1999) (describing the relationship between Schumpeter's and Dahl's theories, and offering its own defense of competitive democracy, drawing on the inevitably natural conflict between varied interests). *Cf.* RONALD DWORKIN, SOVEREIGN VIRTUE 357-62 (offering an ultimately critical assessment of competitive democracy even while observing it may include discursive components).

10. *See* Habermas, *supra* note 6, at 6 ("According to the liberal [competitive] view, the democratic process takes place exclusively in the form of compromises between competing interests. Fairness is supposed to be granted by the general and equal right to vote, the representative composition of parliamentary bodies, by decision rules, and so on."); DAHL, *supra* note 9, at 125 (If the background conditions for democracy are met, "then the election is the critical technique for

constraints (often expressed through constitutional provisions),[11] which preserve the fair character of competition, competitive democracy is agnostic with regard to how individuals should make political decisions or what outcomes are appropriate.

The function of politics in competitive democracy is to allocate goods managed by the government; individuals' political conduct seeks to realize their preferences in the distribution of these goods.[12] Voters and interest groups attempt to elect leaders who will advance policies that they desire. Motivated by a desire to govern or the opportunity to directly advance policies, candidates attempt to obtain votes in order to win elections. Within the bounds of structural (constitutional) constraints, successful elections produce outcomes that reflect the wishes

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insuring that governmental leaders will be relatively responsive to non-leaders; other techniques depend for their efficacy primarily upon the existence of elections and the social prerequisites.").

11. Perhaps the most famous structural threat is the tyranny of the majority. *See* THE FEDERALIST NO. 10 (James Madison). The 13th, 14th, and 15th Amendments guarantee a level of protection for a particular type of minority; it is instructive of their weight that the most devastating conflict in American history was fought at least in part over the institutionalization of this protection. *But see* SHAPIRO, *supra* note 9, at 11-21 (criticizing the traditional minority-protection justification for constitutional and judicial restriction).

12. *See* DAHL, *supra* note 9, at 66 (taking the formation and existence of preferences as a given). *Cf.* ROBERT DAHL, DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL 36-38 (1982) (describing the role played by autonomous collective organizations in creating individual preferences and how these organizations serve as vehicle in politics for such preferences). *But see* Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1692 (1984) (arguing that the Court's insistence on "reasonableness" effectively prohibits government from exercising "raw political power" to transfer wealth on behalf of interest groups). Sunstein's suggestion that the Constitution *prohibits* otherwise unjustified purely competitive outcomes contrasts with the outcome of the competitive implication of the Court's outcomes. Yet the Court's alignment can be traced to its treatment of individual rights, and nothing suggests that the Court has less interest in protecting the individual rights of political figures (or those who wish to succor them). Thus, the reconciliation can be framed as such: a deliberative anticorruption regime that holds public officials (and those who attempt to corrupt them) to a special standard, requiring them to offer deliberative justifications for their conduct. Yet to demand this special justification for the political context is to take unique action against a set of political participants, which, according to Sunstein, requires a unique justification. *Id.* at 1692-93.

of the voting polity.[13] Since this view describes democracy as little more than a selection rubric, many competitive theorists reject politics as a forum for substantively shaping values and preferences.[14]

Competitive theorists suggest that properly structured opposition promotes effective governance and protects individual rights.[15] When leaders govern in the shadow of meaningful elections, they will treat the electorate well; pervasive competition ensures that the state remains responsive to the popular will. Perhaps more incisively, competition encourages constituents to translate the popular will into political outcomes. If citizens and interest groups must actively compete to determine policy, they will defend their interest robustly and resist domination — or simply being neglected — by other political groups or leaders.[16] Consequently, citizens are less likely to be dominated by either direct oppression or subtle co-option. A competitive approach to politics may also encourage citizens, perhaps recognizing the possibility of future political defeat, to place certain rights and liberties beyond the reach of electoral politics.[17]

Because of its focus on power-based outcomes, competitive democratic theory often has a minimalist or pessimistic character,

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13. SHAPIRO, *supra* note 9, at 57-58, interprets Schumpeter, to describe this as the democratic process of "leaders" being "disciplined by the demands of competition."

14. *See, e. g., id.* at 21-34 (critiquing deliberative methods that seek to adapt and reconcile citizens' political preferences through discourse).

15. *Id.* at 63 (observing that the competitive model both ensures "politicians have incentives to be at least as responsive as their competitors to the demands of the electorate" and that competition "is a valuable constraint on the corrupting effects of power . . . shin[ing] light in dark corners, exposing corruption, and demanding that governments be held to public account.").

16. *See* DAHL, *supra* note 9, at 133 (observing that democracies operate by rule as minorities but minorities greatly extended in terms of "number, size, and diversity"). Dahl proposes that the competition between minorities greatly interested in political outcomes will ensure that no one is capable of dominating the political sphere and will prevent tyranny of the majority or domination by the majority of an unaccountable elite.

17. *See* SCHUMPETER, *supra* note 9, at 272 (suggesting that the competitive set-up of elections will, on the whole, create the greatest amount of freedom for citizens, citing as an example that competitive democracy will require "a considerable amount of freedom for the press"). *See also* DWORKIN, *supra* note 9, at 358 (describing the role of free speech in the majoritarian democracy).

particularly in rejecting the "common good."[18] At their most aspirational, competitive theorists suggest that democracy can ensure responsible governance and protect liberties. If politics is ultimately about power, democracy must channel and moderate that power in a responsible manner. Competitive democrats argue this is best accomplished by making the institutional conflict over governmental goods explicit, unvarnished, and uncompromising.

B. Deliberative Democracy

Deliberative democracy appeals to tractable reason and human sociability.[19] Deliberative theorists suggest formal elections ought only to be the denouement of a holistic political process.[20] Citizens advance their claims by demonstrating their positions' reasonableness to other members of the polity. For deliberative democrats, this journey of debate and engagement may have greater importance than formal political outcomes.

Discourse is the central tool by which constituents gain understanding of their own and others' goals.[21] It increases participants' understanding of the reasonableness and legitimacy of others' positions.

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18. See SHAPIRO, *supra* note 9, at 3. Unlike the deliberative approach, the aggregative (competitive) approach does not take "a transformative view of human beings." *Id.* Schumpeter is particularly harsh in his attack on the idea of the common good. *See also* SCHUMPETER, *supra* note 9, at 251-52.

19. As used in this article, "deliberative democracy" draws from a range of thinkers, not all of whom would necessarily be classified (or wish to be classified) as deliberative democrats in the narrowly formal sense — in particular Sunstein and Dworkin. See CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 72 (1993) ("considered judgments of a democratic polity" should have priority over "consumer sovereignty"); DWORKIN, *supra* note 9, at 357, 364 (preferring "partnership democracy" over "majoritarian democracy" in part because its richer account of political life includes "democratic discourse").

20. DWORKIN, *supra* note 9, at 385 ("[S]elf-government means more than equal suffrage and frequent elections. It means a partnership of equals, reasoning together about the common good.").

21. *See* AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY 3-56 (2004) (providing a seminal overview of deliberative democratic theory).

Ideally, discourse may reconcile diverse interests to reach consensus,[22] and even if it does not, citizens with opposing views gain greater mutual understanding, enabling greater cooperation.[23]

Deliberative democrats require rich social engagement for healthy politics, and theorists have proposed a variety of techniques to facilitate deliberation.[24] These techniques encourage citizens to reflect upon the values and interests that shape their political preferences and to empathetically engage with those who hold differing views. Thus, pre-existing desires are only one contributor to citizens' final positions, as this reasoning process modifies final preferences. This may lead to outcomes better than any raw compromise that would result from tallying pre-engagement preferences.[25] Yet, rivaling the importance of better policy outcomes is the opportunity for self-realization provided by reflective political engagement. Deliberative process is not only a more social and engagement-intensive process but seeks benefits that extend beyond the resolution of political decision-making.

Despite its differences, deliberative democracy seeks many of the same practical benefits as competitive democracy — rights protection and responsiveness to the constituency. Robust deliberative engagement promotes responsible government and reflecting on other citizens' political standing protects rights and prevents abuses. In a healthy deliberative democracy, citizens gain greater mutual respect and become more politically involved, creating both a tighter community and stronger

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22. G. A. Cohen, *Deliberation and Democratic Legitimacy*, *in* THE GOOD POLITY 17, 23 (Alan Hamlin & Philip Pettit eds., 1989) ("[I]deal deliberation aims to arrive at a rationally motivated *consensus* — to find reasons that are persuasive to all who are committed to acting on the results of a free and reasoned assessment of alternatives by equals.").

23. GUTMANN & THOMPSON, *supra* note 21, at 4 (the reason-giving emphasis of deliberative democracy is "meant both to produce a justifiable decision and to express the value of mutual respect").

24. *See, e. g.*, Bruce Ackerman & James S. Fishkin, *Deliberation Day*, *in* DEBATING DELIBERATIVE DEMOCRACY 7 (James S. Fishkin & Peter Laslett eds., 2003); James Fishkin & Cynthia Farrar, *Deliberative Polling: From Experiment to Community Resource*, *in* THE DELIBERATIVE DEMOCRACY HANDBOOK 68-79 (John Gastil & Peter Levine eds., 2005); Robert E. Goodin & John S. Dryzek, *Deliberative Impacts: the Macro-Political Uptake of Mini-Publics*, 94 POL. & SOC'Y 219 (2006).

25. *See* Archon Fung & Erik Olin Wright, *Deepening Democracy: Innovations in Empowered Participatory Governance*, 29 POL. & SOC'Y 5, 25-29 (2001).

links between citizens and elected leaders.[26] These stronger relationships in turn increase state accountability, renew citizens' involvement with politics, and generate a healthier, more inclusive political dynamic.[27]

II. TWO CONCEPTIONS OF (ANTI)CORRUPTION

Actual democracies will inevitably have both competitive and deliberative qualities, though they can tend towards one alignment. One aspect of this alignment is a regime's approach to identifying and combating corrupt public behavior. Deliberative theory and competitive theory each identifies different aspects of conduct as determinative of the corrupt status of behavior, and each adopts characteristic anticorruption measures that correspond to these respective aspects.

A. Establishing the Terms of the Debate

Many scholars have indicated that defining corruption poses significant challenges,[28] and a comprehensive account is beyond this

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26. *See* GUTMANN & THOMPSON, *supra* note 21, at 10-11 (describing main benefits of deliberative democracy as "encourag[ing] public-spirited perspectives on public issues" and the "promot[ion of] mutually respectful processes of decision-making").

27. *See* Cohen, *supra* note 22, at 26 ("[I]n seeking to embody the ideal deliberative procedure in institutions, we seek, *inter alia*, to design institutions that focus political debate on the common good, that shape the identity and interests of citizens in ways that contribute to an attachment to the common good, and that provide the favourable conditions for the exercise of deliberative powers that are required for autonomy."); *Cf.* DAHL, *supra* note 9, at 131-33.

28. *See* John G. Peters & Susan Welch, *Gradients of Corruption in Perceptions of American Public Life*, *in* POLITICAL CORRUPTION: CONCEPTS & CONTEXTS 155-160 (Arnold J. Heidenheimer & Michael Johnston eds., 2002). Some commentators have observed that the necessary existence of particular political and social norms undermine any universal definition of corruption. *See, e.g.*, SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT 91 (1999) (noting the problem but indicating that even in cultures without clear distinctions between public and private, there are "distinctions between appropriate and inappropriate behavior"). Others are even less optimistic about the possibility of a universal theory. *See, e.g.*, John Gardiner, *Defining Corruption*, *in* POLITICAL CORRUPTION: CONCEPTS & CONTEXTS 25 (Arnold J. Heidenheimer & Michael Johnston eds., 2002) (observing

article's scope. An underspecifying baseline definition that contains the full range of plausibly corrupt behaviors is: an official's act is corrupt when an official's motives for public action are excessively private-regarding, and a private individual's act is corrupt when the citizen attempts to incentivize an official to act in such an excessively private-regarding manner.[29] To be useful in theory or practice, this definition must be further informed by foundational political and ethical norms.[30] Most pressingly, these norms must identify motives that are excessively private-serving.[31] Some systems demand total disregard of self-interest in politics; others will permit some self-interest but constrain what types of

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underlying definitional problems and possible divergence between legal definitions of corruption and practices perceived as corrupt); Philp, *supra* note 7, at 457 (observing that a theory of corruption must be grounded in a foundational understanding of "the ethical appeal of politics", of which there are several possible interpretations).

29. *Cf.* J. S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 419 (1967) (offering a classic definition of corruption as a violation of public duty for private gain); Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 130 (2010) (identifying "the potential private capture of the powers of the state" as the real nature of corruption, at least in the electoral context). The definition used by this article excludes two types of political occurrences. The first is broad decay or general non-agent-attributable moral collapse of a state. This definition of corruption was prominent in early modern political thought. *See* J. G. A. POCOCK, THE MACHIAVELLIAN MOMENT 204 (2003). For a contemporary account of corruption as decay, *see generally* Laura Underkuffler, *Captured by Evil: The Idea of Corruption In Law* (Duke Law Sch., Working Papers in Public Law), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2030&context=faculty_scholarship. This definition of corruption also excludes incompetence. An official behaves incompetently but not corruptly when the *motive* is acceptable, but the subsequent practical policy is unacceptable. *See* DENNIS THOMPSON, ETHICS IN CONGRESS 17 (1995) (observing corruption may at times be ultimately less harmful than incompetence and that some theorists have observed that corrupt payoffs can induce usually ineffective or slothful public figures to act). *See also* Philp, *supra* note 7, at 459.

30. *See* Philp, *supra* note 7, at 446 ("[W]e are forced to accept that to identify political corruption we must make commitments to conceptions of the nature of the political and the form of the public interest . . . definitional disputes about political corruption are linked directly to arguments about the nature of the healthy or normal condition of politics.").

31. *See* ROSE-ACKERMAN, *supra* note 28, at 2 (observing that self-interest lies at the root of any corrupt act).

such interest are permissible.[32] A related question is when actions qualify as "public" — an act is politically corrupt only when it falls within an actor's sphere of public duty. These questions of private motive and public status are ultimately informed by a system's ethical framework, in particular its theory of representative responsibility. On a less abstract note, assessment of corrupt motives raises the evidentiary problem of inferring *mens rea*. Evidentiary concerns can be especially difficult when an official acts for unacceptable reasons (such as being bribed), but the action itself, underlying motivation aside, appears to be a publicly acceptable one; without public vetting or formal supervision, the corrupt character of the act may never come to light.[33] Establishing appropriate standards for inferring corrupt intent requires striking a difficult balance. Harsher standards identify more potential offenders, but may classify too much behavior as presumptively corrupt.

Each of these questions is a rich topic for further study. However, to demonstrate the institutional conflict in U.S. corruption law, it is only necessary to observe that any anticorruption regime must address them (directly or indirectly), and that competitive and deliberative theories offer characteristically differentiated methods for fighting corruption.

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32. For example, an elected official who desires re-election may take an act purely because it propitiates a group of voters necessary for his re-election (and does not alienate any other particular group of voters); the elected official may not think the act is inherently justified by public reasons, but takes it anyway. The act is clearly self-interested, but a system that incorporates the idea of official-as-pure-representative will not call it corrupt. However, if a public official takes the same act because each member of the same group of voters will provide him with a dollar for campaign finance purposes, some systems of campaign finance regulation would call it corrupt. And if each voter provided him with a dollar for his unrestricted personal use, virtually every healthy government would call it a criminal bribe.

33. *See* ROSE-ACKERMAN, *supra* note 28, at 56 (describing the difficulty of detecting acts taken for corrupt reasons when the communication between official and donor are covert or oblique); THOMPSON, *supra* note 29, at 108-09 (describing the challenges posed by "mixed motives"); *see also* Pranab Bardhan, *Corruption and Development: A Review of Issues*, *in* POLITICAL CORRUPTION: CONCEPTS & CONTEXTS 321-22 (Arnold J. Heidenheimer & Michael Johnston eds., 2002) (discussing corruption in developing countries). For a discussion of the relevance of the mens rea of corruption in the context of American jurisprudence, *see* Daniel Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 798-99 (1985).

B. (Anti)Corruption in Deliberative Democracy: Examining Reasons Directly

Deliberative anticorruption directly addresses whether or not the mental states of public officials are sufficiently public-regarding. This normatively straightforward approach follows from deliberative democracy's emphasis of publically reasoned justification in political decision-making. A legitimate political act must be able to survive discursive examination by the polity; for the purposes of corruption, this means the official must be able to reasonably argue the act is adequately motivated by the public good. Actions that fail to satisfy this public-regarding test are corrupt.[34] In actual discourse, this deviation consists of a failure to participate in politics with good faith, misleading other participants during deliberative engagement. When the official is a delegate, and thus her discrete actions are not publicly debated, the deviation consists of failure to consider if an act would survive such deliberative consideration. Thus, when a public official willfully acts for reasons that could not be justified through public deliberation, her behavior is corrupt.[35] Since any motive that cannot be justified through public reasoning is ultimately inspired by self-interest, an act that could not pass muster before public reason-giving is unacceptably private,[36]

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34. Such failures to engage in proper engagement may be systemic, occurring when political institutions and cultural practices do not facilitate collective deliberation. *See* THOMPSON, *supra* note 29, at 26-33 (the practices of institutional corruption "so closely resemble practices that are an integral part of legitimate political life that we are reluctant to criticize politicians who follow them"). Systemic/institutional corruption lies between clearly corrupt individual acts and the diffuse decay classically associated with corruption.

35. *See id.* at 20 (observing that the first principle of legislative ethics mandates that "a member should act on reasons relevant to the merits of public policies or reasons relevant to advancing a process that encourages acting on such reasons").

36. *See* Teachout, *supra* note 7, at 373-74 (observing, to the congressional founders, "political corruption referred to self-serving use of public power for private ends . . . political corruption is a particular kind of conscious or reckless abuse of the position of trust . . . political corruption is using public life for private gain.") Teachout thus observes that the Founders' idea of corruption has a deliberative streak — they were also concerned with promoting "civic virtue" defined as a "orientation toward the public interest" and discouraging the use of political power to advance special interests (whether personal — self-enrichment —

even if it does not assume the traditional form of a bribe.[37] In practice, the influence of self-interest upon democratic political outcomes is inevitable. Yet the perceptible role of self-interest must be discursively defensible to other citizens (that is, an official could defend the self-interest as politically legitimate) in light of the polity's norms and expectations.

An ideal deliberative anticorruption regime would discursively assess official action on a case-by-case basis. While this solution would demand political behavior that is deeply and sincerely public-regarding; it describes not law, but perpetual self-reflective politics. It is not practical for anticorruption laws to replicate retrospective deliberative democracy.[38] Producing enforceable laws, while still accommodating deliberative values, proves challenging. Procedurally good laws are precise and crisp, define offenses clearly for the benefit of regulated

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or political — the advancement of their districts at the cost of collective national welfare). *Id.* at 374-75.

37. *See* ROSE-ACKERMAN, *supra* note 28, at 91-110 (distinguishing bribes from patronage and gift giving based on cultural norms). If an official reflects upon his reasons for acting and concludes his actions are publicly justified, his actions are not corrupt. If the reasons for acting are in reality publicly justified, the official has satisfied her duty and acted with integrity. If the reasons are not publicly justified but the leader sincerely believes them to be, the official is incompetent in a subtle way (he has a poor grasp of his polity's beliefs, or of dominant norms) but not corrupt. Consider the distinction from incompetence, *see* THOMPSON *supra* note 29. If, however, the official concludes that her action is not publicly justified, but acts anyway for other reasons, those reasons must at some level be self-interested, at least as a public-regarding motive. For example, an official who takes an action that violates public duty because of the vicarious reward of watching a third party benefit is still deemed to have acted corruptly. This does presume that every official: (1) is aware of the obligation to act in a manner that could be justified and (2) self-reflects before taking public action. An official who fails to satisfy these two presumptions may be negligently corrupt; the official *should* be aware of the obligation to act in a manner that accords with public reasons. Whether such negligent malfeasance of public duty is corruption or mere incompetence is a technical question beyond this article's ken, along with other difficult situations (for example, that of the official who suffers from false consciousness and thus believes herself to be acting for public reasons but, at a deep level, is motivated by self-interest).

38. The judicial system performs a very limited form of this review, *see* discussion *infra* p. 408-09. However, because it is limited to questions of fact, it cannot engage with the foundational normative questions regarding corruption.

parties, and are easily applied in the courtroom.[39] Conversely, deliberative anticorruption is structured around constant debate over political values and subtle motive inquiries, which are difficult practices to neatly package in criminal or regulatory code.

In practice, deliberative anticorruption laws resolve this tension by adopting measures that investigate public actors' relevant motivations to the greatest degree feasible using regulatory and prosecutorial tools. As a result of using measures with adaptability or breadth,[40] deliberative anticorruption laws sweep or have the potential to sweep beyond narrowly defined boundaries with a fluidity and sensitivity that mirrors discursive reflection, and they have the capacity to focus upon and potentially shape the general motivational state of actors. These two traits — flexibility or breadth, and a focus upon motive as opposed to sharply defined and easily identified bad behavior — grant such anticorruption measures the holistic, expansive quality that is characteristic of deliberative politics.

Deliberative anticorruption thus defines corruption by a specific element of public conduct — motive — and creates legislation designed to assess, regulate, or shape motives directly. These laws deploy a conception of motive that extends beyond the narrow legal assessment of *mens rea*. Instead, the laws broadly assess if the relevant mental states provide an acceptable justification for the action. The goal is to create measures that assay public conduct in light of public norms (in effect, simulating discursive evaluation as best as possible). Because such an assessment may be holistic and highly individualized, the laws that instantiate it will often have a broader potential reach or fail to have precisely delineated contours.

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39. *See generally* Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010) (describing the tension between the deliberative approach to democracy and the traditional view of good, crisp laws by exploring the difference between rules and standards). The role of this tension in driving the Court's anticorruption jurisprudence is described, *infra* Section IV.

40. For an explanation of why competitive-style bright-line rules are inadequate to achieve deliberative anticorruption, *see* Lowenstein, *supra* note 33, at 838-43 (describing the pluralist-competitive approach as adopting "rules of the game" and describing the problems of treating these rules as fixed and adequate rather than reflecting distinct substantive investments that may themselves be up for debate).

These anticorruption measures seek to guarantee a political culture that is broadly civic-minded and guided by public expectations. Evidentiary precision and bright preemptive delineation of the public-private divide are de-emphasized in favor of ensuring that officials' motives satisfy the standards of reasoned collective discourse; indeed, the measures themselves aspire to simulate this discourse. However, deliberative democracy itself does not entail substantive positions on corruption, nor must laws with characteristics of a deliberative anticorruption approach adopt specific positions on corruption. Rather, deliberative anticorruption is distinguished by how it defines integrity in politics: adherence to public standards of justifiability, as defined by the ability to satisfy discursive assessment.

C. (Anti)Corruption in Competitive Democracy: Procedure above All

Competitive theory faces an initial conundrum in combating corruption. Corruption is defined by normatively unacceptable motives, yet norms and motives have no special weight in competitive democracy — ethical norms and leaders' underlying motives are *non-unique* items on the menu assessed by voter preference. Competitive democrats could not *a priori* condemn constituents' support for a leader who had egregiously self-serving motives if voters found she had other attributes that made her, on the whole, desirable.[41] Yet, as described in Section IA of this article, the baseline requirement for competitive democracy is a fair, formal procedure that establishes a legitimate selection process. Competitive democracy cannot tolerate acts that violate this framework,[42] and competitive anticorruption subsequently condemns actions that threaten it. Competitive anticorruption thus negotiates

41. The ideal competitive system would have no anticorruption laws. In this system, all voters would have full knowledge of all acts and intentions of public officials, perpetual and instantaneous recalls and elections would be feasible, and there would be no transaction costs associated with elections. As a result, voters could simply express any disapproval of leader conduct through political means. In contrast, corruption laws in competitive systems can be explained by departures from this ideal; elections are costly and necessarily involve a time lag, and information is imperfectly provided and expensive to obtain.

42. *See* DAHL, *supra* note 9, at 132-33.

between normative neutrality toward motives and protection of a framework that has ultimately normative roots.

Competitive anticorruption is, in short, results-oriented. It wishes to discourage public behavior that is clearly an abuse of power or office, but it does not wish to make direct normative inquiries. To engage in such normative inquiry would reach beyond the emphasis on procedure and neutrality that characterizes competitive democracy. The resulting anticorruption regime has a minimalist character.[43] Competitive anticorruption condemns specific behavior that transgresses clearly established baseline values but avoids subtle normative assessments of leaders' motives or probing the relationship between ethics and public service. Consequently, competitive anticorruption tends to assume the form of bright-line rules, which directly identify certain types of conduct as unacceptable, prohibited, or illegal. The archetypal instantiation of competitive anticorruption is the formulaic quid pro quo law, which delineates the institutional framework with minimum reflection upon ethical norms. Such laws offer a formula for identifying corrupt acts:[44] a public official performs a public act for a donor who, in exchange, provides a private payoff to the public official.[45] The status of each component (when a payoff is private; when an act is public; when a reason for a public act is sufficiently public-regarding; and when a

43. *See generally* Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111 (1995) (critiquing the "deliberative" and what he calls, "moralist/idealist" approach to politics of Thompson and Lowenstein).

44. Competitive democrats may outlaw buying of citizens' votes, but this is the simple recognition that citizenship itself is a type of public office and voting is a type of public act. For a general overview of anti-vote-buying laws, see 18 U.S.C. § 597 (2006) (imposing criminal penalties for those who exchange their vote for money); Brown v. Hartlage, 456 U.S. 45 (1982) (holding that the First Amendment protected candidate's later-retracted promises to reduce salaries and thus save taxpayers' money); Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323 (2000); Pamela S. Karlan, *Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System*, 80 VA. L. REV. 1455 (1994). While raising interesting questions of the nature of civic duty, this body of law is sufficiently distinct from other corruption law to be omitted from this analysis.

45. Peters & Welch, *supra* note 28, at 157-60 (providing a more extensive account with detailed breakdowns of each element of the offense). J. S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis,* 61 AM. POL. SCI. REV. 417, 419 (1967) (providing one of the early seminal accounts of corruption in this form).

transferred good qualifies as substantial or definite enough to be a payoff) is crisply defined by law,[46] and when they are linked together by quid pro quo, the act is corrupt. Such formulas concretize the framework's norms through bright-line tests. Did the official receive a tangible private payoff? Did the donor receive a public act in return? Does there appear to be a causal connection between the two (a motivational inquiry much closer to traditional criminal treatments of *mens rea*)? Corrupt behavior is cast as analogous to breach of contract to govern responsibly, and the initially standard-like question that underlies any corruption inquiry — has a leader acted in a manner that violates obligations to the polity? — is reduced to a (relatively) crisp and precise rule.[47]

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46. The definitional challenge, see *supra* section IIA, is especially acute for the quid pro quo formulas, as their efficacy depends upon accurate "coefficients" in the equation. Unlike deliberative measures which can "punt" the definitional problem to deliberation inherent in enforcement, competitive approaches must define the terms crisply. For example, what is defined as a payoff? Does a guarantee of support in an upcoming election count? Promise to look favorably upon a friend's child during an upcoming interview? When is an act "sufficiently" public-regarding to be protected from claims of corruption — if an act is inherently good for the public, but the official also receives a pre-emptive (or ex post facto) gift, is the gift a bribe or merely a tip? For an analysis observing that a field-wide consensus has emerged regarding quid pro quo bribery, and simultaneously examining the inadequacies of the consensus in light of comparative differences between cultures and nations, see MICHAEL JOHNSTON, SYNDROMES OF CORRUPTION 20-35 (2005). *Cf.* ROSE-ACKERMAN, *supra* note 28, at 92-96 (observing the impact and limits of cultural relativism). For an element-by-element analysis of American laws on corruption, see Lowenstein, *supra* note 33, at 795-828 (examining corruption law in American state and federal law as having five components — target of a public official, corrupt intent, a benefit of value, a relationship to an official act, and an intent to influence — and providing an analysis of each); Daniel H. Lowenstein, *When is a Campaign Contribution a Bribe?, in* PRIVATE AND PUBLIC CORRUPTION 127, 136-40 (William C. Heffernan & John Kleinig eds., 2004) (analyzing the explicitness prong in particular).

47. Narrow, brightly defined prophylactic conflict-of-interest statutes may be explained in a like fashion. For example, a law prohibiting employment with a company over whom an official has recently held regulatory power may be necessary to prevent bribe-like conduct where the public act is provided prior to the payoff, and the transaction is consummated tacitly. This topic touches on the distinction between "bribes, gifts, prices, and tips." *See* ROSE-ACKERMAN, *supra* note 28, 92-110 (providing a theoretical analysis); Lowenstein, *supra* note 33, at

The competitive approach minimizes the need to directly address the ambiguities of norms and motivation by codifying the relevant inquiries. Of course, while it adopts constrained and crisp forms, the competitive approach does not necessarily adopt a particular substantive view regarding what particular acts are corrupt. A quid pro quo regime may criminalize many behaviors and force disclosures of large amount of information. Yet, the form does not suggest that this regime does more than instantiate aggregate preferences regarding how leaders should act.

D. The Dirty Middle: Laws of Corruption in Practical Application

These accounts describe idealized anticorruption regimes. Actual enforcement must blend the two approaches because in practice each offers particular virtues. Competitive anticorruption measures define offenses and requirements in concrete terms, offering greater predictability and more transparent enforcement. However, this has both practical and principled downsides. Because competitive anticorruption is preemptively defined, it is less capable of reacting to innovatively or intricately corrupt acts.[48] Competitive anticorruption also neglects corruption's ethical underpinnings: leaders and officials are in positions of public trust and responsibility, and corruption is unacceptable, in part, because it contravenes this unique moral standing. Minimal formal adherence to the sharply delineated laws may satisfy competitive theory, but appears brittle as an ethical posture. Deliberative anticorruption does not suffer from this problem; its measures look to deeper motivations and can adaptively incorporate moral intuitions, so evasion of a narrow formal prohibition will not shield an offensive act. Yet these virtues are offset by a lack of precision and the possible need for enormous discretion by enforcement agents — the very flaws competitive enforcement generally solves.

796-97 (describing the distinction between bribes and an "unlawful gratuity offense with bribery").

48. One notorious example of such a corruption-law failure is that of the recent prosecution of Rod Blagojevich, which involved acts that were morally abhorrent to many but only equivocally illegal. *See* Monica Davey & Susan Saulny, *Jurors Fault Complexity of the Blagojevich Trial*, N.Y. TIMES, Aug. 19, 2010, at A1; Monica Davey & Susan Saulny, *For Blagojevich, A Guilty Verdict on 1 of 24 Counts*, N.Y. TIMES, Aug. 18, 2010, at A1. *See also supra* note 40 and accompanying text.

Many corruption laws integrate attributes of deliberative and competitive anticorruption. For example, the most straightforward federal anticorruption law, 18 U.S.C. § 201,[49] is a quid pro quo formula — precisely defining officials, candidates, and official acts, and requiring donors and payoffs to activate the statute — but includes broader discretion in assessment of payoffs (defined as "anything of value") and inserts the unglossed qualifier "corruptly" before "giv[ing]".[50] The resulting measure has a generally competitive form but with interpretive elements that introduce some deliberative flexibility. And prophylactic statutes — those that prohibit conduct such as receipt of gifts by public figures from interested parties, with no requirement of proof of influence or actual quid pro quo — can serve either deliberative or competitive values, based on their breadth. A narrow statute will have the competitive qualities of an anti-bribery law, while a broader statute will create a zone of mandated public-regardingness.[51]

Finally, while I have scrupulously avoided correlating approaches with substantive content, a correlation does exist between regime affiliation and the content of corruption law. Content here refers to the questions posed by the generic corruption model: what are bad motives, what are the foundational norms and what is excessively private-serving? A competitive system will generally condemn fewer motives and self-interested actions, relying more heavily on elections to promote acceptable behavior. Conversely, the deliberative approach will tend to condemn a broader array of motives and permit less self-interest, because any action must satisfy (hypothetical) critical consideration by

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49. 18 U.S.C. § 201 (2006).

50. § 201(b)(1).

51. The spectrum-like nature of prophylactic statutes demonstrates that the competitive and deliberative concepts of corruption define the same misconduct and seek the same final good of political integrity. All theories and laws of corruption merely attempt to define the extent of political obligation, to separate the public from the private, and to describe permissible behavior in their intersection. In the prophylactic statute context, this is demonstrated by the fact that both types of statutes ultimately identify the behavior that is deemed presumptively unacceptable for the polity (receipt of a good even without proof of a corresponding public act), according to the relevant norms. A competitive view pushes this normative focus into the background, whereas a deliberative approach embraces the broad sweep of a prophylactic statute, treating them as part of a scheme to encourage good motives in public officials.

the polity. This contrast may be clearest in the assessment of vote-seeking behavior. In competitive democracy, acts or promises by candidates to gain votes is the very preference-driven engine of the system. Conversely, for deliberative democrats, the belief, "I only take this action because it will encourage a block of voters to elect me not because I believe it publically beneficial," usually contravenes the mutual respect and genuine other-regardingness that defines legitimate politics.[52] However, this parallel between democratic theory and substantive content of anticorruption regimes is correlative rather than causal. The competitive approach could indict such a wide array of acts under quid pro quo and disclosure statutes as to virtually exclude self-interest from officials' political conduct. Likewise, upon deliberation, a polity (or its delegates) might conclude that only the most egregious abuses of public power for private gain are corrupt. As with the forms of laws, in practice a polity will have an intermediate position on substantive corruption. For this article, these ideal substantive positions are primarily helpful in that they can serve as guideposts to the form-oriented analysis of the institutional conflict.

PART TWO: CAMPAIGN FINANCE, HONEST SERVICES, AND THE INSTITUTIONAL DIVERGENCE

Examining modern anticorruption law through the competitive-deliberative divide reveals a remarkable episodic conflict between the Supreme Court and Congress. Both lines of cases (campaign finance reform and honest services) reflect a consistent pattern: Congress passed deliberative anticorruption law, only to watch the Court nullify them by either narrow interpretation or outright rejection. Consequently, the Court has served as the unspoken (and perhaps inadvertent) champion of a competitive response to corruption.

The conflict has manifested on two levels. When the Court has examined anticorruption legislation, its holdings have pruned back deliberative anticorruption while leaving intact competitive

52. *See* Sunstein, *supra* note 8, at 32 (suggesting that the Madisonian conception of democracy rejects the competitive position and defining corruption as acting only to satisfy interest groups, including, presumably, enough interest groups to ensure reelection).

anticorruption measures. In the campaign finance context, when Congress has regulated certain types of campaign spending, the Court has responded by holding that such limitations violate the First Amendment. In the honest services context, the Court has held that broadly defined anticorruption laws, which grant substantial discretion to prosecutors, violate due process, and indicated that only quid pro quo prohibitions satisfy vagueness and notice requirements. Thus, on its face, the conflict has occurred indirectly, as the Court has found constitutional infirmities in most deliberative anticorruption schemes, rather than made specific statements regarding corruption. However, the Court's statements on corruption — which comprise a penumbra of dicta around its holdings — suggest it views politics as a market populated by self-interested actors. The Court has been dubious of congressional efforts to challenge this conception.

A final caveat before plunging into the evidence: neither institution has treated anticorruption law as a coherent whole or articulated a general theory of corruption. Congressional legislation has accumulated piecemeal, often in response to external political pressures. The Court's immediate objections to such legislation have been framed in terms of individual rights. The subsequent two sections must piece together the deliberative-competitive divide through examination of the legislative and judicial responses themselves. Moreover, neither the Court nor Congress has comprehensively or consistently defined corrupt action or framed the conflict in unified terms. Thus, this article definitively concludes only that the divide over anticorruption exists, but it does not suggest that either institution has intentionally advanced or consciously holds a coherent theory on corruption.

III. CAMPAIGN FINANCE: THE BATTLE OVER MONEY IN ELECTIONS

Campaign finance has been the most active forum for debating anticorruption in modern Supreme Court jurisprudence. The Court has generally struck down congressional efforts to deliberatively restrict the influence of private money (and thus private motivational influence). The campaign finance literature is well-trod,[53] so this section focuses on the

53. Campaign finance reform has been a darling of the academy, though corruption has received proportionally little attention. The latter reality is curious

given anticorruption was modern campaign finance reform's original inspiration. The debate has instead focused on the tension between free speech versus equality of political participation. The 'free speech' wing, led on the Court by Scalia and Thomas, has argued that campaign finance reform unconstitutionally, and perniciously, restricts the right to political speech. *See* Citizens United v. Fed. Election Comm'n, 558 U. S. ___, ___, 130 S. Ct. 876, 929 (2010) (Scalia, J., concurring) (noting that "[a] documentary film critical of a potential Presidential candidate is core political speech" and thus protected by the First Amendment even if it is created by a corporation); *id.* at ___, 130 S. Ct. at 980 (Thomas, J., concurring in part, dissenting in part) (agreeing that a campaign finance reform provision violated the First Amendment and noting that "[p]olitical speech is entitled to robust protection under the First Amendment"). For the argument that the broadest possible treatment of First Amendment and minimal finance regulation enhance democratic governance, see Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1089 (1996) (federal and state finance regulation have not only failed to achieve the anticorruption and pro-egalitarian goals of reform, "but . . . have themselves had undemocratic consequences for the electoral system"). *See also* Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U. C. DAVIS L. REV, 663, 672-75 (1997) (arguing that political expenditures may enhance the democratic process). Others have argued that less regulation permits for a broader range of ideas by giving challengers a means to counteract the incumbent advantage. *See* Samuel Issacharoff, *Throwing in the Towel: The Constitutional Morass of Campaign Finance*, *in* PARTY FUNDING AND CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE, 183, 190 (K. D. Ewing & Samuel Issacharoff eds., 2006) (describing as "essentially unanswered" by the Court Scalia's observation that the McCain-Feingold Act restricts soft money while increasing hard money limits, yet that hard money is the type easier for incumbents to raise. The inference is thus that Congress might be engaging in legislative self-dealing.). *See also* Randall v. Sorrell, 548 U.S. 230, 248-49 (2006) ("[C]ontribution limits that are too low also can harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.").

Conversely, the "equality" wing, represented on the Court by Breyer and (until recently) Stevens, suggests that unchecked campaign spending damages political equality by allowing wealth to determine political outcomes. *See, e.g.*, Burt Neuborne, *Money and American Democracy*, *in* LAW AND CLASS IN AMERICA, 37, 42-43 (Paul D. Carrington & Trina Jones eds., 2006) (arguing current campaign spending practices, validated by *Buckley*, leave a vast percentage of the population politically unequal); *id* at 48 (observing, "[v]irtually every other serious democracy subsidizes the campaign process, assuring that the rich do not exercise disproportionate political influence"); Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 77 (2004) (arguing that even after the McCain-Feingold Act, "[m]assive disparities in the distribution of wealth cause disparities in political participation"); Frank Askin, *Political Money and Freedom of Speech: Kathleen Sullivan's Seven Deadly Sins - an*

points most relevant to the institutional divide: the original judicial gutting of the 1974 Federal Election Campaign Act amendments'[54] deliberative measures in *Buckley v. Valeo*[55], and the recent interdiction of Congress's much more modest deliberative efforts in the Bipartisan Campaign Reform Act[56] through *Wisconsin Right to Life*[57] and *Citizens United.*[58]

A. Congress's Turn toward Deliberative Democracy: 1974 FECA

Campaign finance regulation began to assume its current character following Watergate.[59] The scandal demonstrated that

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Antitoxin, 31 U. C. DAVIS L. REV. 1065, 1077-80 (1998) (observing the plutocratic effects of current campaign finance laws and the incompatibility of this system with constitutional values). For a defense of public financing of campaigns, see, e.g., Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160 (1994) (arguing that publically financed campaigns are superior in terms of the constitutional idea of equal access to politics, and in preventing quid pro quo conduct or related behavior); Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials*, 37 LOY. U. CHI. L.J. 669 (2006) (arguing campaign spending limits will result in both fairer elections and better governance, as leaders will be less concerned with fundraising). For a more general account supporting the equality wing, see OWEN M. FISS, THE IRONY OF FREE SPEECH 79 (1996) (differentiating between "libertarian" and "democratic" treatment of the First Amendment). *Cf.* SUNSTEIN, *supra* note 19. *See generally supra* Section I.

54. Federal Election Campaign Act of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431-55 (Supp. 2002)). 1974 FECA amended the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

55. 424 U. S. 1 (1976).

56. Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C. (2002)).

57. Wisc. Right to Life, Inc. v. Fed. Election Comm'n, 551 U.S. 449 (2007).

58. 558 U. S. ___, 130 S. Ct. 876 (2010).

59. *Cf.* George D. Brown, *Putting Watergate Behind Us - Salinas, Sun-Diamond, and Two Views of the Anticorruption Model*, 74 TUL. L. REV. 747 (2000) (describing Watergate as an anticorruption threshold). Brown argues immediately after Watergate there was a pervasive "hard-line" approach to corruption, which has been followed by an accelerating "counterrevolutionary critique." *See id.* at 751-64. Brown claims the Court's conduct reflects this pattern. Claiming its initial decisions are strongly anticorruption but gradually it has adopted a more lenient stance. *See id.*

disclosure requirements alone would not adequately ensure ethical campaign practices.[60] Congress responded with its first attempt to comprehensively regulate campaign spending. It established the Federal Election Commission; created monitoring and reporting mechanisms for most expenditures; placed strict limits on contributions by individuals, parties, and political action groups; limited candidates' expenditures, whether funded by outside contributions or their own wealth; limited "independent expenditures" by private individuals in support of candidates;[61] and established a network of public funding (matching funds for primaries and general funds for general elections).[62] The goal was ambitious: to provide "complete control over and disclosure of campaign contributions and expenditures in campaigns for Federal elective office";[63] Congress indicated that "[t]he election of federal officials is not a private affair."[64] The goals of FECA were twofold: ensuring any viable candidate could communicate with the electorate and preventing corruption by discouraging excessive candidate reliance on a small pool of donors.[65]

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at 811-12. Conversely, this article suggests the Court has maintained a consistent competitive approach to corruption.

60. *See* S. REP. NO. 93-689, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5587, 5588. *See generally* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE. L.J. 1001, 1002 (1976) (stating that "Congress passed these provisions in response to political abuses which culminated in the 1972 presidential campaign and its aftermath . . . .").

61. For recognition of the constitutional issues raised by this measure, *see* S. REP. NO. 93-689, at 18-19 (1974).

62. Federal Election Campaign Act of 1974, Pub. L. No. 93-443, §101(b), 88 Stat. 1263, 1263-64 (1974) (codified as amended at 2 U.S.C. §§ 431-55 (Supp. 2004)), describes contribution limits; § 101(c) describes expenditure limits; and key terminology for contribution and expenditure limits are articulated by §§ 201, 204-309.

63. S. REP. NO. 93-689, at 1.

64. *Id.* at 5.

65. *Id.* ("*The only way in which Congress can eliminate reliance on large private contributions and still ensure adequate presentation to the electorate of opposing viewpoints of competing candidates is through comprehensive public financing.*") (emphasis in original). Both goals are emphasized throughout the introductory text as motivations for the regulations. Current circumstances make it "exceedingly difficult to finance an adequate campaign to carry . . . [candidates'] message[s] to the voters." *Id.* The Report also speaks of the need to "purify" the campaigns, *id.* at 6, and ensure, by encouraging small contributions by many donors

The 1974 FECA recognized that democratic decision-making involves a competitive selection process but sought to make the contextual political culture as deliberative as possible. It facilitated competitive elections, particularly by providing the electorate with information.[66] Yet, the bill also strove to make elections more robustly public affairs by "encourag[ing] a candidate to involve large numbers of voters in the fundraising process";[67] and ensuring citizen participation in politics.[68] The goal was elections imbued with the hallmarks of deliberative democracy: citizen involvement, meaningful discourse, and engagement between polity and leaders.[69]

The central measures of 1974 FECA can be classified as reflecting competitive or deliberative anticorruption concerns. The direct limitations on contributions to candidates and functionally equivalent independent expenditures on their behalf[70] were the most explicitly competitive measures. Their purpose was to prevent "undue influence by a group or individual."[71] In effect, they were anti-bribery measures in the campaign finance context. By treating such payments to or on behalf of politicians as unacceptable payoffs, these limitations prohibited a quid

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in a party context, that any private funding "represents the involvement of many voters and not merely the influence of a wealthy few" *id.* at 8.

66. *See id.* at 5 (defining the legislation's purpose as protecting "the whole process of political competition"); *id.* at 6 (describing the goal of permitting candidates "to run a fully informative and effective campaign").

67. *Id.* at 7.

68. This is particularly salient with regards to the role of parties described in, *id.* at 7-9. For a description of how party competition can contribute to a deliberative approach to democracy, see NANCY ROSENBLUM, ON THE SIDE OF THE ANGELS 306-11 (2008).

69. See Senator Pell's comment, S. REP. NO. 93-689, at 89 (suggesting that the goal of the bill is to "return[] to our people, to our individual voters a rightful share and a rightful responsibility in the choosing of their candidates. And it can serve to establish that climate of public trust in elected officials which this country so earnestly desires").

70. Federal Election Campaign Act of 1974, Pub. L. No. 93-443, §§ 101(a)-101(f)(1), 88 Stat. 1263, 1263-65 (1974) (codified as amended at 2 U.S.C. §§ 431-55 (Supp. 2002)) (limiting amount of contributions to political figures and criminalizing honorariums paid to elected officials).

71. S. REP. NO. 93-689, at 19. *See also id.* at 5 (suggesting the desirability of emancipating candidates from dependence "on those relatively few individuals capable of contributing the maximum amount permitted by law"); *supra* note 68.

pro quo through campaign donations. Operating on the contestable descriptive premise that excessive aid to a candidate could potentially sway the candidate in the donor's favor, these prohibitions manifested a straightforward political principle: democratic political outcomes ought not to be overdetermined by the private deployment of personal wealth. By evoking this principle — which underlies any regulation of quid pro quo bribery — Congress avoided investigation of motivational subtleties in this facet of the regulatory framework.

Conversely, the expenditure limitations[72] directly evaluated the legitimacy of certain political motives. The expenditure limitations discouraged candidates from approaching campaigns as private undertakings, and, as such, were an attempt to shape political motives. Rather, the limitations induced candidates to treat their campaigns as a public process. The motivational aspects of this are subtle — candidates were discouraged from privately structured self-aggrandizement and instead encouraged to participate in broader public engagement. Congress' interests in shaping candidate motivation may have been more apparent in the positive element supporting the expenditure limitations, the public financing regime. In constructing it, Congress expressed a desire to make candidates more broadly public — rather than private-regarding[73] and to engage the citizenry as a whole, rather than propitiate the individuals who offer the most funding.[74] These measures are typical of overbroad deliberative anticorruption protections which discourages overly self-serving conduct by political actors.

Ultimately, the two classes of measures complemented each other: narrower competitive measures sought to improve the translation of constituent preference into government action, while deliberative provisions attempted to infuse the selection process with a sense of collective engagement. Additionally, some elements of 1974 FECA were

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72. Federal Election Campaign Act of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263, 1263-68 (codified as amended at 2 U.S.C. §§ 431-55 (Supp. 2002)).

73. S. REP. NO. 93-689, at 5 (describing the need "*to pay for the public business of elections with public funds*") (citation omitted); *id.* (observing that elections are not "private affair[s]").

74. *Id.* at 6 (describing a major goal of matching public financing as encouraging candidates to rely mainly on "grass roots" for fundraising); *id.* at 7 (describing the use of matching limits to "encourage[] a candidate to involve large numbers of voters in the fundraising process").

justified on both deliberative and competitive grounds, such as streamlined disclosure requirements.[75]

Some have offered an alternative interpretation of FECA, suggesting campaign finance reform must, by structural necessity, be dedicated to the elimination or mitigation of the effect of wealth disparities upon elections.[76] This argument suggests Congress addressed

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75. §§ 201-318, 88 Stat. 1263, 1263, 1265 (summary of the changes); *see also* S. REP. NO. 93-689, at 15-16. These changes can be explained by both the desire to improve voter accuracy and expose speculative quid pro quo to public scrutiny, but also by the desire to facilitate public debate and encourage general awareness of public norms in acceptance of campaign contributions. *See Buckley v. Valeo,* 424 U.S., 1, 68 (1976) ("[D]isclosure requirements – certainly in most applications – appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption . . . ."); *id.* at 83 ("[D]isclosure serves informational functions, as well as the prevention of corruption . . . .").

76. The "equality" wing holds elimination of the effect of wealth disparities on elections to be a valid goal of campaign finance reform. *See supra* note 53. A strand in the campaign finance literature, moreover, has argued that campaign finance reform must never be targeting corruption in a simple form. *See, e.g.,* David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369 (1994). Strauss claims that campaign finance regulation is, at its root, never about corruption. *Id.* at 1373. He explains:

> The conventional form of corruption occurs when elected officials take advantage of their position to enrich themselves. In effect they convert their public office into private wealth. But when the quid pro quo for an official action is not a bribe but a campaign contribution, the official has used the power of her office, not for personal enrichment, but in order to remain in office longer.

Id. Strauss thus suggests the problem facing campaign contributions is not corruption of leaders, but the effect of inequality upon candidate conduct. Campaign contributions just manifest a broader problem of ensuring leaders' accountability; electoral pressure applied by other forms of citizen action can distort the impact of individual vote as much as a campaign contributions. Strauss' insight presumes a competitive view of politics as a simple vote-market. From a competitive view *all* corruption can be traced to inequality; if all individuals had equal resources and political markets were efficient, then there would be no corruption, merely accurate expression of desired political outcomes through both votes and financial expenditures.

Similar arguments are developed by Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1723-24 (1999) (arguing that since campaign finance funds are ultimately directed towards voters through expenditures, the real issue must be corruption of voters, and that this raises

two possible effects of wealth in politics. The use of wealth by the rich might unfairly reduce the relative political power of the poor, and the disproportionate power of wealthy candidates might preemptively bias candidates towards taking positions appealing to rich (prospective) donors. Some have argued Congress' efforts addressed these political imbalances, rather than fought corruption. However, the history and context of the 1974 FECA demonstrates that this critique is inaccurate, at least as of an assessment of institutional intent.[77] As the legislative history confirms, the measures were primarily directed toward politicians, not toward constituents. Increased equality in political influence may have been a benefit of the FECA regime because it required candidates to achieve widespread popular support rather than rely on a few wealthy donors. Yet, this will generally be true of any anticorruption enhancement because it will reduce opportunities to convert wealth into political action.

B. Buckley: Laying the Foundation for a Competitive View of Corruption

This mixed campaign finance regime did not survive judicial review. In *Buckley v. Valeo*,[78] the Court left intact 1974 FECA's

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significant theoretical difficulties for both competitive ("pluralist-protective") and deliberative ("republican-communitarian") democrats, since defending campaign finance in either view suggests voters' interests or reasoning processes can be distorted by candidate spending). *See also* Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 903 (1998) (arguing that campaign spending is really only a concern if it is presumed most voters are "civic slackers" who are disengaged from political reasoning). These authors ultimately attempt to reason away the possibility of campaign finance contributions corrupting leaders, instead suggesting campaign finance reform must be an effort to deliberatively reform voters. This view, insightful as it is, does not give sufficient shrift to the alternate deliberative desire that leaders should be genuinely public-minded, as opposed to voracious vote-obtainers. *Cf.* Molly J. Wilson, *Behavioral Decision Theory and Implications for the Supreme Court's Campaign Finance Jurisprudence*, 31 CARDOZO L. REV. 679, 740-41 (2010) (arguing "the relationship between money and potentially manipulative communication strategies arguably supports a more expansive definition of 'corruption'") (internal citations and quotations omitted omitted).

77. This article remains agnostic regarding the critics of campaign finance reform as anticorruption mentioned in the previous footnote.

78. 424 U.S. 1.

competitive measures while striking down or emasculating most of the deliberative ones. The Court balanced the governmental interest[79] in anticorruption against First Amendment rights and concluded that, provisions that limited contributions to candidates or parties were lawful, while those that limited expenditures (of candidates, parties, or, with a particular limitation, independent advocates)[80] were not.[81] Moreover, the Court's analysis reflected the presumption that competitive corruption is the only valid type, though it never clearly articulated the theoretical foundations of this position.

Measure by measure analysis reveals the Court's competitive bent. The Court held limits on direct contributions to candidates lawful, on the grounds that such contributions could be traded by donors in exchange for political favors by, or greater influence over, candidates.[82] By preventing such trades, these measures deterred corruption or the appearance of corruption.[83] Moreover, the Court held such limitations did not significantly restrict the individual First Amendment right to association, as a small contribution showed one's political allegiance

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79. The Court's classification of anticorruption as a *governmental* interest is itself theoretically substantive. Certainly, the regulation is state action, so in a formal legalistic sense clearly citizen rights are being balanced against government action. However, the relationship between anticorruption and representation is more ambiguous. Insofar as anticorruption seeks to ensure accurate and just translation of constituents' wills into governmental action, anticorruption might be described as a popular interest, rather than a narrow governmental one. In this vein, some have argued that anticorruption should be given constitutional weight on the basis of an accurate originalist reading. *See* Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L.J. 75, 83-86 (2003) (arguing for an "Anti-Corruption Legacy" in the Constitution that addresses federalism concerns); James A. Gardner, *Madison's Hope: Virtue, Self-Interest, and the Design of Electoral Systems*, 86 IOWA L. REV. 87, 122-23 (2000) (arguing that the founders hoped to create a state based in "virtuous" concern of public affairs rather than "self-interest"); Teachout, *supra* note 7, at 387-97 (discussing various Justices' views of corruption and how contemporary definitions of corruption differ from that of the Framers').

80. *Buckley*, 424 U.S. at 40-45 (resolving the line between "express" and "issue" advocacy using a "magic words" approach and thereby differentiating between independent advocacy and de facto contributions).

81. *Id.* at 45.

82. *Id.* at 29.

83. *Id.* at 25-30.

with the same symbolic heft as a large one.[84] The Court held, however, that expenditure restrictions did not directly address corruption and substantially restricted both speech (since much communication requires money) and association (since impairing speech harms associations dedicated to political advocacy).[85] Thus, in the Court's view the more effective measure also did less harm: contribution limits were the better anticorruption tools and infringed less upon First Amendment rights.[86]

The opinion balanced government interests against the burden upon constitutionally protected rights. The Court's positive focus ensured no government action unjustifiably harmed the rights of speech or association. As such, the Court was not independently concerned with anticorruption, but rather with ensuring Congress' own anticorruption efforts did not have untoward ancillary effects. Yet in weighing the anticorruption efficacy of the government's measures, the Court deployed a narrowly competitive concept of corruption.

> [T]he primary interest served by the limitations and, indeed, by the Act as a whole, is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office . . . . To the extent that large contributions are given to secure political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.[87]

With its sole concern for prohibiting quid pro quo, this was a classically competitive formulation of corruption.[88] The Court also recognized that the appearance of corrupt acts may pose risks:

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84. *Id.* at 22.

85. *Id.* at 45, 51-52, 58-59. The Court also summarily rejected the argument that expenditure of money is not speech and thus outside the ken of First Amendment protection. *Id.* at 16.

86. *Id.* at 47-49. *See* SUNSTEIN, *supra* note 19, at 94-95.

87. *Buckley*, 424 U.S. at 25-27. *See also id.* at 53 ("The primary governmental interest served by the Act [is] the prevention of actual and apparent corruption of the political process", thus implying that corruption of the political process is coextensive with the prevention of quid pro quo corruption of individual candidates.).

88. *Id.* at 27-28. The Court notes that:

> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions . . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence is also critical . . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.[89]

This demonstrated awareness of the evidentiary difficulties of monitoring corruption[90] and the subsequent impact inadequate enforcement can have on popular trust in politics. Yet quid pro quo was the only form of "improper influence" the Court recognized as possibly having this trust-eroding effect; the risk that citizens believe their leaders are being corrupted was identified with the risk citizens believe their leaders are being bribed.[91] Thus, the Court's consideration of the appearance of corruption reinforced its commitment to competitive corruption.

> laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action . . . . Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.

Id. Thus, the Court observes that bribery laws may not adequately capture or monitor *all* corrupt exchanges (at least in the election context), simply because there may be difficulties in adequately proving and defining the terms of the corrupt exchange; corruption still consists of illicit public-private exchanges. This concern with defining terms for bribery formulas is characteristic of quid pro quo competitive corruption. *See also* Brown, *supra* note 59, at 803 (recognizing that the Court condemns corrupt behavior based on its "perception of how close it is to bribery").

89. *Buckley*, 424 U.S. at 27 (citations omitted) (quoting U.S. Civ. Serv. Comm'n v. Nat'l Assn. of Letter Carriers, 413 U.S. 548, 565 (1973)).

90. *See id.* at 27 ("[T]he scope of such pernicious practices can never be reliably ascertained . . . .").

91. *See id.* at 26-27.

As demonstrated in Section IVA of this article, Congress wished to establish an electoral culture that condemned excessively self-interested political conduct. Consequently, types of behavior Congress sought to discourage as corrupt included not only the most explicit quid pro quo violations, but also broadly self-interested behavior. Yet the Court demonstrated no concern for Congress' desire to promote deliberative practices, nor acknowledged that Congress' deliberative measures targeted illicit behavior of a form other than quid pro quo. Rather, when condemning the anticorruption efficacy of expenditure restrictions, the Court inquired solely whether a measure deterred quid pro quo.[92] This excluded Congress's deliberative concerns from incorporation into the assessment of anticorruption practices, and thus from the balancing against First Amendment rights that determined if measures passed constitutional muster. In short, the Court's own conceptualization of corruption preemptively ensured only competitive measures would survive constitutional assessment. The Court's narrow competitive allegiance is further apparent when it preemptively declared that efforts to equalize the relative ability of voters to express themselves do not have constitutional weight.[93] According to deliberative theory, public engagement benefits greatly when members of a polity interact as equals, and hints of this are apparent in the 1974 FECA design.[94]

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92. *Id.* at 45-47 (addressing independent expenditures restrictions, with references to "buy[ing] influence" and "alleviat[ing] the danger that expenditures will be given as *quid pro quo*"); *id.* at 52-53 (addressing personal expenditures, and concluding that use of personal expenditures is actually a *good* way to avoid corruption; this is clearly antideliberative given the potential for self-promotion in sheer reliance on personal wealth); *id.* at 56-57 (discussing general limits on campaign spending).

93. *Id.* at 17 (declaring as a core principle that equalizing cannot be a valid justification).

> [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.

Id. at 48-49 (internal citations and quotation marks omitted).

94. S. REP. NO. 93-689, at 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5587, 5594 (describing the goal of "the involvement of many voters and not merely the

Equalizing measures are one facet of the deliberative effort to reduce corrupt motivations, by limiting opportunities for aggressive self-aggrandizement and thus encouraging publicly-oriented engagement.[95] Yet the Court refuses to acknowledge this possible justification for advancing expressive equality.

Of course, the Court need not have concluded that FECA's expenditure provisions *do* pass constitutional muster; it is a separate substantive question if their benefits justify the harm to protected rights. Yet the Court never even acknowledged that Congress is, through these measures, addressing practices and political deviations that might be deemed corrupt. The Court declared that only fighting quid pro quo corruption, and that alone, can satisfy the anticorruption "compelling government interest" bar.[96] In light of the Court's initial statement that anticorruption alone could possibly balance the infringement of constitutional rights, deliberative anticorruption measures that run afoul of constitutional rights will never survive. Since meaningful anticorruption reform will almost necessarily regulate political conduct that receives some level of constitutional protection, this virtually guarantees a competitive electoral anticorruption regime.

Of course, it might be argued that the Court did substantively endorse deliberative democracy, and that its decisions were motivated by a desire to sustain the deliberative mainstays of "political debate and discussion."[97] However, as with corruption, the Court's theory of discourse was founded in competitive democracy. The Court perceived debate and discussion to be facilitated by a greater volume of speech with minimal government intervention.[98] In the Court's view, the

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influence of a wealthy few" in politics and campaign finance); *id.* at 6, *reprinted in* 1974 U.S.C.C.A.N. 5587, 5592 (describing the value of "grass roots" campaign finance).

95. *Cf.* Strauss, *supra* note 76 (discussing David A. Strauss' view on the effect of inequality on elections).

96. *Buckley*, 424 U.S. at 26-27.

97. *Id.* at 58; *see also id.* at 48-49 (describing the need to protect "unfettered interchange of ideas") (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 266, 269 (1964).

98. *See id.* at 19.

> [T]he First Amendment right to speak ones mind . . . on all public institutions includes the right to engage in vigorous advocacy no less than abstract discussion. Advocacy of the election or defeat

electoral process operates best as a libertarian free market; *Buckley* rests on the premise that the only reason for interfering with this dynamic is the prospective quid pro quo corruption of legislators, or suspicion thereof. Yet Congress intended to advance a foundationally different electoral ethos — one premised around elections with a public rather than private character — with the ensuing consequences for political speech and preference formation.[99] By judging democratic practices through free-market principles and treating voters as raw information-obtaining, preference-fulfilling consumers, the Court excluded deliberative values from consideration.

The practical effect of the Court's decision was to institutionalize the contribution/expenditure divide, a policy that still stands.[100] It left the competitive measures intact and the deliberative measures either overruled or ineffective; with the expenditure restrictions gone, the public financing regime was rendered ineffective.[101] Moreover, the Court's analytic framework suggested it would continue to enforce this dichotomy so long as its current principles remained in place — a prediction borne out in *Citizens United.*

> of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.

Id. at 48 (internal citations and quotation omitted).

99. Some commentators (predictably from the equality wing) have criticized *Buckley's* marketized conception of political discourse. *See* DWORKIN, *supra* note 9, at 362 (observing that *Buckley* operates in the majoritarian conception of democracy). *Cf.* STEPHEN BREYER, ACTIVE LIBERTY 46-49 (Alfred A. Knopf ed., 2005) (suggesting that free speech in the campaign context is better conceived of as "a conversation" rather than simple non-obstruction, but ultimately lauding the Court's decision in *Buckley* for respecting this balance). Others have suggested *Buckley* respected deliberative ends. *See* SUNSTEIN, *supra* note 19, at 94-101.

100. Interestingly, the Court also struck down Congress' construction of the FEC as a nonpartisan/bipartisan anticorruption enforcement body. *Buckley*, 424 U.S. at 120. This decision — based on the appointments clause — is not directly relevant to corruption law, but suggests formalist interpretations of the Constitution contribute to the Court-Congress conflict over corruption.

101. *See id.* at 86. *See generally* Askin, *supra* note 53 (describing how absence of regulation renders public financing ineffective).

C. Out of Buckley *towards BCRA*

In the three decades following *Buckley*, the Court handed down a number of decisions that merely shifted the margins of campaign finance regulation, even as the status quo endured harsh criticism from commentators[102] and within the Court.[103] Generally speaking, these decisions elaborated on three doctrinal issues: when money deployed by outside parties comprised a non-coordinated independent expenditure as opposed to a coordinated de facto contribution;[104] when to treat political speech by independent parties as direct advocacy for a candidate, and thus face treatment as a contribution (the "issue/express" advocacy divide initially determined by *Buckley*'s magic words formula);[105] and how money accumulated by corporate entities could be used in campaigns.[106] Other commentators have extensively analyzed these

102. *See generally supra* note 53. Neither faction was happy with *Buckley*; the "free speech" wing suggested the impact on free speech is unjustified and produces a byzantine enforcement regime, while the 'equality' wing found wealth still too influential in politics in the absence of expenditure limitations.

103. It seems a majority of sitting justices favored overruling *Buckley* by the time of *Colorado Republican v. Federal Election Commission* (*Colorado Republican I*), 518 U.S. 604 (1996). *See also* Neuborne, *supra* note 53, at 47 ("If *Buckley* is a rotten tree just waiting to be pushed over, the question is: which way will it fall?"). For a more extensive description of this deadlock, see generally Pamela Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743 (2007).

104. *See Colorado Republican I*, 518 U.S. at 616 (holding that non-coordinated expenditures by a party do not count to contribution caps); Federal Election Comm'n v. Colo. Republican Fed. Campaign Comm. (*Colorado Republican II*), 533 U.S. 431, 446, 456 (2001) (holding that when expenditures by a party are coordinated with a candidate, they do count to contribution caps).

105. *See* Fed. Election Comm'n v. Mass. Citizens For Life, 479 U.S. 238, 248-250 (1986) (discussing *Buckley's* "express advocacy" requirement and holding that "an expenditure must constitute 'express advocacy' in order to be subject to [limitations]."). *See also* Richard Briffault, *Issue Advocacy: Redrawing the Election/Politics Line*, 77 TEX. L. REV. 1751, 1755-63 (1999) (explaining the Supreme Court's definition and analysis of "express advocacy" and how lower federal courts have applied that definition). In *Federal Election Comm'n v. Wis. Right to Life*, 551 U.S. 449 (2007), the Court adopted an ultimately much more permissive perspective on the issue/express advocacy divide.

106. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776, 792-95 (1978) (holding general restrictions against corporate spending for a popular referendum overinclusive and unconstitutional); Austin v. Mich. Chamber of

issues; most relevantly for this argument, the Court continued to define electoral corruption as quid pro quo between large donors and candidates.[107] These decisions also affirmed the Court's commitment to the competitive approach to politics and the idea of a democratic marketplace.[108] In short, the Court's commitment to competitive anticorruption remained unequivocal in both theory and practice.

None of this needlework, however, produced a satisfactory campaign finance regime, and in 2002 Congress again took action. The Bipartisan Campaign Reform Act[109] attempted to "plug"[110] the

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Commerce, 494 U.S. 652, 660-61 (1990) (*overruled* by Citizens United v. Fed. Election Comm'n, 558 U.S. ___ 130, S. Ct. 876 (2010) (permitting a general prohibition on non-segregated independent campaign expenditures by corporations). Some have observed the Court's argument in *Austin* is uniquely aligned in the jurisprudence with the 'equality' theory of speech, arguing it indicates a new approach to corruption in the Campaign Finance literature. *See* David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236, 271-76 (1991). However, this argument has not aged well; later cases showed *Austin* to be an anomalous decision, and *Citizens United* openly overruled it. 558 U.S. at ___, 130 S. Ct. at 913. More importantly, the idea that the Court adopted a new theory of politics in *Austin* for any length of time is undermined by its continued support for the idea of politics as a competitive process. *See infra* note 110.

107. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387-95 (2000) (encapsulating the Court's continued definition of corruption as elected officials yielding to donors' interests). For a recent instantiation of this principle, see *Randall v. Sorrell*, 548 U.S. 230, 261 (2006) (striking down a state attempt to impose especially tight campaign finance restrictions in the absence of evidence or appearance of illicit quid pro quo).

108. For a discussion of how even the Court's more expenditure-restricting decisions (*Austin*) contribute to this broader logic, see DWORKIN, *supra* note 9, at 378-79 (arguing that *Bellotti* and *Austin* can be reconciled as seeking to ensure campaign practices do not "deprive citizens of information that might not otherwise be available to them"); Julian Eule, *Promoting Speaker Diversity:* Austin *and* Metro Broadcasting, 1990 SUP. CT. REV. 105, 109 (1990). These analyses suggest that even when the Court seemed — anomalously in the context of its other jurisprudence — to permit equalizing legislation, it was undertaken in defense of a competitive political dynamic.

109. Pub. L. No. 107-155, 116 Stat. 81 (*invalidated in part by* Citizens United v. Fed. Election Comm'n, 558 U.S. ___, 130 S. Ct. 876 (2010) (codified in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C. (2002)); *See generally* Richard Briffault, McConnell v. FEC *and the Transformation of Campaign Finance Law*, 3 ELECTION L.J. 147 (2004) (offering a comprehensive measure-by-measure description of BCRA).

particularly egregious gaps in the *Buckley* campaign finance regime (soft money and electioneering communication) while respecting the Court's constitutional instructions.[111] BCRA also demonstrated Congress' commitment to enact some deliberative anticorruption even in the shadow of *Buckley*. One specific concern was that soft money provided an unregulated opportunity to directly corrupt candidates.[112] This raised both competitive and deliberative concerns, as soft money could serve as a circuitous quid pro quo vehicle and provide a diffuse means by which private donors could influence candidates and parties. Likewise, unsourced communication raised both types of concerns. Since voters could not always trace the source of campaign information, their ability to make trusting or discerning political judgments was impaired.[113] This

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110. McConnell v. Federal Election Commission, 540 U.S. 93, 133 (2003) (*overruled in part by* Citizens United v. Fed. Election Comm'n, 558 U.S. __, 130 S. Ct. 876 (2010) (referring to the soft-money loophole, but the term is an accurate description of BCRA's general character). *McConnell* was the Court's initial and most comprehensive assessment of BCRA, and left most of the regulatory structure intact. Both BCRA and *McConnell* were, as contributions to the campaign finance debate, subjected to substantial criticism. Some argued that BCRA did not do enough to truly fix the campaign finance system. *See, e.g.*, Richard Briffault, *Reforming Campaign Finance Reform: A Review of* Voting with Dollars, 91 CAL. L. REV. 643, 645 (2003) (arguing that even after the BCRA was passed, candidates still needed large donors to be competitive). Others, however, attacked *McConnell* for failing to address First Amendment concerns with sufficient rigor and instead capitulating to its political overtones. *See, e.g.*, Richard L. Hasen, Buckley *is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. PA. L. REV. 31, 60-63 (2004) (criticizing the Court's "blanket calls for deference" towards the legislature in the *McConnell* majority opinion); Bruce Cain, *Reasoning to Desired Outcomes: Making Sense of* McConnell v. FEC, 3 ELECTION L.J. 217 (2004) (describing the Court's analysis and backwards reasoning in *McConnell* as political, thus making the Court susceptible to political control).

111. *See* H. R. REP. 107-131, at 48 (2002), *reprinted in* 2002 U.S.C.C.A.N. 106, 121 (minority views of Steny H. Hoyer, Chaka Fattah, and Jim Davis) ("The [BRCA] . . . addresses two of the most serious ills infecting American political campaigns today: (1) unregulated soft money contributions and (2) undisclosed issue advocacy."). *See also McConnell*, 540 U.S. at 122-30 (providing extensive descriptions of both the soft money and issue advertising challenges).

112. *See* H. R. REP. 107-131, at 5, *reprinted in* 2002 U.S.C.C.A.N. 106, 110.

113. *See id.* at 50, 2002 U.S.C.C.A.N. at 123.

> As long as pseudonymous groups are able to communicate to the electorate, the ability of the electorate to judge the legitimacy of

had competitive implications — the lack of clarity reduced accurate preference expression. Yet such communication without accountability also creates a venue for aggressively private, often highly confrontational political debate, which increasingly polarized politics and made the respectful discourse central to deliberation difficult.[114]

BCRA addressed these problems by restricting soft money donations and replacing *Buckley*'s 'magic words' formula with a more precise methodology for identifying independent electioneering. However, as a tradeoff, BCRA permitted increased hard money donations to candidates. If Congress could not ensure a broadly public campaign environment (an original goal of the 1974 FECA), it would settle for one in which the private elements were at least transparent and controlled, and the most viciously partisan elements perhaps ramped down. Thus BCRA sought to subtly reestablish a balance between competitive and deliberative anticorruption. BCRA permitted a higher level of transparently competitive quid pro quo influence (through raising the hard-money donation limits),[115] but in exchange sought to

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> the message that is being offered is seriously weakened. Voters cannot confidently determine how much credibility to lend to a communication when they do not know the source of the communication. In short, without real disclosure of the sources of money funding sham issue ads, the ability of the voters to make informed decisions is severely undermined.

Id.

114. For a classic example of such an ad, see the Bill Yellowtail ad reproduced in Jack Beatty, *A Sisyphean History of Campaign Finance Reform*, ATLANTIC, *available at* http://www.theatlantic.com/magazine/archive/2007/07/a-sisyphean-history-of-campaign-finance-reform/6066/ (last visited Mar. 2, 2011)

115. Bipartisan Campaign Reform Act, Pub. L. No. 107-155, § 307, 116 Stat. 81, 87-88 (invalidated in part by *Citizens United*, 558 U.S. __, 130 S. Ct. 876) (codified in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C. (2002)). Admittedly, many have criticized this measure as either purely political or incumbent protection. *See* H. R. REP. 107-131, at 2, 2002 U.S.C.C.A.N. at 107 (The disparate treatment of Representatives and Senators is "cynically included for no reason other than its sponsors' belief that it increases their chances of cobbling together a majority on the house floor." Notably, the main Committee on House Administration Report from which this observation is derived was critical, rather than supportive of, BCRA.); Charles J. Cooper & Derek L. Shaffer, *What Congress "Shall Make" The Court Will Take: How* McConnell v. FEC *Betrays the First Amendment in Upholding Incumbency Protection Under the Banner of "Campaign Finance Reform,"* 3 ELECTION L.J. 223, 225-28 (2004) (arguing that the

eliminate the non-accountable impact of soft money and electioneering. This curtailed diffuse, difficult-to-trace influences and correspondingly placated candidates by increasing regulable (by capping and disclosure) hard money donations. Because soft money and electioneering are not deployed directly to candidates, they are more difficult to use as the (real or apparent) vehicles of quid pro quo exchange. They induce candidates to be generally private-regarding rather than public-regarding — a type of deliberative corruption.[116] By restraining such effects BCRA sought again to balance direct quid pro quo regulation and promotion of a deliberative political environment, albeit in a hamstrung form compared to 1974 FECA.

The Court obliquely condoned the deliberative character of some BCRA anticorruption measures in *McConnell v. Federal Election Commission*, the initial judicial review of BCRA. *McConnell* upheld most of the substantive legislation, and its dicta suggested the Court might be growing amenable to the deliberative view of corruption.[117] The Court acknowledged that campaign finance regulation may seek to do more than prohibit quid pro quo, specifically approving of measures that promoted public-minded behavior and purity of the campaign atmosphere. The Court did not indicate that its broader view of democratic participation extended to its formal definition of corrupt behavior, leaving it unclear if it still adhered to a competitive view of

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BCRA was passed to stop "negative attack" ads and "protect incumbents against meaningful electoral challenge"); Issacharoff, *supra* note 53, at 190 (noting that the BCRA increased limits on hard money, which is easier for incumbents to raise).

116. That is, soft money and electioneering, if they were to corrupt, would do so in a manner that is more closely analogous to deliberative corruption. In response to the benefit or harm of campaign funds quasi-independently deployed, candidates might subtly behave in a more private-regarding manner, both towards soft money contributors or electioneering advocates (in order to seek their favor) and towards themselves (because they need to self-interestedly consider the effects of such uncontrolled campaign resources). BCRA showed a preference for corrupt behavior, if it were to occur, to occur through open competitive channels.

117. In justifying a form of scrutiny more forgiving to campaign regulation, the Court in *McConnell v. Federal Election Commission*, 540 U.S. 93, 137 (2003), indicated "Because the electoral process is the very 'means through which a free society democratically translates political speech into concrete governmental action,' contribution limits, like other measures aimed at protecting the integrity of the process, tangibly benefit public participation in political debate." (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 401 (2000) (Breyer, J., concurring)).

corruption.[118] However, the case hinted at possible future comity between Courts and Congress regarding anticorruption enforcement.

D. A New Extreme in Competitive Retrenchment: Citizens United

However, cracks quickly began to appear in the détente suggested by *McConnell*, first through the *Wisconsin Right to Life* cases.[119] The first case in the series clarified the procedural point that *McConnell* did not include a blanket prohibition of as-applied challenges to BCRA's regulation of electioneering communication.[120] The subsequent *WRTL II*[121] inquired if a particular advertisement comprised express advocacy equivalent to a contribution, or issue advertising that fell beyond the zone of governmental regulation.[122] In a fractured

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118. Commentators on *McConnell* have disagreed regarding how much the Court expands its definition of corruption. *See* Hasen, *supra* note 110, at 57-60 (2004) (criticizing *McConnell* for claiming fidelity to the *Buckley* anticorruption rationale while simultaneously so loosening the definition of corruption that the Court's constitutional analysis is compromised). *Cf.* Cain, *supra* note 110, at 219-20 (observing that the use of the anticorruption rationale to justify BCRA risks "calling everything corruption, or implied corruption" but that the Court seemingly intends to permit the BCRA regulations as "an analogy to conflict of interest regulation"; however, Cain notes that the Court is potentially on the "slippery slope" of broadening the definition of corruption to the point of uselessness); Briffault, *supra* note 109, at 162-67 (observing the broadening of the definition of corruption in *McConnell* but describing a broadening that is best characterized as a redefinition of the terms that comprise a competitive notion of quid pro quo, and in particular expanding the idea of payoff); Dennis Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1037-38 (2005) (lauding the Court for recognizing a new concept of corruption). Hasen and Thompson see in *McConnell* a broadening of corruption to include electoral political integrity. Conversely, Cain and Briffault note the *potential* for such a move but conclude the Court still defines corruption as quid pro quo or quid pro quo like acts, even if it is loosening the definitional terms.

119. Wis. Right to Life v. Federal Election Comm'n (*WRTL I*), 546 U.S. 410 (2006); Federal Election Comm'n v. Wis. Right to Life (*WRTL II*), 551 U.S. 449 (2007).

120. *WRTL I*, 546 U.S. at 410.

121. *WRTL II* had only two justices support the Court's opinion. 551 U.S. at 455. Three others concurred in the judgment, but would have struck down *McConnell* directly; four others dissented. *Id.* at 482-504.

122. *Id. at* 456.

opinion, the Court rejected a number of subtle tests[123] to conclude that ads were regulable under BCRA only if they were the unequivocal functional equivalent of express advocacy.[124] The Court's first concern was ensuring political speech was not chilled;[125] however, it also reiterated the conception of corruption as quid pro quo[126] and declaimed any suggestion that *McConnell* suggested otherwise.[127] Most subtly, the Court suggested a concept of electoral decision-making based on competitive information-gathering and individual preference-selection.[128] In sum, the decision reinforced the priority of maximum breadth of unrestricted free speech and the associated treatment of corruption.

On its face, the impact of *WRTL* was quite localized; it merely encouraged corporations and organizations that engaged in campaign advocacy to claim their ads were not the functional equivalent of express advocacy, and thus fell outside the range of BCRA's electioneering prohibition. However, this prohibition was originally designed to advance deliberative political conduct by establishing a broad zone of public-regardingness. By applying a narrowly competitive test to determine if ads were "functional express advocacy," and thus fell under this regulation, the Court stripped the prohibition of much of its deliberative character.

Three years later, the Court nullified a significant element of BCRA directly while articulating its most staunchly competitive stance yet. In *Citizens United v. Federal Election Commission*,[129] the Court

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123. *Id* at 464-69. Among the rejected tests was an intent-based one, which would mesh well with the deliberative goal of purifying motivation. *Id.* at 467-69.

124. *Id.* at 469-70 ("[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.").

125. *See id.* at 469, 481-82.

126. *Id.* at 478-79 ("Issue ads like WRTL's are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them. To equate WRTL's ads with contributions is to ignore their value as political speech.").

127. *Id.* at 479-80; *see* McConnell v. FEC, 540 U.S. 93, 206 n.88 (2003) (*overruled in part by* Citizens United v. Federal Election Commission, 558 U.S. ___, 130 S. Ct. 876 (2010).

128. *See* WRTLII, 551 U.S. at 470 ("An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose – uninvited by the ad – to factor it into their voting decisions.").

129. 558 U.S. ___, 130 S. Ct. 876 (2010).

ruled restriction of independent corporate campaign expenditures to be facially unconstitutional,[130] eliminating a central pillar in the regulation of campaign spending.[131] As in *Buckley*, the Court's decision was premised primarily on First Amendment rights and on the principle that corporations possess the same constitutional right to speech as individuals;[132] BCRA's regulation of campaign speech by corporate entities was equivalent to an "outright ban" on speech.[133] Secondly, the Court's decision was based on a theory of corruption — public figures act corruptly only when they participate in the most blatant quid pro quo.[134]

The Court's reasoning began with competitive democratic theory. It first presented the indisputable proposition that "[s]peech is an essential mechanism of democracy;" it allows "citizens to inquire, to hear, to speak, and to use information to reach consensus" that comprises "a precondition to enlightened self-government and necessary means to protect it."[135] Ironically, this language evokes the ideals of deliberative democracy, particularly the suggestion that the goal of discourse is to reach "consensus." However, the Court had an unequivocally competitive vision of political communication: it strongly condemned any government efforts to control or shape communication,[136] holding that the restrictions at issue interfered with the "open marketplace of ideas".[137] By this model, ideal democracy selection consists of

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130. *Id.* at ___, 130 S. Ct. at 917; *See id.* at ___, 130 S. Ct. at 888.

131. *See* Bipartisan Campaign Reform Act, Pub. L. No. 107-155, § 203, 116 Stat. 81, 91-92 (invalidated in part by Citizens United, 558 U.S. __, 130 S. Ct. 876) (codified in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C. (2002)); *see also* 2 U.S.C. § 441b (2006).

132. *Citizens United*, 558 U.S. at ___, 130 S. Ct. at 904 (citing First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) and Buckley v. Valeo, 424 U.S. 1, 48-49 (1976)).

133. *Id.* at ___, 130 S. Ct. at 897.

134. *Id.* at ___, 130 S. Ct. at 901-02.

135. *Id.* at ___, 130 S. Ct. at 898.

136. *See id.* at ___, 130 S. Ct. at 899 ("The Government may not . . . deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.").

137. *Id.* at ___, 130 S. Ct. at 906 (criticizing Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990)) (internal citation omitted). For a further claim that more speech equals good speech, see *supra* note 33.

maximally-informed consumers making preference-optimizing choices in a political market.

With this theoretical framework, the Court went beyond strictly scrutinizing government speech restrictions for chilling effect. It posited that First Amendment rights are most valuable when they facilitate political agonism, particularly between voters and government.[138] This entails two presumptions prejudicial against deliberative anticorruption: first, that public structuring of electoral communication is government oppression, rather than a collective decision to order public life; and second, that there is a fundamental dichotomy between the citizenry and the government. This position impairs governmental efforts to promote deliberative political debate because it holds such efforts impede the private autonomy upon which political justice relies.[139]

The Court then articulated its most narrowly imagined theory of competitive corruption. The Court began from the premise, familiar from *Buckley*, that corrupt acts must assume a quid pro quo form, and that independent expenditures pose less of a threat because they are more difficult to coordinate than corrupt payoffs.[140] However, beyond the practical difficulties, the Court then concluded that *no* independent expenditures can "give rise to corruption or the appearance of corruption."[141] The Court justified this position through a brazenly competitive notion of representation:

> The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt . . . . "Favoritism and influence are not . . .

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138. *Citizens United*, 558 U.S. at ___, 130 S. Ct. at 898 ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people . . . . Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.").

139. *Id.* at ___, 130 S. Ct. at 904-05 ("The Constitution . . . confers upon voters, not Congress, the power to choose the Members of the House of Representatives . . . it is a dangerous business for Congress to use the election laws to influence the voters' choices.") (quoting Davis v. Fed. Election Comm'n, 554 U.S. ____, ____, 128 S. Ct. 2759, 2774 (2008)).

140. *Id.* at ___, 130 S. Ct. at 902 ("[A]bsence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.") (quoting Buckley v. Valeo, 424 U.S. 1, 47-48 (1976)).

141. *Id.* at ___, 130 S. Ct. at 909.

> avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness."[142]

This stance — a logical outgrowth of the Court's marketized democratic theory — necessarily curtails deliberative anticorruption.

The Court's other holdings and dicta further buttress this interpretation. *Citizens United* upheld disclosure requirements for expenditures,[143] validating informed citizen preferences as a sufficient defense against bad political outcomes and self-serving motives.[144] Indeed, the Court's theory of corruption did not even have the apparatus to recognize as undesirable the motive-shifting of leaders in response to self-interest, so long as the pressure to act came from constituents in a manner that did not violate the bright-line quid pro quo rule against direct donations.

The cumulative effect of *Citizens United* was to strip federal campaign finance regulation to a competitive core. The Court eliminated a central pillar in BCRA's modestly deliberative regime and the opinion's attendant rhetoric suggests other deliberative measures will meet a similar fate.[145] Furthermore the Court articulated a starkly

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142. *Id.* at ___, 130 S. Ct. at 910 (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 297 (2003) (Kennedy, J. concurring in part and dissenting in part)). The Court goes on to suggest that this position is fundamental to a correct reading of the First Amendment, revisiting the root of the divide in individual rights: "generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle." *McConnell*, 540 U.S. at 297.

143. *Citizens United*, 558 U.S. at ___, 130 S. Ct. at 914-17.

144. *Id.* at ___, 130 S. Ct. at 910.

145. This predictive claim ignores the partisan divide that underlies *Citizens United*; as a hotly contested 5-4 decision, under a Democratic president it may be a literal heartbeat away from reversal. But so far the various political permutations of

economic theory of democracy: that good government is a mechanism for converting private interests into state action. In light of this, the Court's sympathy for deliberative theories of democracy and anticorruption expressed in *Austin* and, less dramatically, in *McConnell,* appears anomalous or outdated.

Citizens United also marked a fitting coda to the battle over campaign finance that began with *Buckley*. In *Buckley*, the Court laid out its basic position — campaign regulation that infringes upon substantial First Amendment rights is impermissible unless the governmental interest is preventing explicit quid pro quo. *Citizens United* pushed this position to its logical extreme by defining explicit quid pro quo as the only typologically corrupt conduct, and suggesting that preventing such quid pro quo is the only legitimate goal of direct electoral regulation. While this position has its origins in the Court's zealous protection of individual rights, the implications for the anticorruption are striking: judicial decisions have nullified deliberative anticorruption efforts in the campaign finance realm for almost forty years.

IV. OFFICIAL CORRUPTION: THE BATTLE OVER HONEST SERVICES

The evolution of law on official corruption — in the broadest terms, official action by a governmental figure taken on account of an illicitly private benefit[146] — has taken a meandering path. Official corruption legislation has not enjoyed the consistent attention and coherent consideration of the campaign finance narrative[147] —

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the Court have not resulted in any change to the Court's commitment to competitive democracy and anticorruption.

146. Adequately defining official corruption lies at the center of the Court-Congress debate; this definition merely provides a big-tent starting point. The key distinction between official corruption and campaign finance is that the former involves acts taken by officials for private gain, and the latter by candidates for campaign contributions. As *McCormick* and *Evans*, discussed *infra* Part IV.B., demonstrate, this is often a blurry line in practice.

147. At a high level of abstraction, official corruption and campaign finance corruption doctrines merge. Ultimately, both ask what duties do public figures owe their constituents, and what external obligations, influences, or gifts might prevent them from fulfilling these duties? Campaign finance corruption doctrine addresses the electoral process and how private individuals become public fiduciaries. Official corruption doctrine inquires into the propriety of acts taken under the guise of

congressional legislation has been diverse and piecemeal,[148] the Court's rulings have been sporadic and frequently unrelated, and the entire dispute has failed to engender much of an ideological or jurisprudential firestorm.[149] Moreover, the most conspicuous line of cases on federal

official government action. Both seek to establish standards of political accountability and good representation. *See generally* Lowenstein, *supra* note 33, at 795-828 (defining corruption in the context of political bribery and campaign contributions and discussing how the two intersect); Lowenstein, *supra* note 46. For a general theoretical discussion, see Philp, *supra* note 7, at 440. For an attempt to use campaign finance to inform the less well developed official corruption literature, see George Brown, *The Gratuities Debate and Campaign Reform: How Strong is the Link?,* 52 WAYNE L. REV. 1371, 1373 (2007).

148. *See* Peter Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 ARIZ. J. INT'L & COMP. L. 793, 798-99 (2001) (characterizing federal anticorruption law as a "hodgepodge," listing the various measures, and observing the lack of an overarching scheme); Michael W. Carey, Larry R. Ellis, & Joseph F. Savage, Jr., *Federal Prosecution of State and Local Public Officials: The Obstacles to Punishing Breaches of the Public Trust and a Proposal for Reform, Part One,* 94 W. VA. L. REV. 301, 324-33, 354 (1991-92) (providing a descriptive overview of federal anticorruption law, and arguing for their consolidation in a single statute). For an explanation of why politicians undervalue coherent approaches to anticorruption, see generally John Dumbrell, *Corruption and Ethics Codes in Congress: Ethics Issues in the U. S. Congress*, 6 CORRUPTION & REFORM 147 (1991).

149. The official corruption cases have raised various issues tangential to the actual nature of anticorruption enforcement. Perhaps most salient of these tangential issues has been the jurisdictional question: How much of a nexus is necessary between a corrupt act offense and the federal government to permit federal prosecution? Federalism concerns are especially salient following the strict reading of the commerce clause. *See* United States v. Lopez, 514 U.S. 549, 561-68 (1995). Recent Supreme Court cases in the official corruption context have affirmed broad federal jurisdiction. *See* Sabri v. United States, 541 U.S. 600, 604-06 (2004); Salinas v. United States, 522 U.S. 52, 58 (1997) (both affirming that federal jurisdiction under 18 U.S.C. § 666 only requires a relationship between bribe-receiving party and state agency or project receiving federal funding); *see* George Brown, *Carte Blanche: Federal Prosecutions of State and Local Officials after* Sabri, 54 CATH. U. L. REV. 403, 404-05 (2005) (arguing *Sabri* and *McConnell* demonstrate that the Court believes it is the duty of the federal government to prevent corruption).

One unanswered question from *Weyhrauch* is if a state law violation is a prerequisite for federal honest services prosecutions. The non-engagement of the Court with this particular federalism issue is surprising, though the limitation of honest services to bribery may alleviate some of the exigency, as unequivocal bribery is almost universally criminal. Still, the Court seems to implicitly grant the honest-services fraud statute, § 1346, unique federal anti-bribery jurisdiction over

anticorruption law — the honest services cases — has been predicated on individual due process rights and questions of statutory interpretation, and has not directly addressed the definition of corruption. In the campaign finance context, the Court explicitly balanced individual First Amendment rights against government interest in anticorruption, and thus addressed the nature and efficacy of anticorruption measures. Conversely, in the honest services cases, individual rights have served as a simple bar to prosecution, obviating the inquiry into the nature of corruption. Yet, because the honest services cases have curtailed deliberative anticorruption, they have mirrored the campaign finance cases in their impact upon federal anticorruption. The Court has twice pruned down 18 U.S.C. § 1341, the most wide-reaching federal anticorruption law, on grounds that it evoked vagueness and notice concerns. This section begins with the history of § 1346 and its predecessor, § 1341, climaxing with the *Skilling* series. It then reviews the judicial treatment of other federal official corruption laws, in order to demonstrate the consistently competitive nature of the Court's underlying theory.

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state and local offenders. Skilling v. United States, 561 U.S. ____, ___, 130 S. Ct. 2896, 2934 n.45 (2010). *Cf.* Sorich v. United States, 555 U.S. ___, ___,129 S. Ct. 1308, 1310 (2009) (denying cert.) (Scalia, J., dissenting) ("Is it the role of the Federal Government to define the fiduciary duties that a town alderman or school board trustee owes to his constituents?"). *See also* Sara Sun Beale, *Comparing the Scope of the Federal Governments Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L.J. 699, 700 (2000) (observing honest services law regulates state and local officials more harshly than federal law regulates federal officials); Roderick M. Hills, *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?*, 6 THEORETICAL INQ. L. 113, 114-15 (2005) (arguing federal prosecution of otherwise non-federal state and local corruption undermines local democracy and damages the federalism balance). A related question is if honest services creates federal common law. *See* John Coffee, *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 431-32 (1998).

A. The Battle over Honest Services: McNally, Skilling, *and the Latest Demise of § 1341*

At the highest level, honest services has been shaped by two Supreme Court cases and a terse congressional act. The first case, *McNally v. United States*,[150] struck down the expansive use of a long-standing law, 18 U.S.C. § 1341, which prosecutors had cultivated as a powerful deliberative anticorruption tool, on the grounds such use was not the original intent of the law.[151] Congress quickly responded with 18 U.S.C. § 1346, which restored § 1341 to its pre-*McNally* contours. In the final case, *Skilling*, the Court, again guided by due process concerns, constrained the breadth of § 1346, effectively reducing it to a competitive anticorruption law.[152] This sequence mirrors the conflict over anticorruption in campaign finance law. Even more clearly than in the campaign finance realm, the Court has intervened in honest services law to protect individual rights. As a result, the Court's impact on the competitive-deliberative divide in the honest services context has been especially oblique. Yet this only highlights that the competitive-deliberative divide reflects differing foundational investments.

Section 1341 emerged as a potent deliberative anticorruption tool only thanks to textual ambiguities in a century-old anti-fraud law.[153] The statute imposes severe criminal penalties upon "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses", proceeds to use interstate mails[154] or telecommunications[155] to advance

150. 483 U.S. 350 (1987).

151. *Id.* at 359-60.

152. *Skilling*, 561 U.S. at ___, 130 S. Ct. at 2928 (2010).

153. The core prohibition of the law, against "any scheme or artifice to defraud" was first codified in an 1872 reorganization of the postal laws; a 1909 revision added the prohibition against obtaining money or property by false pretences. The 1909 addition codified language from a late 19th century case, *Durland*. *See McNally*, 483 U.S. at 356-57 (citing Durland v. United States, 161 U.S. 306, 312-14 (1896)). *See* Jed Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 779-86 (1980) (providing early history of the mail fraud statute). The debate between broad and strict interpretations of the mail use requirement in some respects paralleled the current deliberative-competitive conflict. *Id.* at 816-20.

154. 18 U.S.C. § 1341 (2010). The entirety reads:

such a scheme. The statute can be read as creating an offense with two necessary conditions, and thus prohibit fraudulent use of mails to obtain property. Alternately, it can be read disjunctively, with the prohibition on "obtaining money or property by means of false or fraudulent pretenses" criminalizing one offense, and the prohibition on "schemes or artifices to defraud" criminalizing another. The second prong of the disjunctive reading criminalizes any fraudulent action, even if there is no harm to the wronged party, thus creating the intangible right to honest services. It was not until the 1940s[156] that courts began to apply the disjunctive reading, but by the early 1980s,[157] the Courts of Appeals had universally

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> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Id.

155. 18 U.S.C. § 1343 (2010) (creating an identical offense for wire fraud).

156. *See* Shushan v. United States, 117 F.2d 110, 115 (5th Cir. 1941).

157. By 1982, all Courts of Appeals accepted honest services fraud. Daniel Hurson, *Limiting the Federal Mail Fraud Statute — A Legislative Approach*, 20 AM.

embraced the disjunctive reading and with it the intangible right to honest services.

In its original form, the intangible right to honest services had the breadth and adaptability to be a potent and uniquely deliberative anticorruption tool.[158] In the public service context, the law could plausibly reach any behavior where a public official betrayed the duties owed to the polity. This underspecification allowed for an investigation of deeper political intentions;[159] enforcement agents and courts were not limited to condemning a predefined set of illicit behaviors but could adaptively target any conduct displaying excessively private-regarding motives.[160] The breadth of the law could also encourage deliberation

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CRIM. L. REV. 423, 456 (1983). For a more extensive discussion of the history of 1341, see *Skilling*, 561 U.S. at ___, 130 S. Ct. at 2926-27.

158. In practice, honest services emerged as a uniquely deliberative tool in the federal arsenal, insofar as it allowed far broader prosecution of self-dealing and conflict of interest violations. Conflict of interest by federal officials is governed by more precise (i.e. competitive) federal laws and regulations. *See, e.g.*, 18 U.S.C. § 203 (2006) (setting forth the rules of compensation for Members of Congress). Thus, there exists virtually no other federal law that reaches conflict of interest among state and local officials. *See* Beale, *supra* note 149, at 714 (observing "the potential for honest services prosecutions to reach conduct that would not fall within the criminal statutes that govern the conduct of federal officers and employees"). *See also* Sorich v. United States, 555 U.S. ___, ___, 129 S. Ct. 1308, 1310 (denying cert.) (Scalia, J. dissenting) (criticizing the federal government's role in defining duties of local officials, especially in the area of honest services).

159. *See* Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 161 (1994) (observing that honest services came to prohibit "a state of mind").

160. Justice Kennedy broached the idea that anticorruption law should focus on actual intent rather than legal formalities in *Evans v. United States*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring). Addressing the general question of when a payoff is a bribe, he noted

> The criminal law in the usual course concerns itself with motives and consequences, not formalities. And the trier of fact is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor.

Id. The fixation on jury instructions runs through *McCormick* as well and is the core of the dissent: "the instructions . . . properly focused the jury's attention on the critical issue of the candidate's and contributor's intent." McCormick v. United States, 500 U.S. 257, 287 (1991) (Stevens, J., dissenting). The emphasis on triers of fact — juries — is a noteworthy one, because juries are one of the most well-

among potential offenders; aware that any violation of norms governing self-interested public conduct, rather than explicitly defined malfeasance, was potentially criminal, they might have reflected on the general normative legitimacy of their conduct. In this way, the underspecified law could encourage greater public-mindedness among public officials.[161] Finally, the openness of the law demanded that enforcement agents and courts provide interpretive guidance to define offenses, and reflect on the norms that should guide enforcement. The result was a continuous adaption in interpretation of the law. This process eventually created a body of judge-created law describing specific violations with some detail, encompassing conduct that would be deemed illicit even in the narrowest competitive readings (bribery) as well as more nebulous offenses such as self-dealing and non-disclosure.[162]

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established venues of deliberation in contemporary democracy. *See, e. g.*, Lyn Carson & Janette Hartz-Karp, *Adapting and Combining Deliberative Designs, in* THE DELIBERATIVE DEMOCRACY HANDBOOK 120-38 (John Gastil & Peter Levine eds., 2005). However, this emphasis on the substantial nature of corruption inquiries does not seem to be a consistent thread of anticorruption jurisprudence.

161. *See* Shiffrin, *supra* note 39, at 1222-25 (describing the benefits of standards over rules in inducing deliberation).

162. Most circuit courts included both bribery-style offenses and self-dealing as honest services offenses by the time of *McNally*, when, as described *infra* notes 156-60, the judge-created law was incorporated by statute. *See, e.g.*, United States v. Bohonus, 628 F.2d 1167, 1171 (9th Cir. 1980) (identifying bribery and self-dealing as the two forms of prohibited conduct even in the absence of material lost to the betrayed party); United States v. Margiotta, 688 F.2d 108, 122 (2d Cir. 1982) (holding failure by a de facto public official to disclose a secret agreement violated honest services obligations). *See also* United States v. Woodward, 149 F.3d 46, 62-63 (1st Cir. 1998) (post-*McNally* case assessing honest services law in several circuits, and concluding it encompassed conduct such as bribes and self-dealing such as non-disclosure); United States v. Rybicki, 354 F.3d 124, 139-144 (2d Cir. 2003) (examining pre-*McNally* jurisprudence, but with a focus on the private context). *Rybicki* had been described by another circuit court as the "leading opinion on honest-services fraud." United States v. Brown, 459 F.3d 509, 521 (5th Cir. 2006). The Seventh Circuit was the only pre-*Skilling* Court to dissent from this reading, instead adopting a misuse-of-position-for-private-gain standard. United States v. Sorich, 523 F.3d 702, 707-08 (7th Cir. 2008). Furthermore, courts had established that § 1341 was a specific intent crime, requiring a deliberate intention to defraud. *See, e.g.*, United States v. Warner, 498 F.3d 666, 691 (7th Cir. 2007) ("Mail fraud is a specific intent crime, and so defendants are entitled to introduce evidence of good faith or absence of intent to defraud." (citing United States v. Longfellow, 43 F.3d 318, 321 (7th Cir. 1994))); United States v. Alkins, 925 F.2d 541, 549-50 (2d Cir.

However, its history reveals the intangible right to honest services originated without direct congressional guidance or approval.[163] In light of this, the Court's succinct nullification of the intangible rights doctrine in *McNally* was first and foremost a reminder Congress is responsible for identifying crimes. *McNally* observed that fraud usually entails a loss of property by the victim, and neither the language of § 1341 nor the congressional record indicate otherwise.[164] The Court then held, by the rule of lenity, ambiguity in the statute must be interpreted in favor of the defendants absent explicit congressional intent.[165] Since it was unclear if § 1341 criminalized fraudulent conduct without property loss, and it would be more lenient towards defendants if it held property loss as a necessary condition, the rule of lenity led the Court to invalidate the intangible right.[166] The Court then indicated that if Congress wished

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1991) (noting that "[g]ood faith is a complete defense" to mail fraud because an individual must have the "requisite intent to defraud"). The specific intent requirement narrowed the scope of the honest services offenses, but also demonstrated § 1341's concern with motive, the main focus of deliberative anticorruption.

163. The fact that Congress failed to address § 1341's growing reach says little (at least before its affirmation by § 1346). *See* EINER ELHAUGE, STATUTORY DEFAULT RULES 169 (2008) (observing that there is "no effective lobby for narrowing criminal statutes," and thus that expansive readings of criminal laws usually go uncorrected by the legislature). Some had observed even before *McNally*, however, that § 1341 was exceptional in its breadth. Rakoff, *supra* note 153, at 771 (speaking as a white-collar prosecutor, described § 1341 as "our Stradivarius, our Colt 45 [sic], our Louisville Slugger, our Cuisinart — and our true love" in reference to its ability to reach a broad array of crimes).

164. McNally v. United States, 483 U.S. 350, 358-59 (1987) ("As the Court long ago stated, however, the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'") (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924).

165. *McNally*, 483 U.S. at 359-60. The majority wrote:

> The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language . . . . There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute. *Id.* (internal citations and quotations omitted).

166. *Id.*

to include such behavior in § 1341, it must "speak more clearly that it has."[167]

While *McNally* struck down a deliberative anticorruption law, it did so while applying well-established interpretive principles. The Court did not appraise the inherent legitimacy or efficacy of honest services or its deliberative character but only noted criminal sanctions (presumably whether deliberative or competitive) must be specified by Congress. The principles cited by the Court were potentially inauspicious for deliberative anticorruption, insofar as they favor clarity[168] and narrowness in judicial interpretation, perhaps to provide defendants with constitutionally mandated fair notice.[169] Thus these principles favor the crisply defined laws of competitive anticorruption and hamper the breadth and underspecification often characteristic of deliberative anticorruption.[170] Yet because *McNally* does not substantively address corruption law, it does not reveal the full impact of these principles on the competitive-deliberative conflict.

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167. *Id.* at 360.

168. *Id.* (declining to leave the "outer boundaries [of § 1341] ambiguous").

169. The Court has held in the past that the rule of lenity reflects due process concerns regarding notice. *See, e.g.*, United States v. Lanier, 520 U.S. 259, 266 (1997) (holding that "rule of lenity[] ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered"); United States v. Bass, 404 U.S. 336, 348 (1971) (finding that "'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.'") (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)). *See also* Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 471 (1989) (classifying the rule of lenity as the "most celebrated" due process principle that ensures rule of law). For a description of the constitutional roots of the fair notice doctrine, see Bouie v. City of Columbia, 378 U.S. 347, 350-52 (1963). Others have suggested the rule of lenity is not actually a fair notice doctrine, but serves other principles. *See, e.g.*, Dan Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345 (1994) (suggesting lenity is actually an incarnation of a non-delegation principle); ELHAUGE, *supra* note 163, at 168-76 (arguing the rule of lenity is designed to elicit legislative preferences).

170. It is a difficult theoretical question — touched on briefly, *infra* section V, but in full beyond the scope of this article — if the role of courts in interpreting law and creating legal rules necessarily undercuts establishment of a deliberative regime. This is a question ultimately of the nature of legal interpretation. *See generally* Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109 (2008) (discussing the Hart-Fuller debate and the determinacy of rules).

Congress acted the next year on *McNally*'s invitation to "speak more clearly," preserving honest services with its deliberative qualities intact. 18 U.S.C. § 1346 restored § 1341 to its pre-*McNally* state without any elaboration upon the concept of honest services.[171] Legislative history suggests Congress considered a bill that defined honest services offenses in more detail, but ultimately chose to validate the pre-*McNally* state of the law without adornment.[172]

Congress' restoration of honest services to its original form suggests a conscious commitment to deliberative anticorruption.[173] Congress retained the breadth and flexibility of the law, allowing enforcement agents and courts to adaptively inquire into the motives of public officials. This incorporated shifting norms into the enforcement and legal regime.[174] Thus Congress ensured honest services would

171. The law states in full: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346 (1988).

172. *See* The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (1988). Congressional testimony indicated the Senate wished to pass a more extensive bill, the "Anti-Corruption Act of 1988," which described honest services offenses in more detail. At least one version of the bill debated in the Senate imposed the requirements of either gain to the offender, or an intention to cause loss or harm to the affected organization. 134 CONG. REC. 23,954 (1988) (statement of Sen. Biden). However, other points of debate in the Senate suggested that Congress did have the consistent intention of passing a broad law. *Id.* at 15,046 (statement of Sen. McConnell) (endorsing language designed to include a broader array of offenses in legislation designed to return honest services to the ken of § 1341). And early in the legislative process, advocates of overturning *McNally* evidently had in mind using § 1341 to guarantee good government and public integrity, rather than narrowly define crimes. 133 CONG. REC. 32,959-61 (1987) (testimony of Rep. Conyers, suggesting it is the constitutional duty of Congress to protect the polity from all forms of corruption). Regardless, analysis of the pressures that shaped the bill remain somewhat speculative — this legislation did not receive attention as extensive as the 1974 FECA — but by the time it was discussed in the House, the bill had been reduced to a bare overturning of *McNally*. 134 CONG. REC. 33,296-97 (1988) (testimony of Rep. Conyers).

173. This is especially true if the general hypothesis put forth by ELHAUGE, *supra* note 163, at 168-76, is correct and the purpose of the Court's use of the rule of lenity in *McNally* was to elicit congressional preference.

174. Following the passage of § 1346, lower courts turned to pre-*McNally* jurisprudence to define the law. *See supra* note 162. Those attempting to defend the law pointed to this to argue for § 1346's specificity in the face of vagueness claims. *See* Brief for the United States at 13-35, Weyhrauch v. United States, No. 08-1196

remain a fruitful deliberative forum for norm-assessment and promotion of public-regardingness.

After this resurrection, the intangible right to honest services endured harsh criticism on the grounds it was unconstitutionally vague, failed to provide fair notice, and gave excessive discretion to prosecutors.[175] When the Court finally addressed these criticisms in *Skilling* more than twenty years later, it hobbled honest services, citing, in particular, constitutional due process concerns. However, defying honest services' harshest critics, the Court declined to hold § 1346 unconstitutionally vague[176] and instead observed there was clear congressional intent "to refer to and incorporate the honest-services doctrine recognized in the Court of Appeals' decisions before *McNally*"

(U.S. Oct. 29, 2009), *available at* 2009 WL 3495337. However, the legislative history does not itself suggest Congress simply wished to statically instantiate pre-*McNally* litigation into law, as opposed to permit for the continual evolution of anticorruption law. *See supra* note 172.

175. Sorich v. United States, 555 U.S. ___, ___, 129 S. Ct. 1308, 1310 (2009) (denying cert.) ("[Section 1346] invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct.") (Scalia, J., dissenting); *cf.* Skilling v. United States, 561 U.S. ___ , ___, 130 S. Ct. 2896, 2935 (2010) (Scalia, J., dissenting) (repeating the claims and calling for § 1346 to be struck down as unconstitutional). *See also* Transcript of Overcriminalization and the Need for Legislation Reform, Testimony Before the H. Subcomm. on Crime, Terrorism, & Homeland Security at 507 (2009) (statement of Dick Thornburgh, former U.S. Attorney General), *available at* http://judiciary.house.gov/hearings /pdf/Thornburgh090722.pdf; Moohr, *supra* note 159 (suggesting honest services violates federalism, separation of powers, and the First Amendment); George Brown, *Should Federalism Shield Corruption? – Mail Fraud, State Law and Post-*Lopez *Analysis*, 82 CORNELL L. REV. 225, 299 (1997) (arguing, either presciently or causally that "the federalism problem can be greatly alleviated by looking to state law to define the content of honest services") (Scalia cites this article in his *Sorich* dissent, 555 U.S. at ___, 129 S. Ct. at 1310); Gregory Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137, 170 (1990) (arguing that if the courts or Congress do not define honest services post-*McNally*, that "federal prosecutors should develop guidelines clearly delineating the criteria for federal intervention in the prosecution of governmental and corporate corruption").

176. *Skilling*, 561 U.S. at ___, 130 S. Ct. at 2929-30. The Court did acknowledge that pre-*McNally* honest services appellate jurisprudence suffered from "occasion[al] disagreement," *id.* at ____, 130 S. Ct. at 2930, and that the constituent cases were "not models of clarity or consistency," *id.* at ____, 130 S. Ct. at 2929.

into the meaning of § 1341.[177] The Court noted that principle federal statutes should be saved, when possible, through limited construction.[178] It then applied this practice by paring honest services down to its "solid core."[179] It identified this core by consolidating the pre-*McNally* appellate holdings. Because the Courts of Appeals were unanimous that "bribes [or] kickbacks" constituted honest services offenses,[180] the Supreme Court interpreted only that area of unequivocal agreement as statutorily validated by § 1346. By so holding § 1346 to reach only bribery, *Skilling* reduced honest services to a narrowly competitive anti-bribery measure.

As in *McNally*, the Court did not make a substantive statement regarding the appropriate form of corruption law; formally, *Skilling* was an interpretation of congressional intent via the pre-*McNally* appellate case law. The Court acknowledged that the pre-*McNally* case law included conflict of interest violations as well as bribery, but dismissed the body of law as "amorphous."[181] Yet the real driver of the Court's reasoning appeared to be due process concerns, particularly vagueness.[182]

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177. *Id.* at ____, 130 S. Ct. at 2928.

178. *Id.* at ____, 130 S. Ct. at 2929 ("It has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to limiting construction.").

179. *Id.* at ___, 130 S. Ct. at 2930.

180. *Id.* at ___, 130 S. Ct. at 2933. For the Court's definition of bribery, see *id.* at ___, 130 S. Ct. at 2927 (citing United States v. McNeive, 536 F. 2d 1245, 1249 (8th Cir. 1976); United States v. Procter & Gamble Co., 47 F. Supp. 676, 678 (Mass. 1942)). Here, the Court uses the language of fraud in describing an offense similar to bribery. "When one tampers with [the employer-employee] relationship for the purpose of causing the employee to breach his duty [to his employer,] he in effect is defrauding the employer of a lawful right." *Skilling*, 561 U.S. at ___, 130 S. Ct. at 2926 (internal citations and quotations omitted).

181. *Skilling*, 561 U.S. at ___, 130 S. Ct. at 2932.

182. *Id.* at ___, 130 S. Ct. at 2931 ("Reading the statute to proscribe a wider range of offensive conduct [than bribery and kickbacks] . . . would raise the due process concerns underlying the vagueness doctrine."). For a judicial bibliography of the constitutional roots of the vagueness doctrine, see *Kolender v. Lawson*, 461 U. S. 352, 357-58 (1983) ("As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."). *See generally* H. PACKER, THE LIMITS OF CRIMINAL SANCTION 91-94 (1968). As with the rule of lenity, some have challenged the interpretation and justification of the vagueness

The Court was concerned § 1346 did not criminalize self-dealing and conflict of interest violations through a clear enough legislative mandate. The Court furthermore indicated that the identification of these type of conduct lacked sufficient "definiteness and specificity."[183] It was the potential breadth of these prohibitions that granted § 1346 a deliberative flexibility. The Court further indicated it was generally dubious of deliberative anticorruption measures on due process grounds; the Court went so far as to impute hypothetical legislative intent, speculating that if Congress had known a broader form of § 1346 would risk rendering the measure "impermissibly vague . . . . Congress, we believe, would have drawn the honest-services line, as we do now, at bribery and kickback schemes."[184] The Court verified this decision by citing the rule of lenity to hold that given the lack of explicitness in § 1346, it must be construed narrowly.[185] The analysis concludes by confidently asserting that by limiting § 1346 to bribery offenses, the Court has resolved any vagueness or due process concerns, as bribery is clearly defined, well-established criminal conduct.[186]

Thus, the Court's interpretation of § 1346 was driven by a desire to ensure constitutional viability as well as to reconstruct congressional intent (or perhaps to creatively interpret congressional intent in a manner that permitted such viability). Yet the Court elided any evidence in § 1346's construction or its legislative history that the measure was meant to be deliberative. Moreover, the Court implied that even if Congress explicitly established broad honest services offenses, but failed to specify the elements of the offenses with clarity and precision, the law would

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doctrine that have been traditionally offered, including by the Court. *See generally, e.g.,* Tony Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (discussing the inconsistencies among the holdings in cases where the Court used the "vagueness" standard to invalidate laws); John Calvin Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes,* 71 VA. L. REV. 189, 195-97 (1985) (discussing the role of the vagueness doctrine in criminal law).

183. *Skilling*, 561 U.S. at ___, 130 S. Ct. at 2933, 44 (providing an extensive list of questions the government proposal would have to resolve).

184. *Id.* at ___, 130 S. Ct. at 2931, 42.

185. *Id.* at ___, 130 S. Ct. at 2932-33.

186. *Id.* at ___, 130 S. Ct. at 2933 (citing Kolender v. Lawson, 461 U. S. 352, 357 (1983) (holding that with fair notice and arbitrary prosecution concerns addressed, §1346 pass constitutional due process muster).

have had fatal vagueness defects. This is a well-established application of the vagueness doctrine, but nonetheless demonstrates that the Court's interpretation of due process principles requires anticorruption laws to assume a competitive format.

Skilling is the clearest demonstration of the conflict between deliberative anticorruption and due process. The Court suggested that anticorruption measures must be precisely articulated to avoid vagueness defects. Because deliberative anticorruption law relies upon breadth, flexibility, and discretion — the core defects of vagueness — it appears the Court will require anticorruption laws to adhere to a competitive format. Furthermore, in light of *Skilling* and *McNally*, both based in lenity and recognizing constitutional protection of fair notice, it now appears a predecessor claim that due process will prevent deliberative anticorruption. The parallel with campaign finance is clear: years after cases that established the theoretical foundations for their recent decisions, the Court has recently — and more definitively — demonstrated that its treatment of individual rights is antithetical to deliberative anticorruption.

B. Trends in Corruption: Official Corruption before the Supreme Court

The substance of anticorruption law has been the Court's primary concern in neither of the main case lines considered so far. In the honest services context, the impact on anticorruption was indirect; in the campaign finance context, anticorruption was addressed only insofar as it was balanced against free speech. However, three modern cases — *McCormick, Evans*, and *Sun-Diamond* — have addressed the specific substance of public anticorruption.[187] While the cases do not comprise an especially coherent narrative and address fairly narrow black-letter questions, they provide some clarification of the Court's view of corruption. The decisions suggest the Court conceptualizes politics as a

187. A number of other cases have dealt with corruption, but have not involved on the substance of public corruption law. The most notable is the line of federal jurisdiction cases, described in detail, in *supra* note 149. Other cases have dealt with the connotations of the word "corrupt" as a modifier for a particular act, (i.e. corrupt persuasion), but have referred to a general state of evil-mindedness rather than specific betrayal of fiduciary trust. *See* United States v. Aguilar, 515 U. S. 593, 599-600 (1995).

market driven by self-interest (a position intimated in *Buckley* and openly expressed in *Citizens United*). Therefore, elected or appointed officials behave acceptably when they engage in private-regarding action, so long as they do not transgress explicit conditions of public service.

McCormick, the earliest of the three cases, overturned the conviction of a state representative for receiving bribe-like contributions on procedural grounds, but its ultimate reasoning demonstrated the Court's broadly competitive view of politics. A state representative was convicted under the Hobbs Act[188] for soliciting a contribution from a special interest group.[189] The appellate court concluded he was clearly soliciting a bribe rather than a legitimate campaign contribution and upheld his convictions. In reversing the Court of Appeals and remanding the case, the Court pointed to a procedural defect: the appellate court had affirmed the official had accepted a bribe on the basis of a factual determination that was never properly before a jury.[190] The deficiency of the jury instruction was a failure to define quid pro quo with sufficient

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188. 18 U.S.C. § 1951 (1994). The relevant part of the Act prohibits "extortion . . . under color of official right." The Hobbs Act was an addition to the Anti-Racketeering Act of 1934, a measure directed against organized violence, and specifically designed to expand its reach to violence by unions. Courts have, over the past fifty years, generally permitted it to be used against any economic crime, and its prohibition of extortion under "official right" has become a main federal anti-bribery tool. *See* McCormick v. United States, 500 U.S. 257, 266-67 (1991) (describing the expansion of the "color of official right" prong); Michael McGrail, Note, *The Hobbs Act After Lopez*, 41 B.C. L. REV. 949, 959-66 (2000) (providing a detailed history of the Hobbs Act). It is long accepted at common law that bribery and extortion are equivalent crimes. Evans v. United States, 504 U.S. 255, 260-62 (1992). *But see id.* at 280-82 (Thomas, J., dissenting) (suggesting that extortion and bribery were not seen as analogous crimes). *See generally* James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695 (1993) (ultimately holding it is logical to view bribery and extortion as overlapping crimes).

It is curious that the Court has permitted the federal government to expansively use the Hobbs Act while curtailing § 1341, though the conservative wing of the Court has questioned this expansion. *See McCormick*, 500 U.S. at 277 (Scalia, J., concurring); *Evans*, 504 U. S. at 290-91 (Thomas, J., dissenting). This may be explained by the Court's willingness to permit expansive anticorruption jurisdiction even as it constrains anticorruption substantive law. The Hobbs Act may provide jurisdictional reach, but the targeted behavior is basically bribery.

189. *McCormick*, 500 U.S. at 259-60. For a more incriminating reading of the facts, see *id.* at 281-82 (Stevens, J., dissenting).

190. *Id.* at 269-70.

narrowness. In order to convict an elected official under the Hobbs Act for what is claimed to be a campaign contribution, the Court held such payments must be made "in return for an explicit promise or undertaking by the official to perform or not to perform an official act" such that "the official asserts that his official conduct will be *controlled* by the terms of the promise or undertaking."[191] The Court further indicated "proof of a *quid pro quo* would be essential" for conviction.[192] While leaving it "not . . . impossible" for candidates to commit bribes while seeking campaign contributions,[193] *McCormick* raised a strikingly high standard for Hobbs Act prosecutions where an official can claim the offering was a campaign contribution,[194] particularly given the surreptitiousness or implicitness of much corrupt conduct.

McCormick's test for bribery is the epitome of narrowly competitive anticorruption law. The Court justifies the holding by presenting a fundamentally competitive theory of politics:

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after

191. *Id.* at 273 (emphasis added). The holding in this case was limited to the question of when Hobbs Act bribery convictions are not bribes because they are campaign contributions, and did not reach cases where such an exemption was not claimed. *Id.* at 268.

192. *Id.* at 273.

193. *Id. Cf. supra* note 142 and accompanying text (explaining that some favoritism and influence is unavoidable in a democratic system premised on responsiveness).

194. See *supra* note 33 and accompanying text, for a discussion of evidentiary difficulties. *See also* Evans v. United States, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring) ("[Anti-bribery] law's effect could be frustrated by knowing winks and nods.").

> campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation. It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion.[195]

This is a straightforward articulation of competitive democracy. Public duty is defined by the aggregative preference — which can be, in effect, purchased — of constituents, rather than the collective good or holistic norms. Moreover, the Court characterizes politics as a reciprocal market: politicians wish to be elected, and constituents wish to have governmental action taken on their behalf, so the two groups bargain to satisfy their preferences.[196] And it bears note that there is some irony in *McCormick*'s call for more explicit statutory language following *Citizens United* and *Skilling*. As this article has demonstrated, the Court has struck down on other grounds attempts to broaden anticorruption efforts.

Within a year, the Court faced a remarkably similar fact pattern and came to a substantively diametrical, if not formally contradictory, conclusion.[197] In *Evans v. United States*, a federal undercover agent made a contribution to a public official, who never openly demanded the money. The public official reported some of this money as a campaign

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195. *McCormick*, 500 U.S. at 272-73.

196. The dismissive remark on ethical obligations and the invocation of the 'real' practice of historical politics elicits the brand of competitive democracy described by Judge Posner, in *supra* note 6.

197. Lowenstein, *supra* note 46, at 130, ("[W]hether *Evans* actually modifies *McCormick*, and if so to what degree, is unclear."). *See also* Steven Yarbrough, *The Hobbs Act in the Nineties: Confusion or Clarification of the* Quid Pro Quo *Standard in Extortion Cases Involving Public Officials*, 31 TULSA L. J. 781, 816 (1996) (describing post-*Evans* Hobbs Act public official jurisprudence as "in disarray"). It is tempting to read the cases in a legal realist mold, and focus on the swings in individual justices: the justices who dissented in the respective cases formed two mutually exclusive groups.

contribution,[198] but was nonetheless convicted of violating the Hobbs Act.[199] The narrow legal question before the Court was if an official must have "demanded or requested the money, or . . . conditioned the performance of any official act upon its receipt" to violate the Hobbs Act, or if passive acceptance can suffice to prove quid pro quo.[200] Based on the common law definition of extortion,[201] the Court affirmed the conviction, concluding that passive acceptance is sufficient. The Court also held that an official need not fulfill the pro quo to commit the offense.[202] Furthermore, the Court rejected the requirement that an official must actively "induce[]" a party in order to extort it; the very possession of public power granted coercive power to the illicit official action.[203]

On its face, *Evans* merely established the minimum conditions to sustain an official's bribery conviction under the Hobbs Act — the trier of fact must find that the "public official has obtained payment to which he was not entitled, knowing that payment was made in return for official acts."[204] While subtle, the Court's focus on motive gives the opinion deliberative drift. So long as the official acted in a manner that the trier of fact believes to demonstrate an intention to exchange public action for illicit private gain, a Hobbs Act violation stands. The Court, in essence, concluded the trier of fact should generally assess the official's state of mind. Yet *Evans*' black-letter holding reveals that even when the Court faced clearly illicit corrupt behavior, permitted the conviction only by contorting the idea of quid pro quo to fit the facts. Thus, even if *Evans* hinted at a substantive deliberative theory of anticorruption, the Court insisted upon formal quid pro quo to support the conviction. This suggests the Court's discomfort with abandoning the foundation of competitive anticorruption.

The most recent federal case to substantively address corrupt behavior endorsed a competitive structure to anticorruption law. In *Sun-*

198. *See Evans,* 504 U.S. at 296 (Thomas, J., dissenting) (chastising the majority for failing to address evidence the transfer was a campaign contribution).

199. *Id.* at 257-58.

200. *Id.* at 258.

201. *Id.* at 259-67.

202. *Id.* at 268.

203. *Id.* at 266.

204. *Id.* at 268.

Diamond, a high-ranking federal official was accused of accepting gifts from a trade organization the official regulated,[205] thus violating the illegal gratuity provisions of 18 U.S.C. § 201.[206] The specific question before the Court was if a conviction for illegal gratuities receipt required the payoffs to the official to be connected to the performance of specific public acts. The Court concluded a gratuity must be connected to an "official act" performed by the public official, not merely the official's office or generalized "capacity to exercise governmental power or influence in the donor's favor."[207] The Court suggested that a broader interpretation would clash with a natural reading of the statute and might have "peculiar results," such as criminalizing trivial or sentimental tokens given to public officials.[208] The Court further indicated that more precise statutory language would be necessary to criminalize such broad swaths of behavior. Pointing to the wide array of corruption statutes that define other offenses, the Court concluded Congress would have spoken more precisely if it wished to criminalize the general receipt of gifts while in public office.[209]

Sun-Diamond offered a convincing reading of the illegal gratuities statute, insofar as "official act" and "official position" are not

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205. United States v. Sun-Diamond, 526 U. S. 398, 400-01 (1999). The donor was also charged in the case, and is the named defendant.

206. 18 U.S.C. § 201 (1994) defines two crimes, bribery and the less severe crime of giving or receiving unlawful gratuities. Both prohibit the "corrupt" transfer of a payoff to a public official with the intent to influence official action by that official, and in parallel prohibit the receipt of such by the public official. For gratuities, the nexus between the act and the payoff need not be as well-established; while a bribe requires a direct quid pro quo relationship between gift and act, an illegal gratuity only requires that the gift act as a reward for a future or past action. *Sun-Diamond*, 526 U. S. at 404. *See generally* Lowenstein, *supra* note 33, at 796-97 (breaking down the law on bribery and unlawful gratuity); Lowenstein, *supra* note 46, at 130-35 (analyzing the law on both bribery and illegal gratuities). Brown, *supra* note 147, at 1372, argues the statute is poorly drafted and confusing.

207. *Sun-Diamond*, 526 U.S. at 405-06 (emphasis and internal quotations omitted).

208. *Id.* at 406-07 (suggesting that a broader reading of 18 U.S.C. § 201 would criminalize a baseball cap given to a U.S. Cabinet member by a visiting high school principal).

209. *Id.* at 408-12 ("[A] statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.").

interchangeable concepts. Its holding resulted in a law that sweeps more narrowly, but this seems attributable to accurate judicial interpretation. That said, the case saw no impropriety in the receipt of substantial gifts by a high-ranking federal official who was to assess matters relevant to the donor, suggesting the Court was broadly tolerant of self-interested behavior by public official. Implications of the gifts' triviality aside, the donee in *Sun-Diamond* received thousands of dollars in gifts. However, the Court's broader competitive perspective is most apparent in its structural description of corruption law. The Court indicated the statute at issue "is merely one strand of an intricate web of regulations . . . . governing the acceptance of gifts and other self-enriching actions by public officials."[210] Each law ought to be interpreted as a "scalpel" rather than a "meat axe" so the "regulatory puzzle" fits together.[211] This description of an anticorruption regime is seminally competitive: corruption laws should be crisp and precise, defining specific offenses. Such a view curtails the possibility of broad or adaptive laws suited for general inquiry into motives or broad-based promotion of public-regardingness.

McCormick, *Evans*, and *Sun-Diamond* are a sufficiently diverse set of cases to render any generalizations tentative, at least on the holdings. *McCormick* is the most easily integrated into the existing narrative this article has constructed, providing additional evidence that the Court conceives of democratic representation as a self-interested driven, market-style dynamic. However, *Evans*' contrary holding in the context of such a similar fact pattern complicates any conclusion drawn from *McCormick*. At a broader level, the most striking pattern may be the more ambitious, structurally oriented, and ultimately normative accounts of law and politics offered by the competitive-outcome decisions. *McCormick* (in its defense of transactional relationships between officials and voters) and *Sun-Diamond* (in its depiction of a precisely woven anticorruption regime) both offered broader visions than *Evans*, which engaged in a narrow reconstruction of a particular term in the context of a single statute (and ultimately retreated to the definition of quid pro quo to support a corruption conviction). As such, the

210. *Id.* at 409.
211. *Id.* at 412.

competitive view may have more theoretical momentum than any deliberative anticorruption sentiment in the Court.

This point is particularly trenchant in the context of the fate of honest services. The Court's holdings reflected commitment to some of the most fundamental principles of individual rights protection and statutory interpretation. As a result, even if the subsequent effect on anticorruption law — pushing it towards narrowly competitive molds — was inadvertent, it was founded in well-entrenched judicial principles. The force of the Court's claims in *McCormick* and *Sun-Diamond* — reflective of core views on law and politics — reinforce this sense that this competitive tendency has powerful theoretical roots.

PART THREE: THEORETICAL ANALYSIS AND POLICY IMPLICATIONS

The conflicts over campaign finance and official corruption demonstrate a subtle but long-standing conflict between courts and Congress over anticorruption legislation. This section pursues three interpretive questions: why has this conflict occurred, what are the practical implications, and what is the appropriate direction for future policy? The first of the following sections considers possible underlying judicial motivations for ardently advancing a competitive anticorruption regime. The Court has generally played the role of spoiler in the conflict, thwarting deliberative legislation. While this article has observed a correlation between the protection of constitutional rights and the Court's antideliberative holdings, it is helpful to consider deeper structural reasons for the Court's position. The second section considers the implications of this struggle for the nature of democratic governance and the effects of various future efforts to reform anticorruption on such governance.

V. A UNIFIED VIEW OF THE INSTITUTIONAL STRUGGLE

A. The Generalized Picture: Balancing the Public and the Private

The two lines of law analyzed in this article reveal a distinct pattern in the judicial treatment of anticorruption.[212] When Congress has passed competitive measures,[213] the Court has typically taken no action. When, however, Congress has passed deliberative anticorruption measures, the Court has, by interpretation or outright invalidation, nullified them for violating various constitutionally protected individual rights.

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212. It is possible to discuss the perspective of Supreme Court anticorruption jurisprudence with a degree of coherence unavailable for congressional anticorruption legislation. Congress has passed a wide variety of legislation designed to fight corruption, ranging across the competitive-deliberative spectrum and unreflective of a single coherent regime or plan. *See supra* note 148. Consequently, making generalizations about congressional posture is difficult. However, this article has not claimed that Congress has adopted, either consciously or effectively, a specifically deliberative or competitive approach to anticorruption, or even chosen to assume a particular point on a spectrum between them. This article merely observes that, whenever Congress has, for whatever reason, chosen to pass deliberative anticorruption legislation, the Court has inevitably opposed it in favor of a competitive approach. This article can treat Congress as a black box which outputs various anticorruption measures, and the claim regarding judicial conduct has the same force.

That is not to say it is impossible to speculate as to why Congress has continued to pass deliberative legislation even in the face of judicial disapproval. Legislating against crime is always popular with the constituency, particularly legislation that will purportedly increase public accountability. In this respect, public corruption is low-hanging fruit; it is politically popular yet uncontroversial. Deliberative legislation, cutting in broad swaths, can be particularly robust or powerful, or at least appear so. This is an especially compelling explanation when there are historical pressures, such as Watergate. Secondly, without the particular constitutional interests of the Court, Congress just might be more willing to try a broad variety of measures, and some of these happen to be deliberative. Finally, Congress can use deliberative corruption legislation to punish its worst members and it can trust norms will not target the majority. Therefore, the majority of politicians wish to prevent a worse minority from exploiting formalist loopholes (essentially preventing internecine parasitism), and might do so through deliberative anticorruption laws.

213. Many congressional anticorruption laws are competitive in nature, attacking quid pro quo bribery or similar crimes with bright-line prohibitions. *See, e.g.*, 18 U.S.C. § 201 (2006); 18 U.S.C. § 666 (2006); 18 U.S.C. § 1951 (2006) (the Hobbs Act). Likewise, as demonstrated above, the competitive elements of 1974 FECA were left standing, and the honest services doctrine was converted to a competitive anticorruption law.

The direct impact has been straightforward: American anticorruption law is a competitive regime and facilitates competitive democratic practices.[214] Since neither Court nor Congress has provided a comprehensive account of what makes conduct corrupt, fully unpacking this position requires consideration of the baseline definition of corruption as the unacceptable influence of private motives on public decision-making.[215]

Since competitive democracy conceives of government as a particular arena in which individuals fulfill their individual preferences, the status of a political motive as private does not inherently vitiate it. Indeed, there are no truly "public" motives in competitive democracy, merely private ones[216] advanced in the political context. However, motives are condemned when they violate the rules of the public decision-making framework; this is necessary to protect the system's structural integrity. Yet the implication is that corrupt motives are unacceptable not because they violate norms of public-regardingness, but because, by disrupting the implementation of governance, they can harm the private individuals who constitute the polity. Corruption impairs the ultimate goal of politics: the accurate translation of aggregate private interest into governmental action. Competitive anticorruption laws are bulwarks against breaches of this system. Because their straightforward purpose allows them to be crisply delineated, they have tended to survive judicial review and its focus on vagueness and overbreadth.

Yet the Court's preference for competitive anticorruption is not coincidental. Because it conceptualizes corruption's harm in individual terms, competitive anticorruption is intelligible to an institution focused on the protection of individual rights. The Court has a foundational mandate to protect certain individual rights enumerated in the Constitution. These rights demand government non-interference with certain zones of private conduct — much as competitive anticorruption seeks to ensure that governmental processes adequately reflect constituents' private interests. Thus competitive anticorruption measures

214. *See supra* Sections I.A, II.C.

215. *See supra* Section II.A.

216. Motives and preferences may, of course, be altruistic or collectively oriented, and thus normatively public. Whether they are from a philosophical or moral perspective is not relevant for the purpose of competitive democracy.

and individual rights share the same end: ensuring that governmental processes benefit (or do not illegitimately harm) private individuals.[217]

Conversely, deliberative corruption is defined by collective public norms. In ideal deliberative democracy, individuals would justify their conduct through discursive engagement with other citizens. Conduct would be corrupt when its motivations are unacceptable to the polity. While in practice deliberative anticorruption can only simulate idealized discursive engagement, corruption at root is still defined by failure to satisfy shared standards. By prioritizing collective norms over the impact on private individuals, deliberative anticorruption assumes a position that is alien to the Court's mandate. The Court has a structural obligation to protect individual rights, but has no particular obligation to advance these standards of public service.[218] Thus, when faced with a deliberative anticorruption law, the Court will have a strong tendency to strike it down or convert it to a competitive form.

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217. The Court's protective posture towards individual rights also manifests in its underlying normative justification for a competitive regime. In many of its decisions, the Court has suggested politics is a market determined by self-interested exchanges between citizens and electorate, and criticized deliberative anticorruption because it seeks to interfere with this dynamic. *See* McCormick v. United States, 500 U.S. 257, 272-73 (1991) ("[T]o hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment . . . ."); Citizens United v. Federal Election Comm'n, 558 U. S. ___, ___, 130 S. Ct. at 876, 904-06, 909-10 (2010) (The Court goes at length to state that corporate influence in politics will not cause voters to distrust the political process. "The appearance of influence or access . . . will not cause the electorate to lose faith in our democracy."). The political-participant-as-market-actor model is a logical outgrowth of the focus on individual rights; both establish a bright boundary of non-collective interference around individual conduct. However, this alignment has the ancillary effect of coordinating the Court's view of politics with the foundational assumptions of competitive democracy, which imagines individuals as self-interested preference-satisfiers. *But see* Sunstein, *supra* note 8, at 50-51 ("[M]uch of modern constitutional doctrine reflects a single perception of the underlying evil: the distribution of resources or opportunities to one group rather than another solely because those benefited have exercised the raw power to obtain governmental assistance.").

218. *Cf. infra* Section V.B.ii (discussing the Court's emphasis on protecting individuals against harm from political bodies while neglecting to provide protections to the political bodies themselves).

Of course, democracies inevitably blend competitive and deliberative aspects, and in practice target corruption on both deliberative (norm-protecting) and competitive (private-individual-protecting) grounds. Deliberative anticorruption enforcement instantiates public values, punishing conduct that violates shared norms. Competitive anticorruption targets behavior that directly threatens the adequate provision of government service to citizens. Congress' deployment of both competitive and deliberative measures illustrates this diversity of aims. The competitive elements of 1974 FECA were designed to prevent legislators from falling under influences that would make them prejudiced public servants; the deliberative elements were designed to create an electoral atmosphere that was more broadly public-regarding.[219] The various simple bribery measures prevent the conversion of public goods into illicit private gain;[220] the honest services doctrine protected not just the waste of government resources, but the character of public service.[221]

The Court's imposition of an exclusively competitive anticorruption regime has been to deny one of these aspects of anticorruption. The standing judicially mandated regime is one attentive to the potential of anticorruption law to serve citizens' private welfare, but that has little room for advancing shared norms or protecting uniquely public goods.

B. Beyond Individual Rights: Systemic Explanations for the Court's Position

The subsequent question is why the Court has approached democratic practice and individual rights so as to favor competitive anticorruption law. This section provides possible structural explanations for the rejection of deliberative democracy and use of individual

219. *See supra* Section III.A.

220. *See, e.g., supra* note 149 (describing 18 U.S.C. § 666, which is essentially designed to protect federal funds from being embezzled by corrupt recipients).

221. *See supra* Section III.A. (discussing the disjunctive reading of honest services as criminalizing fraudulent conduct even without material harm).

rights.[222] This reveals other stakes in the anticorruption debate and points to a more unified explanation for the Court's stance.

i. Adversarial Procedure and Rights Protection

The American judicial system has a strong commitment to adversarial procedure, the idea that fair process requires the opportunity to confrontationally contest issues before a neutral arbiter.[223] The adversarial process is seen as an especially important mechanism for protecting individual liberty, including the particular rights at issue in central corruption narratives — rights to speech and association[224] and to due process.[225]

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222. There is one explanation this essay will not explore: that the Court's internal politics, and in particular, its conservative drift in the past few years, are responsible for its competitive stance. Political explanations fail on several fronts. They lack sufficient explanatory power. To characterize the Court as having a certain partisan political stance may map on to certain holdings, but it does not map on to the broad sweep of competitive anticorruption over either time or topic. *Citizens United* may have been a partisan decision (though *Buckley*, or at least the holding, was not), but the relevant holding in *Skilling* was unanimous in judgment. And, if *Citizens United* can be claimed to demonstrate a relationship between the conservative wing and a stronger defense of competitive democracy, other cases contradict it. *See, e. g.,* United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 489 (1995) (Rehnquist, C.J., dissenting) (as dissenting minority, Chief Justice Rehnquist, and Justices Thomas, and Scalia would uphold broad federal prophylactic measures and generally defer to federal anticorruption efforts). Secondly, even if a partisan position by the Court, or a dominant partisan bloc within it, seems to be facially responsible for competitive corruption holdings, this explanation alone is under-determinative. Positions on corruption can fall anywhere on the political scale. For example, an interest in defending individual rights can be seen as traditionally liberal, and cut against broad, deliberative anticorruption measures, yet constraining the power of the federal government can have the same effect but be classified as a traditionally conservative concern.

223. *See generally, e.g.,* BOB KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001) (arguing that the adversarial system imposes significant costs in terms of time, money, and predictability); David Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CAL. L. REV. 1051 (2005) (arguing the adversarial approach regulates markets efficiently).

224. *See, e.g.,* Henry Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518-20 (1970) ("[C]ourts have lately come to realize that procedural guarantees play an equally large role in protecting freedom of speech.").

225. *See* KAGAN, *supra* note 223, at 61-81.

However, a strong commitment to adversarial procedure is difficult to reconcile with deliberative democracy. Deliberative politics are mutualist, non-hierarchical, and consensus-preferring. Adversarial procedure is binary, winner-take-all, and resolved by an authoritative figure. Moreover, the character of deliberation — collaborative engagement and empathetic discourse — does not mesh well with the zealous self-interested advocacy characteristic of adversarial confrontation. Resorting to adversarial procedure suggests that deliberative politics have failed. Moreover, the specific goals of deliberative anticorruption are not ideally suited to adversarial mechanisms. Deliberative anticorruption encourages good motives in order to create publicly minded officials, not merely the coercive enforcement of tolerable behavior. It does not, as it were, seek only an outcome but a transformative process.

In practice, the adversarial critique of deliberative anticorruption has more bite. Deliberative laws restrict individual behavior without the clarity of the adversarial/competitive approach. Broad prophylactic restrictions, designed to ensure public-minded conduct, do not give constrained parties the opportunity to advocate for the acceptability of their conduct. Likewise, laws that define self-serving behavior in a vague manner can prevent the prosecuted party from knowing exactly what to defend against, or even what specific behavior to avoid.

Deliberative anticorruption's practical incompatibility with the adversarial process can be seen as the root of the Court's rejection of such measures. The tension is obvious in the context of due process rights — vaguely defined laws place regulated parties at a serious disadvantage when confronting accusations brought by prosecutors. More subtly, the competitive, market-oriented democratic theory[226] underlying some of the Court's decisions produces an adversarial conception of politics. Competitive democracy involves adversarial confrontation between opposed candidates or parties, with voters acting as arbiters. The Court has endorsed an idea of politics that vets candidates and positions through the "marketplace of ideas" and struck

226. *See supra* note 217 (discussing the Court's focus on protecting individual rights and the resulting outgrowth of seeing the political landscape as a competitive realm populated by self-interested actors).

down regulations that impair this process.[227] The apparent concern is that government intervention will prevent the adversarial resolution of political disagreement. Thus, in defending individual rights — whether in the criminal or electoral contest — courts guarantee citizens the opportunity to robustly context legal and political decisions in an adversarial context. The Court's favoring of competitive anticorruption law is a consequence of this investment in the adversarial process.

The Court's commitment to an adversarial resolution may be further traced to the Court's own practices and purpose. Courts, insofar as they are mechanisms for adversarial confrontation, will conceptualize fair dispute opportunities in those terms. Supervising and resolving adversarial confrontation — at least in common law countries — is what courts do. Approaches that redefine such resolution both challenge the concept of fairness underlying traditional judicial review and threaten the status of the court as a basic mechanism for dispute resolution.[228] Thus, the Court's ardent defense of the adversarial resolution may relate not only to its efficacy, but to the Court's own nature.

ii. The Judicial Concept of Politics and the Priority of the Individual

The Court's preservation of the adversarial process may protect individual rights in the face of government intrusion. This posture, however, reflects particular institutional commitments of the Court. Guided by a constitutional mandate, federal courts have performed two main roles in public law: defending individuals against government interference [229] and enforcing federalism and the division of power to

227. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. ___, ___, 130 S. Ct. 876, 914 (2010); *See also* DWORKIN, *supra* note 9, at 357 (discussing differing views of democracy).

228. *See* KAGAN, *supra* note 223, at 242-50.

229. There are some questions related to this issue that the Court has always had to attend to in the plain text of the Constitution — what is free speech, what is cruel and unusual punishment? — and based on the level of ambiguity, resolve the question more or less creatively. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 16 (1980). In the past century, the battleground over *where* rights exist has expanded to new territory, particularly substantive due process and the nature of equality. Perhaps the most famous comment on this is Justice Jackson's footnote 4 in *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938), as it proposes a theory for when the government should be more willing to intervene to protect

ensure government bodies do not metastasize beyond their constitutionally established boundaries.[230] Conversely, the Court's public law jurisprudence has not been attentive to the need for internal government regulation, including the need for effective anticorruption. This may be unsurprising, as there is neither a constitutional mandate for nor a strong tradition of courts performing such monitoring.[231] Yet, perhaps because the values of state integrity receive no unique weight and other values do, the Court has adopted principles that are prejudiced against effective internal government regulation. One manifestation is that the Court has come to favor bright-line, competitive-style rules — forms of law well-suited to protecting individual rights and structural boundaries but less apt at encouraging inherently reliable governance. Consequently, the Court is attentive to the harm political bodies may inflict on individuals and other governmental institutions — but pays little heed to the needs and pressures within the political bodies themselves.

This feature of the Court's jurisprudence emerges from the same characteristic that poses corruption law's unique challenges. When a corrupt individual violates a polity's expectations of trust and loyalty, he betrays a collective of which he is part.[232] Corruption thus raises the difficult problem of how to assess and prevent such internal bad acts.[233] However, both types of traditional public law address conflicts between distinct entities — either between individuals and the government or between discrete governmental bodies. The Court's public law jurisprudence usually does not address the types of problems raised by

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individual rights (that is, when the individuals at issue may be uniquely politically disempowered due to their status as discrete and insular minorities).

230. That the Court plays a fundamental role in enforcing the division of powers between branches of the government, and between the federal government and the states, is apparent in the cases from the Court's early jurisprudence that are still of the greatest relevance today: *Marbury v. Madison,* 5 U.S. 137 (1803), and *Maryland v. McCulloch.* 17 U.S. 316 (1819).

231. As this essay has observed, some have argued such a constitutional mandate exists — it has just been neglected. *See supra* note 79.

232. In a related vein, some academic commentators have indicated the need for Madisonian public virtue to sustain democratic governance. *See* Sunstein, *supra* note *8*; Gardner, *supra* note 79.

233. This harkens back to the concept of corruption. *See supra* note 29.

membership of the citizenry in the polity and the attendant responsibilities.

Of course, an individual facing restriction of his rights or charged with a criminal offense will likely assume a defensive oppositional posture, even if the individual originally assumed a voluntary role in the shared project of politics. And from the perspective of competitive theory, such an adversarial approach is universally appropriate, for competitive politics presumes every individual in the political structure is self-interested. Yet if politics has distinctly collective obligations, the Court systematically distorts anticorruption by ignoring this collective character while prioritizing other values. Such a distortion ultimately restricts deliberative anticorruption measures.

iii. The Court Deliberative: Institutional Self-Preservation and Judicial Uniqueness

A third, most speculative explanation for the Court's posture towards corruption originates from judicial self-preservation, rather than from any normative alignment. By curtailing internal deliberative anticorruption, the Court maintains for itself a uniquely deliberative role in the current political landscape. If other elements of the government begin to operate deliberatively, they supplant the interpretive function currently fulfilled by the Court.

If the elected branches of federal government — the legislative and executive — are presumed to operate competitively, then actors in the judicial system occupy a uniquely deliberative niche. Juries are expected to consider evidence, engage in debate, and reach consensus as a decision-making process.[234] Judges, even acting alone, engage in a similar process of contemplation and reflection, albeit often considering issues of fact rather than law.

In a recent case, the Supreme Court suggested that careful reflection reminiscent of deliberative democracy is obligatory, rather than aspirational, for judges. *Caperton v. Massey* held an elected state supreme court justice violated a litigant's right to fair trial when he failed to recuse himself from a case directly affecting the interests of a major

234. *See supra* note 160.

contributor to the judge's campaign.[235] From a legal perspective, *Caperton* was the inverse of the cases that have been discussed in this article. Because the harmed party may have had his right to a fair trial violated by corrupt conduct, individual due process served a vehicle of anticorruption, rather than a potential barrier to regulation or prosecution. If one takes the judicial investment in protecting individual rights at face value, this may explain the outcome of the case.

Yet *Caperton* was a de facto anticorruption inquiry: what motives (or apparent motives) taint conduct by a public official? In concluding the judge may have been improperly influenced, the Court thoughtfully considered the psychology of motivation, bias, and objectivity.[236] Even though the form of the influence was perfectly legal, and there was no formal impropriety, the Court held that an inference — albeit compelling — of influence necessitates recusal. Indeed, the Court's ruling might be seen as anti-democratic; it nullified the decision-making of an elected judge for potentially being biased, even though the bias was presumptively validated by the electorate.[237] *Caperton* thus runs counter to the treatment of democratic self-determination the Court has so assiduously advanced in the campaign finance context. The holding deployed a far more restrictive approach to anticorruption than the Court has permitted to the federal government in other political contexts.

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235. 556 U. S. ___, 129 S. Ct. 2252 (2009).

236. *Id.* at ___, 129 S. Ct. at 2262-64. The Court observes, "Following accepted principles of our legal tradition respecting the proper performance of judicial functions, judges often inquire into their subjective motives and purposes in the ordinary course of deciding a case. This does not mean the inquiry is a simple one . . . . Nothing could be farther from the truth." *Id.* at ___, 129 S. Ct. at 2263 (internal citations and quotations omitted). The Court further noted, "Much like determining whether a judge is actually biased, proving what ultimately drives the electorate to choose a particular candidate is a difficult endeavor, not likely to lend itself to a certain conclusion. This is particularly true where, as here, there is no procedure for judicial factfinding and the sole trier of fact is the one accused of bias." *Id.* at ___, 129 S. Ct. at 2264.

237. Lawrence Lessig, *What Everybody Knows and What Too Few Accept*, 123 HARV. L. REV. 104 (2009), criticizes *Caperton* on related grounds. Observing that the corrupting influence of money is popularly held to be rife in elected government and that the justice at hand should have recused himself, Lessig holds the Court to be acting in a unique — and thus unjustified — manner to protect the ostensible integrity of the judiciary by suggesting that this particular instance of financial influence was unacceptable.

Caperton preserved the deliberative integrity of the judiciary through a broad-based and subtle assessment of a public servant's motives. Yet when the government has sought to use anticorruption tools that make possible the same deliberative inquiries, the Court's decisions (albeit premised on principles distinct from theories of corruption) have proven an inflexible barrier. The Court thus implies that the judicial system must be kept especially free of unacceptable influences in a manner that other areas of government need not be — indeed, *may not* be. If the broader pro-competitive, anti-deliberative arc of the Court's holdings is treated as a conscious pattern, the implication is that the Court is protective of the judiciary's unique deliberative role.

VI. ANTICORRUPTION IN THE FUTURE: POLITICAL IMPLICATIONS AND DIRECTIONS FOR POLICY

The Court's rulings on anticorruption have had an immediate impact upon black letter law — only competitive laws are left standing. Yet more significantly, the form of permitted anticorruption regimes shapes the nature of governance.[238] It is this broader impact on political life that demonstrates the full impact of the competitive-deliberative divide and ought to be most decisive in guiding future reform.

A. The Practice and Theory of Anticorruption

Since the specific content of anticorruption law does not depend on its form as competitive or deliberative, the immediate legal implications of the Court's competitive allegiance are subtle. The current state of corruption law requires Congress to narrowly tailor anticorruption legislation if it is to survive judicial review. This raises costs for the creation of anticorruption legislation — drafting convincingly justified laws that target behavior with sharp precision demands significant institutional effort. The Court's requirement regarding the form of the law, however, does not itself prevent regulation

238. Much of the discussion of the impact of anticorruption laws has relied on economic modeling, but it is clear there is a broader impact on political behavior. *See, e.g.*, ROSE-ACKERMAN, *supra* note 28, at 52-69 (discussing if and how anticorruption laws can deter bribery).

or criminalization of any particular conduct. Yet for certain measures — regulation of campaign finance expenditures, for example — even crystalline drafting and forceful articulation of underlying norms might not overcome the Court's constitutional objections (though such a clear statement of congressional intent would starkly illustrate the institutional conflict over the norms of corruption). Such a firm constitutional bar demonstrates that the competitive effects of the Court's holdings do, at some point, bleed into substantive positions.[239]

However, anticorruption enforcement also reflects the political values that underlie a regime.[240] Competitive and deliberative anticorruption measures promote the qualities of their respective regimes and shape the behavior of political participants. Deliberative anticorruption law has the potential to encourage greater public-mindedness. Conversely, exclusive reliance on competitive laws may establish a political culture based on self-interest.[241] While certainly not the sole or dominant determinant of political culture, anticorruption law is both a signpost and a constituent part.

However, deliberative anticorruption enforcement can have substantial side effects — indeed, these effects have driven the Court's position. As anticorruption measures become more deliberative — that is, as they become more flexible, expansive, and discretionary — the greater the risk they will infringe upon the individual rights of these figures (and, since donors as well as recipients of bribes are usually culpable, the private rights of those who attempt to sway political conduct). Deliberative measures that investigate motive are little more

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239. If Congress passed a law explicitly premised in a carefully articulated view of politics and anticorruption, but that challenged the Court's defense of rights, it would demonstrate that at some level the Court's holdings evince a certain view of politics and the relationship between state and individual, at least in the context of corruption enforcement. This is, again, a difficult theoretical question regarding the relationship between law and political substance. *See supra* note 170.

240. *See generally* THOMPSON, *supra* note 29, at 166-70 (describing the relationship between corrupt behavior and general political practices, including enforcement of ethical norms).

241. *See, e.g.*, Alexander, *supra* note 53, at 683-707 (arguing that there should be greater concern for protecting politicians' time so that they can focus on their public duties rather than fundraising efforts); Issacharoff & Karlan, *supra* note 76, at 1711 (observing that the current (competitive) state of campaign finance produces leaders who are obsessed with fundraising).

than vague grants of discretion to enforcement agents; deliberative measures that seek to preemptively exclude private interest from politics will inevitably intrude upon legitimate private action. Thus, by exposing the intentions and deep mental states of individuals to greater state scrutiny, deliberative anticorruption risks eroding the zone of truly private action.

Yet this indictment of deliberative anticorruption presumes a relationship between private and public action affiliated with competitive democracy. Private and public rights are treated as mutually exclusive and hydraulic — the expanded public sphere required for deliberative anticorruption necessarily lessens the extent of private liberty. This assessment of anticorruption is perfectly compatible with the competitive assumption that individual participation in politics is oriented around self-interest. From such a perspective, the basic question in anticorruption enforcement is balancing the competing goods of government integrity and private rights.

Deliberative democracy, however, associates good faith political involvement with the possible enhancement of an individual's private life. When individuals participate in politics, they gain benefits beyond the private receipt of state-allocated goods.[242] In the most ideal case, political participation can be transformative, and at a minimum, it should be somewhat enriching. In this view, assessment of anticorruption efforts requires a more subtle calculation. Properly tuned, the motive-transformation that underlies deliberative anticorruption can make individuals better citizens, as well as prevent leaders from engaging in self-enrichment. If legitimate, the deliberative theory of politics undermines — or at least complicates — many of the objections to the anticorruption measures which have not survived judicial review.[243]

Thus, the desirable future direction of anticorruption policy depends upon the preferred democratic principles. The types of anticorruption measures permitted by a polity that conceptualizes of political obligation as founded in self-interest will differ dramatically from one that that is founded in democratic discourse and mutual endeavor.

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242. *See supra* Section I.B.

243. This is also true of the Court's investment in adversarial process, described in *supra* Section V.B.

Of course, theoretical investments must be balanced against practical concerns. In particular, deliberative anticorruption measures can lend themselves to abuse by those in power. Because of their breadth, deliberative anticorruption laws grant more opportunities for discretionary action; lack of integrity by enforcement agents can thus make anticorruption itself a vehicle of corruption. This is most direct in the honest services context, where some claimed the potential for and reality of prosecutorial abuse.[244] Some have argued that restriction of independent campaign contributions are likewise motivated by corrupt self-interest: by limiting opportunities for outside communication, campaign finance restrictions can protect incumbents.[245] In light of these risks, the Court's competitive holdings on anticorruption can be reframed as protection of individual rights from unscrupulous government action; a competitive anticorruption regime is necessary to prevent corruption law itself from being corruptly used. Of course, in terms of achieving genuine integrity in government, adherence to the competitive approach poses a paradox: while decreased trust in standing public figures may make it less prudent to trust them with deliberative anticorruption tools, deliberative anticorruption is more effective at promoting genuine public spiritedness. Competitive anticorruption is less liable to abuse, but also less effective at genuinely transforming the character of public leadership.

B. Policy Reform: Capitulation, Circumvention, or Coercion

The future direction of federal anticorruption enforcement will necessarily be shaped by the Court's indirect but forceful establishment of a competitive anticorruption regime. Because the competitive regime

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244. *See supra* note 175 (describing Scalia's attack on honest services as giving prosecutors excessive discretion); Beale, *supra* note 149, at 719 (describing the potential for political abuse in honest services). *See generally* Sandra Caron George, *Prosecutorial Discretion: What's Politics Got to Do With It?*, 18 GEO. L.J. LEGAL ETHICS 739, 740 (2005) (discussing whether prosecutorial discretion aids in "rein[ing] in public corruption" and hypothesizing whether politics can appropriately play a role in this context); HARVEY SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT (2009).

245. *See supra* note 53 (describing Scalia's argument that campaign finance restrictions are a form of incumbency protection).

emerges from protection of constitutionally recognized rights, the costs of directly rejecting the Court's position and imposing deliberative measures is high. There are alternatives — either redefining anticorruption jurisprudence with acceptably competitive measures, or developing anticorruption strategies that do not infringe upon the Court-defined rights — but they would struggle to replicate the impact or cultural effect of deliberative anticorruption achieved by the coercive power of criminal law and government regulation. The ultimate decision must advert to substantive political values. A robust deliberative regime would require either rejecting the Court's prioritization of individual rights, or redefining politics such that deliberative anticorruption and individual rights are not at odds.

The path of least resistance for Congress would be to capitulate to the Court and only pass anticorruption measures in a narrow competitive mold: criminalize behavior through crisp, bright-line rules, primarily target offenses that resemble illicit quid pro quo exchanges, and impose restrictions that do not substantially interfere with individual rights even among public figures. Explicit self-limitation to such measures could encourage Congress to more precisely define what types of behavior it wishes to prohibit. However, given the institutional hurdles such well-drafted legislation might face, the result might simply be less anticorruption legislation altogether. Regardless, if the deliberative approach were abandoned wholesale, anticorruption would no longer be available to generally shift political culture or encourage broader public-mindedness. Competitive anticorruption is not suited to seeking such wide-ranging goals.

Conversely, Congress could challenge the normative and interpretive legitimacy of the Court's antideliberative holdings. The most extreme approach would be to seek a constitutional amendment explicitly granting anticorruption unique standing. The amendment could indicate that anticorruption efforts should be granted equal weight as other constitutional concerns, or it could explicitly address particular anticorruption goals, such as campaign finance and general self-enrichment by public figures. Alternatively, Congress could apply oblique institutional pressure, such as attempting to marginalize the Court by passing legislation that has a popular mandate and clear deliberative intent. Either approach, however, would cost enormous political capital. It would pit a less trusted political institution (Congress)

against one of the more trusted ones (the Court),[246] ironically enough on the subject of integrity. Furthermore, the attack would, at some level, insinuate that the Court was working too vigorously to protect individual rights from government regulation. In the absence of a clear crisis because of the inadequacy of such regulation, challenging such practice is politically difficult and normatively suspect.

Finally, Congress could seek the broader goals of deliberative anticorruption without directly challenging the Court. This would involve continued reliance on competitive anticorruption measures for formal enforcement and regulation, but promotion of a broadly deliberative political culture through measures that do not infringe on individual rights.[247] If these measures are successful they would create more direct accountability for public officials, encourage greater citizen involvement in government, and strengthen the ties between constituents and leaders — ultimately creating a political culture in which leaders are more public-minded and the expectations of the polity are a guiding influence. However, while these measures might confer benefits, they do not seem properly classified as anticorruption laws, and it is unclear if they will have the same efficacy in preventing self-serving conduct by officials. Deliberative measures without the coercive potential of criminal or regulatory law are less likely to catch or rectify the conduct of the most self-aggrandizing politicians — whom are the least likely to be swayed by softer deliberative programs.

As indicated in the previous section, the appropriate solution will depend upon foundational political values shaped by practical context. If the public wishes to achieve a broadly deliberative political culture, anticorruption laws that serve those values will provide a necessary tool. However, in the absence of a near-consensus regarding the desirability of

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246. *See* Lydia Said, *Congress Ranks Last in Confidence in Institutions*, GALLUP, July 22, 2010, http://www.gallup.com/poll/141512/Congress-Ranks-Last-Confidence-Institutions.aspx; *Distrust, Discontent, Anger and Partisan Rancor*, PEW CTR., Aug. 18, 2010, http://people-press.org/report/606/trust-in-government.

247. For a list of such proposals — mini-publics, deliberative polling, and so forth — see *supra* notes 24-25. Other alternatives could involve intensified disclosure regimes wedded to efforts to more broadly publicize the results of such disclosure. However intensive, mandated disclosure itself may raise First Amendment issues. *See* Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 326-27 (1998).

such a cultural shift, the risks of deliberative anticorruption — as the Court has indirectly suggested in its jurisprudence — may be excessive. The accepted forms of anticorruption law may be so intimately tied to dominant political norms that broadly changing anticorruption policy without parallel shifts in political culture may be futile. In this respect, the form of anticorruption law may be more valuable as a bellwether of broader political values than as an independent target of policy change.

CONCLUSION

The core of this article is a modest descriptive claim: the Supreme Court's modern holdings in corruption cases have, citing constitutionally protected individual rights, tended to overturn or constrain congressional anticorruption laws that are broad or flexible. To elucidate this analysis, I have deployed a theoretical distinction between competitive and deliberative anticorruption law, with the Court's decisions demanding strict adherence to the competitive approach. I have finally speculated that the Court's indirect imposition of a competitive anticorruption regime is not merely the serendipitous result of its treatment of individual rights but reflects deeper, perhaps constitutionally-inspired, commitments to adversarial procedure and individual-oriented politics. Thus, the Court's own institutional tendencies have inclined it toward competitive democratic theory and thus competitive anticorruption, even if these allegiances have not openly appeared in the corruption jurisprudence.

These claims are linked and hopefully mutually reinforcing. Yet they also stand alone, if necessary. The observation there is an institutional conflict over corruption could be modeled with a rubric other than competitive/deliberative democracy; or the Court's own tendencies may ultimately be attributable to forces other than the constitutional pressures this article has observed. Each of these claims has distinct significance and this article suggests further investigation of both institutional action and democratic theory is necessary to make real progress in the development of a coherent understanding of anticorruption law.